

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

+ CRL.A. 717/2018

Reserved on: 01.04.2019

Date of decision: 15.05.2019

IN THE MATTER OF:

SADDAK HUSSAIN

..... Appellant

Through: Mr. Subodh K. Pathak, Mr. Adil Alvi
and Mr. Balwan Singh, Advocates.

versus

STATE (NCT OF DELHI)

...Respondent

Through: Mr. Amit Gupta, APP.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE VINOD GOEL

HIMA KOHLI, J.

1. The present appeal is directed against the judgment dated 13.2.2018, passed by the court of the learned Additional Sessions Judge, Pilot Court, North District, Rohini Courts, New Delhi ('ASJ') in Sessions Case No.220/2017, arising from FIR No.598/2016 registered at PS Mahendra Park, New Delhi whereunder, the appellant has been convicted for the offence under Section 302 IPC. The appellant is also aggrieved by the order on sentence dated 17.2.2018, whereby he has been sentenced to undergo life imprisonment for the offence under Section 302 IPC alongwith fine of Rs.5,000/- and in default of payment of fine, to further undergo simple imprisonment for one year.

2. The appellant herein was arrayed before the trial court as accused No.4 (A-4). He was sent to trial alongwith four other co-accused i.e. Prateek @ Bholu (A-1), Prashant @ Chhotu (A-2), Kamal @ Jaipal (A-3) and Sandeep @ Pankaj @ Bachha (A-5). Under the impugned judgment, except for the appellant herein, the other accused have been acquitted of the charge under Section 302 IPC.

CHARGE FRAMED

3. Vide order dated 25.4.2017, the trial court framed the following charge against A-1, A-2, A-3 and A-4:-

“I Virender Kumar Bansal, do hereby charge you accused 1) Prateek @ Bholu S/o Sh. Talewar Singh, 2). Prashant @ Chhotu @ Amitesh S/o Sh. Talewar Singh, 3). Kamal @ Jaipal S/o Sh. Ram Bhool, 4). Saddak Hussain S/o Sh. Shakir Ali as follows:-

*That on 25.12.2016 at about 8.15 pm at A-1 Market near Country Made liquor Van, Jahangir Puri, Delhi within the jurisdiction of PS: Mahendra Park you all with you co-accused Sandeep and Ajay (not arrested) in furtherance of your common intention caused death of Jeet Kumar eye witness of case **FIR No.282/2016 PS: Mahendra Park** and thereby committed the offence punishable u/s 302 IPC r/w 34 IPC and with the cognizance of this court.*

And I hereby direct that you be tried by this court for the aforesaid offences punishable u/s 302/34 IPC.

(Virender Kumar Bansal)
ASJ/Pilot Court/North, Rohini Courts
25.04.2017”

4. On 19.5.2017, charge was amended due to an error in the FIR No. and it was framed as follows:-

“I Virender Kumar Bansal, do hereby charge you accused 1) Prateek @ Bholu S/o Sh. Talewar Singh, 2). Prashant @ Chhotu @ Amitesh S/o Sh. Talewar Singh, 3). Kamal @ Jaipal S/o Sh. Ram Bhool, 4). Saddak Hussain S/o Sh. Shakir Ali as follows:-

*That on 25.12.2016 at about 8.15 pm at A-1 Market near Country Made liquor Van, Jahangir Puri, Delhi within the jurisdiction of PS: Mahendra Park you all along with you co-accused Sandeep and Ajay (not arrested) in furtherance of your common intention caused death of Jeet Kumar eye witness of case **FIR No.382/2016 PS: Jahangir Puri** and thereby committed the offence punishable u/s 302 IPC r/w 34 IPC and with the cognizance of this court.*

And I hereby direct that you be tried by this court for the aforesaid offences punishable u/s 302/34 IPC.

*(Virender Kumar Bansal)
ASJ/Pilot Court/North, Rohini Courts
19.05.2017”*

5. During the trial against A-1 to A-4, the other accused, A-5, who was absconding, was arrested and a supplementary charge-sheet was filed against him. The learned ASJ framed the charge against A-5 on 30.8.2017, as under:-

“I Virender Kumar Bansal, do hereby charge you accused Sandeep @ Pankaj @ Bachcha S/o Late Sh. Sita Ram as follows:-

That on 25.12.2016 at about 8.15 pm at A-1 Market near Country Made liquor Van, Jahangir Puri,

*Delhi within the jurisdiction of PS: Mahendra Park you all along with your co-accused persons Ajay (not arrested) along with accused persons Prateek @ Bholu, Prashant @ Chhotu @ Amitesh Kamal @ Jaipa(sic), Saddak Hussain in furtherance of your common intention caused death of Jeet Kumar eye witness of case **FIR No.382/2016 PS: Jahangir Puri** and thereby committed the offence punishable u/s 302 IPC r/w 34 IPC and with the cognizance of this court.*

And I hereby direct that you be tried by this court for the aforesaid offences punishable u/s 302/34 IPC.

*(Virender Kumar Bansal)
ASJ/Pilot Court/North, Rohini Courts”*

6. The prosecution examined 30 witnesses to prove the charges against A-1 to A-5. Thereafter, the learned ASJ recorded their separate statements under Section 313 Cr.PC wherein each of them claimed innocence. However, the accused persons did not lead any evidence.

PROSECTUION CASE

7. The prosecution case is that on 25.10.2016, at about 7.30 PM, Jeet Kumar, the victim was standing with his cousin Ajeet Kumar (PW-7) outside their house situated in the *jhuggi* cluster at K Block, Jahangir Puri, when he expressed a desire to partake chicken. Ajeet suggested that they should proceed to a chicken shop situated in the A Block Market, Jahangir Puri. Both of them proceeded on a motorcycle to the chicken shop (Saleem Chicken Wala), where Jeet stopped his motorcycle to answer the call of nature. While they were easing themselves, six men arrived there on two motorcycles. Ajeet recognized them and was aware of the fact that case FIR No.382/2016 had been registered against them

on a complaint made by Jeet. Besides the accused, A-1 to A-5, one Ajay was also present at the spot. The appellant grabbed Jeet by his face and said “*Tu hamare khilaf gawahi dega*”. Thereafter, all the accused started beating him. A-5 took out a pistol and fired at Jeet, who was hit by a bullet on his arm. To save himself, Jeet ran towards a nearby country liquor shop. All the six accused followed him in hot pursuit. PW-7 also ran after them. On reaching near the country liquor shop, Jeet was thrashed by the accused persons, who said “*Is sale ko jaan se mar dete hai, na hoga gawah na hogi gawahi*”. A-5 fired at the chest of Jeet, who sustained injuries and fell down on the ground. On seeing this, PW-7 fled from the spot, rushed to his aunt, Bimla (mother of the victim) and his parents and informed them about the incident. By the time they reached the scene of crime, Jeet was not present there. PW-7 along with the family members rushed to BJRM Hospital, where the victim had been taken. As no doctor was attending to the victim, his family members rushed him to Fortis Hospital, Shalimar Bagh, Delhi where he was declared ‘brought dead’. This incident set into motion the criminal machinery.

PROSECUTION EVIDENCE:

8. On receiving information of the firing, DD No.29A (Ex.PW-X-7) was recorded at PS: Mahendra Park. The police reached BJRM Hospital, where they came to know that the injured had been taken by his family members to Fortis Hospital. The first IO in this case, Inspector Dhananjay Gupta (PW-30) reached the spot and recorded the statement of PW-7 marked as Ex.PW7/A. He prepared the *Rukka* (Ex.PW30/A-Ex.PW3/B) and handed it over to Head Constable Kamlesh Kumar (PW-

20), for registration of the FIR. The *Rukka* was presented to the Duty Officer on 26.12.2016, at 00.15 hours and FIR No.0598 (Ex.PW3/A) was registered. The Crime Team reached the spot (Ex.PX-4), took photographs of the scene of crime. An empty cartridge was found at the spot and its sketch was prepared (Ex.PW20/A). The cartridge was also seized vide seizure memo (Ex.PW20/B). The motorcycle belonging to the deceased was taken into possession vide seizure memo, Ex.PW20/C. The IO (PW-30) prepared the site plan (Ex.PW30/B). PW-30 also prepared the inquest papers and got the post-mortem conducted on the body of the deceased. On the same day in the evening, on the identification of PW-7, the Investigating Officer arrested A-1 and A-2 vide arrest memos, Ex.PW7/B and Ex.PW7/C, respectively. PW-7 identified the motorcycle of A-1 bearing number DL8SAT 0967 that was taken into possession vide seizure memo, Ex.PW7/F. The disclosure statement of A-1 was recorded and marked Ex.PW7/H. The disclosure statement of A-2 was recorded and marked Ex.PW7/G. The appellant was arrested on 29.12.2016 at 9.15 P.M. and his motorcycle bearing number DL-14SF 7849 was taken into possession on 1.3.2016, vide seizure memo, Ex.PW19/B.

9. On 31.12.2016, based on the disclosure statement of the appellant (Ex.PW19/A), the Investigating Officer (PW-30), Head Constable Kamlesh Kumar (PW-20) and ASI Suresh Kumar (PW-19) proceeded to a premises at Khichripur Village, Shiv Market alongwith the appellant, who got recovered a pistol from which A-5 had fired at the victim and handed it over to him. The recovery memo-cum-pointing out memo is Ex.PW19/D. The said pistol was found loaded with a magazine. The

sketch of the pistol and the magazine is marked as Ex.PW19/C. Both, the pistol and the magazine were seized vide seizure memo, Ex.PW-19/D and handed over to the *Malkhana Muharar*. On 1.3.2017, the police deposited the exhibits with the FSL, Rohini. On 14.3.2017, some more exhibits including motorcycles number DL-14SF 7849, DL8SAT 0967, DL8S 5680, the empty cartridge, one pistol with the magazine and the clothes of the deceased were deposited with the FSL, Rohini for obtaining a ballistic report. The case material produced before the trial court by the *Malkhana Muharar* were shown to the Investigating Officer during his deposition and he duly identified the same.

10. Inspector Mukesh Kumar (PW-28) was the Investigating Officer who took over the further investigation on 29.5.2017. He deposed about the arrest of Sandeep @ Bachha (A-5) vide arrest memo, Ex.PW28/B. The disclosure statement of A-5 dated 29.5.2017 is Ex.PW28/C. A-5 pointed out the scene of crime vide pointing out memo, Ex.PW28/D. On his pointing out, the I.O. prepared a site plan (Ex.PW28/E), where he handed over the pistol to A-4 for hiding.

11. ASI Bhagwan Singh (PW-3) deposed that he had received the *Rukka* from PW-20 on the intervening night of 26/27.12.2016 at 00.15 hours and generated a copy of the FIR (Ex.PW3/A). He also recorded DD No.5A (Ex.PW3/D) at 1.20 A.M. on 27.12.2016, on receiving information from Fortis Hospital that an injured had been admitted in the said hospital with a firearm injury.

12. The rest of the police witnesses were mostly formal in nature and were associated with various steps taken in the course of the investigation, including arrest of the accused, recording of their

disclosure statements, depositing of the case material with the FSL, obtaining the reports from the FSL and re-depositing the case material with the *Malkhana Muharar*.

13. Dr. R.S. Mishra, CMO, BJRM Hospital, Delhi (PW-1) deposed that the victim was brought to the hospital on 25.12.2016 at 8.50 P.M. by one Surya, with a history of finding him on the road side. On examining the patient, the doctor declared him as 'brought dead'. The attendants present at the hospital forcibly took away the dead body. He proved the MLC of the deceased as Ex.PW1/A.

14. PW-2, Dr. Ajeet Kumar, Fortis Hospital, Shalimar Bagh, Delhi deposed that the victim was brought to the hospital by his father on 25.12.2106, at 9.15 P.M. with an alleged history of firearm injury. He was declared as brought dead at 9.26 P.M. on that day. The MLC prepared by PW-2 was proved as Ex.PW2/A.

15. The post-mortem report of the body of the deceased was proved by PW-4, Dr. Anshul Saxena, Sr. Resident, Department of Forensic Medicine, BJRM Hospital, Delhi as Ex.PW4/A. On an external examination of the body of the deceased, he noted four injuries and opined that the deceased had died due to haemorrhage, secondary to gunshot injury to the lungs, heart and liver and that injuries No.2 and 4 were sufficient to cause death in the ordinary course of nature. He opined that the injuries were ante-mortem in nature.

16. The ballistic experts in the present case were Ms. Prerna Lakra, Senior Scientific Assistant, Ballistic, FSL, Rohini (PW-22 who again appeared as PW-26) and Mr. R. Enivyan, Junior Forensic/Assistant Chemical Examiner, Ballistic, FSL, Rohini, Delhi (PW-25). PW-22

proved her reports, Ex.PW22/A and Ex.PW26/A. She deposed that the clothes of the deceased bearing hole marks sent to her for examination were analysed and detected with gunshot residue. PW-25 proved his report, Ex.PW25/A, wherein he gave an opinion in respect of the firearm (F1) and empty cartridge case (EC1). Mr. S.K. Singla, Senior Scientific Officer-1 (Retd.), CFSL, CBI Chemical Examiner (Biology) FSL, Delhi (PW-24) proved his report, Ex.PW24/A, regarding the presence of blood and the serological analysis conducted on the case material forwarded to the FSL for examination. He confirmed that human blood was detected on the clothes of the deceased but stated there was no reaction in respect of the blood grouping.

17. Ms. Vijayanta Arya, IPS, Additional DCP-1, North-West Delhi (PW-27) proved the sanction order dated 31.7.2017 (Ex.PW27/A) issued by her under Section 39 of the Arms Act, 1959 for prosecution of the appellant herein and A-5 under Section 25 of the Arms Act.

18. Ramesh (PW-9), father of the deceased identified the dead body of his son and deposed that it was handed over to him vide memo, Ex.PW5/A. Manoj Mehto (PW-5), Mahesh Singh (PW-6) and Suresh Mehto (PW-8), relatives/family members of the deceased stated that they had accompanied PW-9 to the mortuary and identified the dead body. Joginder (PW-10), Chandan (PW-11), Pawan (PW-12) and Jitender Kumar (PW-13) are public witnesses, who deposed that they had heard sound of gunshots and had witnessed the accused fleeing away from the spot on their motorcycles. PW-12 was also a witness to the arrest of the appellant by the police on 29.12.2016, at 8.30 P.M.

FINDINGS OF THE TRIAL COURT

19. The trial court agreed with the argument advanced by the defence counsel and held that there were several contradictions in the testimony of PW-7, the sole eye witness, which created doubt about his presence at the scene of crime and gave a clear impression that the FIR had been ante timed and he had been introduced later on. In other words, he was not present at the scene of the crime. The aforesaid conclusion was drawn on the ground that the conduct of PW-7 was found to be doubtful particularly, when he claimed to be present at the scene of crime and was a witness to the accused persons thrashing his cousin but had neither intervened or tried to save him; nor did he raise an alarm when his cousin was allegedly beaten up by the accused and they had fired at him. The trial court further observed that the injured was not removed to the hospital by PW-7 or any of his relatives but by a third person, one Surya, resident of Jahangirpuri, whose name was mentioned by the MLC doctor, PW-1 but he was not arrayed as a prosecution witness though he was the best person to tell where and how he had found Jeet and taken him to the hospital.

20. After discarding the testimony of the sole eye witness (PW-7), the trial court proceeded to examine the remaining two circumstances, firstly, fleeing away of the accused on motorcycles from the scene of crime and secondly, recovery of the weapon of offence, as brought out by the prosecution to prove the guilt of the accused. Referring to the testimonies of the public witnesses, PW-10, PW-11 and PW-12, who had deposed that they had gone to the spot to purchase liquor, had heard

sounds of two gunshots and seen the accused persons fleeing from the spot on two motorcycles, the trial court opined that there were several *inter se* contradictions, sufficient to disbelieve the prosecution version that the aforesaid witnesses had seen the accused persons fleeing from the scene of the crime immediately after the commission of the offence. Thus, the first circumstance set up by the prosecution, was rejected outright.

21. Coming to the second circumstance relating to the recovery of the weapon of offence on the disclosure statement made by the appellant and the co-accused, Sandeep @ Bachha (A-5), the impugned judgment relied on the testimony of three police witnesses, PW-19, PW-20 and PW-30 to hold that the said witnesses had fully supported and corroborated each other for proving recovery of the weapon of offence at the instance of the appellant. Thereafter, the trial court went on to conclude that recovery of the weapon of the offence could not be attributed to Sandeep @ Bachha (A-5) as the recovery had already been effected at the instance of the appellant herein, before the arrest of A-5. Holding that once the prosecution had been able to prove the recovery of the weapon of offence at the instance of the appellant and further, the forensic evidence brought on record showed that the bullet found in the dead body had been fired through the said weapon, the said circumstance pointed towards the guilt of the appellant and accordingly, the learned ASJ convicted him under Section 302 IPC while acquitting all the other accused persons. Aggrieved by the said decision, A-4, the appellant herein has filed the present appeal.

ARGUMENTS ADVANCED

22. The main thrust of the arguments addressed by Mr. Subodh K. Pathak, learned counsel for the appellant is that the trial court grossly erred in convicting the appellant under Section 302 IPC solely on the basis of one circumstance, i.e. recovery of the weapon of offence. He cited Section 26 of the Indian Evidence Act to contend that the confession by an accused while in custody of the police is to be treated as an unreliable evidence and cannot be proved by the prosecution and only that part of the disclosure statement of the accused can be proved which relates distinctly to the discovery of evidence consequent upon information given by him, as contemplated under Section 27 of the Act. He disputed the stand taken by the prosecution that recovery of the weapon of offence was made on the appellant's disclosure statement and argued that the said recovery was doubtful and a planted one as the IO did not prepare the site plan of the place of recovery and further, the sketch of the pistol and the magazine bears the signatures of only PW-19 and PW-20, both of whom are police witnesses.

23. It was pointed out that while the appellant had been arrested on 29.12.2016, the recovery of the weapon of offence was allegedly made two days later, on 31.12.2016 and the weapon of offence was dispatched to the FSL for a report after a period of two months, i.e. on 1.3.2017, all of which casts a shadow of doubt on the recovery and the manner in which the investigation was conducted. Learned counsel also referred to the disclosure statement of the co-accused, Prateek @ Bholu (A-2) made on 26.12.2016 wherein, he had stated that he could get the weapon of offence recovered from Anu, a friend of the appellant and wondered why

the police did not take any steps to get the weapon recovered at his instance. He stated that even otherwise, it was the version of the prosecution itself that the weapon of offence was used by A-5 and fact of the matter is that the said weapon was falsely planted on the appellant. Lastly, it was argued that assuming without admitting that the weapon of offence used by A-5 was recovered on the disclosure made by the appellant, it is not even the case of the prosecution that he had used the said weapon of offence to fire at the deceased, for being convicted for his murder.

ANALYSIS AND DISCUSSION

24. We have heard the arguments advanced by Mr. Subodh K. Pathak, learned counsel for the appellant and Mr. Amit Gupta, learned APP and carefully scanned the evidence brought on record in the light of the findings returned in the impugned judgment.

25. As noted above, the testimony of the sole eye witness, Ajeet Kumar (PW-7) was discarded by the trial court on the ground that there were several inconsistencies in his deposition and it was doubtful if he was at all present at the scene of the crime. Once the testimony of PW-7 was discarded, all that is left for examination is the circumstantial evidence. The twin circumstances referred to by the learned ASJ is the fleeing away by the accused on motorcycles from the scene of crime and the recovery of the weapon of offence. The first circumstance was discarded on account of the glaring contradictions in the testimony of the public witnesses i.e., PW-10, PW-11 and PW-12, who claimed that they had heard sounds of gunshots being fired and had witnessed the accused

persons fleeing away from the scene of crime. The only other circumstance relates to the recovery of the weapon of offence.

26. Considering the fact that at no stage did the prosecution project a case that it was the appellant, who had fired at the deceased, rather it was their consistent stand that it was A-5, who had taken out a pistol from his possession and fired at the victim on his chest and he had succumbed to the said injuries, we are left wondering as to where was the occasion for the trial court to have convicted the appellant for the offence under Section 302 IPC on the ground of recovery of the weapon of offence? The only role allegedly attributed to the appellant in the entire incident was that he had grabbed the victim by his face and thrashed him by saying that “*Tu hamare khilaf gawahi dega*”. Thereafter, the appellant alongwith the other accused persons had started beating Jeet, who tried to save himself by running towards a nearby country liquor shop. On reaching near the said country liquor shop, the appellant and the other accused persons had again caught hold of Jeet and thrashed him. The prosecution version has consistently been that it was A-5, who had taken out a pistol and fired at Jeet. That being the admitted case of the prosecution throughout and the trial court having acquitted A-5 for the offence punishable under Section 302 IPC, the conviction of the appellant for the said offence is not sustainable only on the basis of alleged recovery of the weapon of offence on his disclosure statement.

27. We are, therefore, in complete agreement with the submission made by learned counsel for the appellant that there was no occasion for the trial court to have convicted the appellant on the sole circumstance of recovery of the weapon of offence on the basis of his disclosure

statement when, it was never the prosecution case that the appellant was the one, who was in possession of the pistol on that day and had fired at the deceased with the said weapon. When as per the case of the prosecution, A-5 was in possession of the weapon of offence and he had fired on the deceased, it is hard to digest that A-5 would have handed it over to the appellant.

28. The view expressed above is also fortified on a scrutiny of the questions put to the appellant under Section 313 Cr.PC. It was not the version of the prosecution that he had pulled out a pistol and fired at the deceased. The only circumstance alleged against the appellant was regarding his presence at the scene of the crime alongwith the co-accused, where he had allegedly threatened the deceased and given him kicks and fist blows. In fact, it was the case of the prosecution that A-5 had pulled out a pistol and fired on the chest of the deceased whereafter, the appellant and the other co-accused had fled from the spot on motorcycles. A specific suggestion on these lines was made to the said effect to A-5, while recording his statement under Section 313 Cr.P.C.

NO SUBSTANTIVE CHARGE FRAMED AGAINST THE APPELLANT UNDER SECTION 302 IPC

29. Though no argument has been advanced before us by the learned counsel for the appellant on the absence of a substantive charge framed against the appellant under Section 302 IPC, we would be failing in our duty if we overlook the said error committed by the trial court. A glance at the charges framed against the accused, as reproduced hereinabove, clearly brings out that all the accused were charged for harbouring a common intention of causing the death of the deceased, an eye witness in

case FIR No.382/2016, PS Mahindra Park, for the offence punishable under Section 302 IPC read with Section 34 IPC. No substantive charge was framed against any of the accused individually. Considering the fact that the remaining accused, A-1, A-2, A-3 and A-5 have been acquitted for the offence under Section 302 IPC and their acquittal has not been challenged by the State by filing an appeal, and further, taking note of the fact that all the accused were collectively charged for the offence under Section 302 IPC read with Section 34 IPC and not individually, it is not understood as to how could the appellant be convicted under Section 302 IPC simpliciter. This, in our opinion, is an error that goes to the root of the matter.

30. The patent fallacy of convicting an accused for a substantive offence without there being any charge framed against him, has been repeatedly highlighted by the Supreme Court in a catena of decisions. In Nanak Chand vs. State of Punjab reported as **AIR 1955 SC 274**, the appellant along with six other co-accused had been charged for committing offences under Section 148 and Section 302 read with Section 149 IPC and the trial court had acquitted three of the six accused while convicting the appellant therein and three others for the offences referred to hereinabove. In the appeal filed against the said judgment, the High Court had acquitted three of the remaining accused of the offence under Section 302 IPC read with Section 34 IPC but convicted the appellant alone for the substantive offence under Section 302 IPC. In view of the fact that no separate charge had been framed by the trial court under Section 302 IPC, the Supreme Court held that the High Court could not have convicted the appellant for the said offence. Rejecting the

plea of the prosecution that non-framing of a substantive charge against the appellant was an error in framing of charge that was a curable irregularity, it was held as follows:-

“13.....In the present case, however, there is no question of any error, omission or irregularity in the charge because no charge under section 302 of the Indian Penal Code was in fact framed. Section 232 of the Code of Criminal Procedure permits an appellate court or a court of revision, if satisfied that any person convicted of an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of sections 535 and 537 of the Code of Criminal Procedure. Assuming, however, for a moment that there was merely an irregularity which was curable we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302 of the Indian Penal Code.

14. By framing a charge under section 302, read with section 149 of the Indian Penal Code against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under section 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case.....”

(emphasis added)

31. In Suraj Pal vs. State of U.P. reported as **AIR 1955 SC 419**, where twenty accused including the appellant therein had been charged with offences under Sections 147, 323/149, 307/149 and 302/149 IPC and held guilty by the trial court, in the appeal, the High Court set aside the conviction of ten of the co-accused. As for the remaining ten co-accused, the High Court opined that nine of them could only be convicted under Sections 323/149 IPC, thus leaving the appellant therein, who alone was held guilty of the substantive offence under Section 307 and Section 302 IPC. The said decision was challenged by the appellant before the Supreme Court that held that once specific charges had been framed, which referred to all the accused having acted together with a common intention of firing upon the deceased and there was no amendment to the charge, the appellant could not have been convicted for the substantive charge for the offence under Sections 302 and 307 IPC as if he was acting alone. Holding that such a course of action was not legitimate, the Supreme Court observed as follows:-

“4.....The appellant might well have relied on the absence of any such amendment as being an indication that he was not called upon to defend himself on the footing of his being the author of the pistol fire. In a case so serious as that which involves the sentences of transportation for life, and of death, and particularly in a case like the present one, where the death sentence has been awarded in the trial court by distinguishing this appellant from all the other accused in respect of his individual act by way of pistol fire, it is difficult to say that the accused has not been prejudiced by the absence

of specific charges under sections 307 and 302, Indian Penal Code.

5. Further, the medical evidence indicates that P.W. 2 as well as the deceased Surajdin had gun-shot wounds on their person. The evidence of the Doctor is to the effect that these wounds may have been caused by a country pistol which, it is alleged, the appellant had in his hand. It has been suggested on behalf of the defence that the Medical Officer was not competent to speak about it and that if the prosecution wanted to rely thereupon, they should have called an arms expert to speak to the same. Whether or not this comment is legitimate, it is clear that if the appellant is to be found directly responsible for inflicting the wounds, noted as gun-shot wounds by the Medical Officer, he might well have availed himself of the opportunity to elucidate, by cross-examination or positive defence, the nature of the firearm which would have caused the actual injuries found on the bodies of PW-2 and of deceased Surajdin. In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellant under sections 307 and 302, Indian Penal Code has materially prejudiced him. We must accordingly set aside the convictions and sentences of the appellant under sections 307 and 302 of the Indian Penal Code.....”
(emphasis added)

32. In Krishna Govind Patil vs. State of Maharashtra reported as **AIR 1963 SC 1413**, which is case of Section 302 read with Section 34 IPC, the Supreme Court made the following observations:-

“8.....While it acquitted Accused 1, 3 and 4 under Section 302, read with Section 34 of the Indian Penal Code, it convicted Accused 2 under Section 302, read with Section 34,

of the said Code, for having committed the offence jointly with the acquitted persons. That is a legally impossible position. When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same: it would mean that they did not take part in the offence. The effect of the acquittal of Accused 1, 3 and 4 is that they did not conjointly act with Accused 2 in committing the murder. If they did not act conjointly with Accused 2, Accused 2 could not have acted conjointly with them.....”

33. In Baul and Another vs. State of U.P. reported as **AIR 1968 SC 728**, there were three accused charged with the offence under Sections 302/34 IPC and the Sessions Court convicted all of them. In the appeal, the High Court acquitted one of the accused and altered the sentence of the other accused to Section 325 read with Section 109 IPC. But the conviction of the third accused was altered from Sections 302/34 IPC to Section 302 IPC simpliciter. The Supreme Court allowed the appeal of the third accused by making the following observations:-

*“7. No doubt the original prosecution case showed that Sadhai and Ramdeo both hit the deceased on the head with their lathies. One is tempted to divide the two fatal injuries between the two assailants and to hold that one each was caused by them. If there was common intention established in the case the prosecution would not have been required to prove which of the injuries was caused by which assailant. **But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so in this case when one of the accused has got the benefit of the doubt and has been acquitted. It cannot, therefore, be postulated that Sadhai alone caused all the injuries on the head of the deceased. Once that position arises the doubt remains as to whether***

*the injuries caused by Sadhai were of the character which would bring his case within Section 302. It may be that the effect of the first blow became more prominent because another blow landing immediately after it caused more fractures to the skull than the first blow had caused. **These doubts prompt us to give the benefit of doubt to Sadhai. We think that his conviction can be safely rested under Section 325 of the Indian Penal Code, but it is difficult to hold in a case of this type that his guilt amounts to murder simpliciter because he must be held responsible for all the injuries that were caused to the deceased. We convict him instead of Section 302 for an offence under Section 325 of the Indian Penal Code and set aside the sentence of imprisonment for life and instead sentence him to rigorous imprisonment for seven years.***

34. A similar view was expressed by the Supreme Court in Subran @ Subramanian vs. State of Kerala reported as (1993) 3 SCC 32, as follows:-

*“11. Since, appellant 1 Subran had not been charged for the substantive offence of murder under Section 302 IPC, even the trial court, which tried the six accused persons, was not justified in recording a conviction against him for the substantive offence of murder punishable under Section 302 IPC after framing a charge against him for the offence under Section 302 read with Section 149 IPC only. **A person charged for an offence under Section 302 IPC read with Section 149 cannot be convicted, of the substantive offence under Section 302, IPC without a specific charge having been framed against him as envisaged by law. Conviction for the substantive offence in such a case is unjustified because an accused might be misled in his defence by the absence of the charge for the substantive offence***

under Section 302 IPC simpliciter and, therefore, in defending himself, he cannot be said to have been called upon to meet that charge and he could very well have considered it unnecessary to concentrate on that part of the prosecution case during the cross-examination of the prosecution witnesses. Therefore, the conviction of the first appellant for an offence under Section 302 was not permissible.” (emphasis added)

35. Again in State of West Bengal vs. Vindu Lachman Das Sakhrani @ Deru reported as **1995 SCC (Crl) 175**, a case where both, husband and wife were charged for committing an offence under Sections 302/34 IPC and the husband was acquitted but the wife was convicted for the substantive offence, the Supreme Court reiterated its stand that there being no charge under Section 302 IPC simpliciter against the wife, she could not have been convicted and in the following words:-

“4.....Both husband and wife were charged with an offence under Section 302 read with Section 34 I.P.C. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 simpliciter against the wife she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence.”

36. In Nallabothu Venkaiah vs. State of A.P. reported as **(2002) 7 SCC 117**, the Supreme Court was faced with two questions of law. Firstly, whether the appellant could be convicted under Section 302 IPC without the aid of Section 149 IPC, in the absence of any substantive charge

under Section 302 IPC. Secondly, whether the appellant could be convicted under Sections 302/149 IPC on selfsame evidence on the basis of which other accused were acquitted. After analyzing a catena of earlier decisions on the above aspect, the law was distilled in the following words:-

“24. On an analytical reading of a catena of decisions of this Court, the following broad proposition of law clearly emerges: (a) the conviction under Section 302 simpliciter without aid of Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence; (b) wrongful acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under Section 302 read with Section 149 IPC; (c) charge under Section 302 with the aid of Section 149 could be converted into one under Section 302 read with Section 34 if the criminal act done by several persons less than five in number in furtherance of common intention is proved.”

37. In Koppula Jagdish @ Jagdish vs. State of A.P. reported as **(2005) 12 SCC 425**, three accused persons were charged under Section 302 read with Section 34 IPC for sharing a common intention to commit the murder of the victim. The trial court convicted all the three accused. In the appeal, the High Court acquitted two of the accused and the conviction of the third accused was modified from Section 302 read with Section 34 IPC to Section 302 IPC simpliciter. In the above facts, the Supreme Court observed as under:-

“3. Undisputedly, all the three accused persons were charged under Section 302 read with Section 34 IPC for sharing common intention to commit murder of the victim. The other

two accused persons as stated above, have been already acquitted by the High Court. There is neither any allegation nor evidence that the appellant alone inflicted all the injuries or the fatal one. This being the position, the appellant could not have been convicted under Section 302 simpliciter but could have been convicted only with the aid of Section 34 IPC, which also is not possible in the case in hand as the other two accused persons with whom he could have shared the common intention have been already acquitted by the High Court. In our view, the High Court was not justified in convicting the appellant under Section 302 IPC.”

38. In Annareddy Sambasiva Reddy & Ors. Vs. State of Andhra Pradesh reported as (2009) 12 SCC 546, placing reliance on its earlier decisions in Surajpal (supra), Pandurang, Tukia and Bhillia vs. State of Hyderabad reported as (1955) 1 SCR 1083 and Nanak Chand (supra) referred to Section 464 of the Cr.P.C., which deals with the fact of omission of framing, or absence of, or error in charge, the Supreme Court held that no straightjacket formula can be applied and every case must depend on its merits. The essential and important aspect to be kept in mind is:- has omission to frame a specific charge resulted in prejudice to the accused.

39. In the instant case too, it is an admitted position that no separate charge was framed against the appellant for the substantive offence under Section 302 IPC. Once charges were framed by the trial court against all the accused collectively and not individually and no effort was made by the prosecution to approach the trial court for amending the charges as framed, the appellant alone could not have been convicted for a

substantive offence under Section 302 IPC. This is an illegality which is not curable in the circumstances of the present case as in the absence of any substantive charge framed against him under Section 302 IPC, the appellant was misled in his defence.

40. Moreover, there is no direct evidence against the appellant for upholding his conviction under Section 302 IPC. Mere recovery of the weapon of offence at the instance of the appellant cannot be the sole premise on which a judgment of conviction under Section 302 IPC could be recorded. It is too slender an evidence to hold him guilty of such an offence. This is particularly so when the fifth accused, who as per the prosecution, is the one who had pulled out the pistol and fired at the deceased, has been acquitted by the learned ASJ. There is also no explanation as to why despite the second accused, who was arrested on 26.12.2016, three days before the appellant was arrested, stated in his disclosure statement that he could get the weapon of offence recovered from a third person, no steps were taken in that direction. In the absence of any other evidence connecting the appellant with the commission of the murder of the deceased, the trial court could not have proceeded to convict him for the offence under Section 302 IPC while proceeding to acquit the remaining accused. For the aforesaid reason too, the impugned judgment is unsustainable, being contrary to the settled legal position and is accordingly quashed and set aside alongwith the order on sentence.

41. Before parting with this case, we would also like to highlight another disturbing feature i.e., the lapse on the part of the trial court in omitting to frame a charge against the appellant and the fifth accused for

the offence under Section 25 of the Arms Act, particularly when the original charge-sheet and the supplementary charge-sheet filed in the present case specifically refer to the provisions of Sections 302/411/120B/34 IPC and Section 25/27 of the Arms Act. Vide order dated 5.4.2017, the trial court had framed the charge against all the accused except for the fifth accused, Sandeep @ Bachha, who was yet to be arrested, under Section 302 IPC read with Section 34 IPC, without making any reference to Sections 25 and 27 of the Arms Act. Even at the stage of amending the original charge vide order dated 19.5.2017, on account of an error in recording the correct FIR number wherein the deceased was an eye witness, the prosecution failed to point out that no charge had been framed under Sections 25/27 of the Arms Act, nor did the trial court notice this omission or take any step to amend the charge. The third occasion for amending the charge arose when the fifth accused was finally apprehended and a supplementary charge-sheet was filed against him. Vide order dated 30.8.2017, charge was framed against the said accused, who as per the prosecution version, had taken out a pistol and fired at the chest of the deceased. Yet again, no charge was framed against him under Sections 25/27 of the Arms Act. Even the sanction order dated 31.7.2017 under Section 39 of the Arms Act for prosecution of the appellant and A-5 were not taken into account by the learned ASJ for framing the charge against them under Sections 25/27 of the Arms Act. Ironically, this lapse went undetected not only by the learned ASJ, but also by the learned APP even during the course of the trial when PW-27, the sanctioning authority had appeared and testified that she had accorded sanction under Section 39 of the Arms Act for the prosecution

of the appellant and A-5 under Section 25 of the Arms Act and the ballistic expert witnesses, PW-22, PW-24 and PW-25 had appeared and proved their reports in respect of the weapon of offence, the empty cartridge etc. As a result of this negligence on the part of the prosecution and omission on the part of the trial court, no charge came to be framed against the appellant and A-5 under Sections 25/27 of the Arms Act, which can only be described as a colossal blunder. Such a casual manner of framing the charge is a matter of serious concern.

42. To sum up, here is a case where the appellant has been convicted under Section 302 IPC without any foundation laid for the said offence and though evidence was led by the prosecution for proving the charge under Sections 25/27 of the Arms Act, it could not yield any result in the absence of any charge framed against the appellant and A-5 for the said offence, due to gross negligence on the part of the prosecution, compounded by the oversight attributable to the trial court. It is noteworthy that the case was assigned to a Pilot Court and it was the same Judicial Officer who had framed the charge and conducted the trial to finally deliver the impugned judgment of conviction.

43. As a result of the above discussion, the appeal is allowed. The impugned judgment of conviction and order of sentence *qua* the appellant are quashed and set aside. The appellant is acquitted for the offence punishable under Section 302 IPC and is directed to be released forthwith, unless required to be detained in any other case. The bail bond and surety bond offered by him stand discharged. The appellant shall fulfill the requirements of Section 437-A of the Cr.P.C. at the earliest.

44. The appeal is disposed of. Trial court record be sent back forthwith alongwith a certified copy of this judgment. The Registry shall forward a copy of this judgment to the concerned ACR Committee of the learned ASJ for perusal.

(HIMA KOHLI)
JUDGE

(VINOD GOEL)
JUDGE

MAY 15, 2019
NA/rkb/ap