

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.REV.P. 782/2019, CRL.M.A. 32034/2019 (stay)
and CRL.M.A. 32035/2019 (delay)

Reserved on : 01.08.2019

Date of Decision : 14.08.2019

IN THE MATTER OF:

ABHISHEK TANWAR

..... Petitioner

Through: Mr. D. Hasija, Advocate with
Mr. Mustafa Ahmad Khan, Advocate

versus

THE STATE OF DELHI (NCT OF DELHI)

..... Respondent

Through: Dr. M P Singh, APP for State with
SI Krishan Kumar, PS Moti Nagar

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. By way of the present petition, the petitioner has assailed the order on charge dated 28.03.2019 passed by the Court of District & Sessions Judge (West) Tis Hazari Court, Delhi under Section 308/323/506/34 IPC arising out of FIR No.0395/2016.

2. Learned counsel for the petitioner has primarily challenged the impugned order on three grounds namely:-

(i) *as per the MLC the injury was opined to be simple;*

(ii) *the weapon was not recovered; and*

(iii) *no public witness has been associated with the investigation.*

3. Per contra, learned APP has supported the impugned order. He has opposed the present petition and submitted that at the stage of passing of order on charge, the court is not required to go into the evidence in detail and only a prima facie view is to be taken, which the learned District & Sessions Judge did take while passing the order on charge and as there is no illegality or perversity committed by the court below, the present petition ought to be dismissed.

4. The present case was instituted on the complaint of Aakash Singh. The facts, as noted in the charge-sheet, mention that the incident occurred on 03.08.2016. In his statement, the complainant alleged that on the day of the incident, he had gone to pick his remaining luggage and take refund of his security deposit of Rs.8,500/- from his landlord namely, Vinod Tanwar as he had taken another house on rent. Vinod Tanwar refused to hand over the security deposit and rather asked the complainant to take it from the present petitioner at whose instance the premises were given on rent to the complainant.

5. It is the case of the prosecution that the present petitioner also arrived at the spot and the complainant was assured that his security amount would be refunded. The complainant was asked to reach ATM of HDFC Bank, where the petitioner was present along with Vinod Tanwar and others. The complainant was accompanied by his friends at coaching namely Karan Kirti Singh & Rahul Yadav. The petitioner and Vinod Tanwar were armed with weapons similar to a country made pistol and exhorted "*salon ko jaan se mar do*". At this, the petitioner assaulted Karan Kirti Singh. Simultaneously, Vinod Tanwar and others also started assaulting the complainant and his two friends with hockey, stick and

sharp edged *sanwars*. On arrival of police, the assailants ran away. The complainant and other injured were taken to the hospital where their MLCs were prepared.

6. Initially, a case under Section 308/34 IPC was registered. On receipt of the medical opinion on the MLC, Section 323/506 IPC was added. The MLCs of the complainant and the injured alongwith their statements recorded under section 161 CrPC were filed with the charge-sheet.

7. The scope of power of the Court under Sections 227 & 228 CrPC has been defined time and again. The Court while framing charge has the power to sift and weigh the evidence for the limited purpose to find out whether a *prima facie* case against the accused is made. The test at this stage is that of “*grave suspicion*”, of involvement of the accused in the offence committed.

8. The law on the subject is encapsulated in the decision rendered in the case of Sajjan Kumar Vs. CBI reported as **(2010) 9 SCC 368:-**

“21) Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this

stage, he is not to see whether the trial will end in conviction or acquittal.”

9. The law on the subject was reiterated by Supreme Court in Dipakbhai Jagdishchandra Patel vs. State of Gujarat and Ors. reported as **2019 SCC OnLine SC 588**, where it was held as under:

“23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.”

10. Recently, in Vikram Johar vs. State of Uttar Pradesh and Another reported as **2019 SCC OnLine SC 609** it was held:

“19. It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence.”

11. Coming to the first contention, that the injury on the complainant and injured have been opined to be simple, learned counsel for the petitioner submitted that no charge under Section 308 IPC ought to have been framed as the injuries were opined to be simple. To buttress his submission, he placed reliance on the decisions rendered in the case of *Rajiv Sharma Vs. State of NCT of Delhi & Anr.* reported as 2015 SCC Online Del 12138, *Sheila Devi & Ors. Vs. State* reported as 2015 SCC Online Del 12280 and *Mr. P.K. Ghosh Vs. State and Anr.* in Crl. Rev. P. No. 361 of 2003.

12. In somewhat similar facts, the Supreme Court of India in State of M.P. vs Saleem reported as (2005) 5 SCC 554, held as under:

"12. To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

13. *It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt."*

13. Again, in Vineet Mahajan vs State of Punjab and Others reported as **(2017) 14 SCC 803**, it was held as under:

"10. Having regard to the aforesaid statement of the persons recorded under Section 161 CrPC and the medical report, we fail to understand as to how the High Court could come to the conclusion, at the stage of framing of the charge itself, that guilty intention of the accused persons were conspicuously missing. This Court in Anjani Kumar Chaudhary v. State of Bihar 2014 (12) SCC 286 has categorically held that in order to attract the provisions of Section 307 IPC, injury need not be on fatal part of the body. It is further held that when several persons attacked unarmed persons with deadly weapons, it is reasonable to presume that they had knowledge or intention that such attack would result in death.

11. Further the question as to whether there was an intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case which has to be attributed on evidence by the trial court."

14. In view of above decisions, the contention that injuries were simple hence no charge under Section 308 IPC could be framed as well as the reliance placed by the learned counsel for the petitioner on the decisions cited by him, is misplaced. It was next contended that the

weapon of the offence was not recovered during the investigation. The prosecution case depends upon the material in the form of statements of the injured supported by their MLCs. The effect of non-recovery of weapon will have to be tested in light of the testimony of the material witnesses and the medical evidence that would come on record, at the conclusion of the trial. As such, the non-recovery of weapon by itself cannot be held to be fatal at the stage of framing of charge. It was also urged that no public witness has been associated with the investigation. Again, the effect of same would be judged in the totality of the evidence that would emerge during the trial.

15. At this stage, the prosecution in support of his case has placed reliance on the statement of the complainant as well as the statements of the other injured namely, Karan Kirti Singh and Rahul Yadav. The prosecution has also placed reliance on their MLCs. So far as the requisite intention or knowledge to commit the offence punishable under Section 308 IPC is concerned, it is the case of the prosecution that initially when the complainant asked for refund of the security deposit from Vinod Tanwar, he refused and rather asked the complainant to take the same from the present petitioner. The complainant asked for refund from the petitioner, who asked the complainant to reach ATM of HDFC, where the petitioner along with other accused were present, armed with weapons similar to country made pistol and exhorted to kill the complainant and his friends. The petitioner and Vinod Tanwar were accompanied by about 10 other people. On the exhortation, the petitioner attacked Karan Kirti Singh while Vinod Tanwar and others attacked the complainant and his two friends. Prima facie, the accused arrived at the ATM with a pre-mediated plan. They were armed with weapons similar

to country made pistol, hockey, dandas and sharp edged *sanwars*. The blows were inflicted on the head, arms, ear and chest of the injured. Although the other co-accused could not be arrested, however, it was stated in the charge-sheet that supplementary challan will be filed as and when the co-accused are arrested.

16. The veracity and truthfulness of the prosecution witnesses would be tested only during the trial. At this stage, the appreciation is limited to the test of “grave suspicion”. The order passed by the trial court is based on prima facie view of the matter and the material available on record. At this stage, it cannot be said that the conclusion arrived at by the Trial Court is unreasonable or unjustified calling for the interference by this Court in exercise of its revisional jurisdiction. Accordingly, the order is upheld and the present revision petition is dismissed alongwith pending applications. However, it is clarified that this Court has not expressed any opinion on the merits of the case and whatever is observed and stated hereinabove shall not tantamount to any expression on the merits of the case.

17. A copy of this order be sent to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

AUGUST 14th, 2019
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