

IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR

Reserved on: 03.06.2022

Pronounced on: 27.06.2022

CRM(M) No.411/2021

c/w

Bail App. No.146/2021

Bail App. No.147/2021

TAJA BEGUM & ORS

... PETITIONER(S)

*Through: - Mr. R. A. Jan, Sr. Advocate
with Mr. Taha Khalil, Advocate.*

Vs.

UT OF J&K

...RESPONDENT(S)

Through: - Mr. Ilyas Nazir Laway, GA.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

CRM(M) No.411/2021

- 1) The petitioners have challenged order dated 09.11.2021 passed by the Principal Sessions Judge, Baramulla, whereby charges for offences under Sections 147, 148, 447, 323, 427, 302 read with Section 34 IPC have been framed against them.
- 2) A perusal of the record reveals that on 24.05.2021, complainant PW1-Mohammad Rafiq Sofi, lodged a written report with Police Station, Baramulla, against the accused Jan Mohammad Changa, Reyaz Ahmad Changa, Ali Mohammad Changa, Taja

Begum and Ulfat Bano, alleging therein that on the said day, the aforementioned five accused persons, who were armed with lathies, launched an assault upon the complainant party. It was alleged that accused Jan Mohammad Changa, who was armed with a cricket bat, gave a blow upon the head of Ghulam Din Gazi with full force, as a result of which he suffered grievous injuries whereas PW2-Mst. Bakhti Begum received a blow on her arm and PW-Shameema received injury on her nose. It was alleged that accused above named had, under a well-knit conspiracy, committed the aforesaid acts with an intention to do away with the complainant party. The FIR further revealed that there was a dispute over a piece of land going on between the complainant and the accused party. The police registered FIR No.117/2021 for offences under Section 147, 148, 323, 447, 427, 307 and 34 IPC and started investigation of the case. During the investigation of the case, the injured, namely, Ghulam Din Gazi succumbed to the injuries and, accordingly, offence under Section 307 IPC was converted into offence under Section 302 IPC.

3) It was revealed during the investigation of the case that on the day of occurrence, all the accused persons including the petitioners herein armed with clubs trespassed into compound of the complainant with a common intention to do away with the complainant party. It was also found that the accused damaged the

tin sheeted boundary wall of the compound of the complainant and deceased Ghulam Din Gazi, upon hearing the noise, came on spot and he objected to the acts of the assailants/accused. This, as per the challan, infuriated the accused and accused Jan Mohammad Changa, who was armed with a cricket bat, gave a blow of the bat upon the head of the deceased which resulted in grievous injuries to him leading to his death. Thus, according to the challan, offences under Section 147, 148, 447, 323, 427, 302 IPC read with Section 34 of IPC were found established against accused including the petitioners herein.

4) It appears that the age of accused Jan Mohammad Changa was found to be less than 18 years and, as such, a separate challan was laid against him before Juvenile Justice Board, Baramulla, whereas against other accused including the petitioners herein, the challan came to be filed before the learned Sessions Judge, Baramulla, who, after hearing the parties and upon perusal of the material on record, vide the impugned order dated 09.11.2021, framed charges for offences under Section 147, 148, 447, 323, 427, 302 IPC read with Section 34 of IPC against the accused including the petitioners herein. It is this order which is under challenge before this Court through the medium of instant petition.

5) I have heard learned counsel for the parties and perused the material on record including the trial court record.

6) It has been contended by learned senior counsel appearing for the petitioners that the allegations made in the charge sheet and the evidence in support thereof assembled by the investigating agency even if taken at their face value do not disclose the ingredients of offence under Section 302 IPC read with Section 34 of IPC against the petitioners. It has been further contended that the learned Sessions Judge has, while framing charges against the petitioners in terms of the impugned order, misdirected himself and has not considered the material on record in its right perspective. Elaborating the aforesaid contention, the learned senior counsel has submitted that the alleged occurrence, as per the material on record, has taken place during the course of a scuffle in a sudden fight and the petitioners did not share common intention of committing murder of the deceased with the main accused, namely, Jan Mohammad Changa. According to the learned senior counsel, this aspect of the matter has not been considered by the learned Sessions Judge while framing charge for offence under Section 302 IPC read with Section 34 IPC against the petitioners.

7) Before testing merits of the contentions raised by learned senior counsel appearing for the petitioners, it would be necessary to understand the legal position as regards the factors which are required to be taken into account while framing charges against an

accused. The scope of the power of this Court to interfere with an order of framing charge is also required to be noticed.

8) The Supreme Court had an occasion to consider both these questions in the case of *Amit Kapoor v. Ramesh Chander and another*, (2012) 9 SCC 460. The Court has, after noticing the provisions contained in Section 227 and 228 of the Code of Criminal Procedure, which relate to framing of charge against an accused, observed as under:

“17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the ‘record of the case’ and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of *State of Bihar v. Ramesh Singh* (1977) 4 SCC 39:

“4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If “the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing”, as enjoined by Section 227. If, on the other hand, “the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— ... (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused”, as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before

recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of 12 CRMC No.24/2017 the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

9) From a perusal of the aforequoted ratio laid down by the Supreme Court, it is clear that at the time of framing of charge even a strong suspicion against an accused would justify framing of charge. The Court at this stage is not required to see whether the accused can be finally held guilty of the offence but it has to see whether there exist sufficient grounds for proceeding against the accused. The Court has to see whether, on the basis of material on record, ingredients constituting the alleged offences are, prima facie, made out. For this limited purpose, sifting of evidence is permissible but probative value of the material brought on record by the prosecution cannot be gone into at this stage.

10) In the same judgment, the Court also examined the scope of power of the High Court under Section 482 of Cr. P. C to interfere with an order framing a charge. The Court, after noticing the scope and power of revision vis-à-vis scope of inherent powers of the High Court under Section 482 of Cr. P. C, made certain observations. Paras 18 and 25 of the judgment are relevant to the context and the same are reproduced as under:

“18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be

exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

xxx xxx xxx xxx xxx xxx xxx xxx

25. Having examined the inter-relationship of these two very significant provisions of the Code, let us now examine the scope of interference under any of these provisions in relation to quashing the charge. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

- 11) From a careful analysis of the aforesaid ratio laid down by the Supreme Court, it is clear that if upon considering record of the case the Court finds that no offence is made out or there is a legal bar to prosecution against the accused, then only interference in the

order of framing charge is warranted and the accused may be discharged.

12) With the aforesaid legal position in mind, let us now analyze the material on record so as to test the merits of contention of the learned counsel for the petitioners. The allegations made in the charge sheet, as already noted, are that there was a land dispute going on between complainant party and the accused party. It is alleged that on the fateful day, the accused including the petitioners herein trespassed into the compound of the complainant after having damaged the tin sheeted gate of the said compound. It is also alleged that the accused including the petitioners herein were armed with lathies whereas juvenile accused, namely, Jan Mohammad Changa, was armed with a cricket bat. The further case of the prosecution is that deceased Ghulam Din Gazi, the maternal uncle of the complainant, came on spot and tried to intervene but this infuriated the accused and one of them i.e. Jan Mohammad Changa, gave a fatal blow of cricket bat on his head. These allegations are supported by the statements of prosecution witnesses recorded under Section 161/164 of the Cr. P. C. According to the learned counsel for the petitioners, the deceased came on spot later in point of time and the petitioners did not intend to cause his death. He has contended that at best it was a case of sudden fight between accused Jan Mohammad Changa and the

deceased. Thus, according to learned counsel, the offences under Section 302/34 IPC cannot be invoked against the petitioners.

13) It is true that the deceased came on spot after the scuffle between the accused and the complainant party had already commenced but then, in order to invoke the provisions contained in Section 34 IPC which provide for vicarious liability in a case where an act has been committed in furtherance of a common intention, it is not necessary that common intention must have developed before reaching the spot of the occurrence. It is a settled law that even on the spot of occurrence, common intention to commit a particular act may develop between the assailants on reaching there. There cannot be any direct evidence in this regard but the circumstances prevailing at the time of commission of the crime may give sufficient indication as to the intention of the assailants.

14) In the instant case, as per the material on record, the petitioners were armed with lathies and they had a long standing enmity with the complainant party. It is also, *prima facie*, established that the accused including the petitioners herein trespassed into the compound of the complainant, which means that they had come on the spot of the occurrence with a premeditated mindset that they would be launching an attack upon the complainant party with deadly weapons like lathies by using the same against anyone who would come in their way. So, it is not a

case where the complainant party was the aggressor and the occurrence took place while the petitioners were exercising their right of private defence but it is a case where the petitioners and the other accused were the aggressors who went right into the compound of the house of the complainant party to launch an attack upon them. The intention of the accused to commit murder of anyone supporting the complainant can thus be inferred from the aforesaid circumstances. The contention of learned senior counsel appearing for the petitioners that there is no material on record to suggest that the petitioners had shared common intention of commission of murder of the deceased is, therefore, without any merit. Similarly, the charge against the petitioners for offences under Section 147, 148, 447, 323, 427 read with Section 302 IPC is also supported by the material on record.

15) It has been contended by learned senior counsel appearing for the petitioners that there are contradictions relating to vital aspects of the case between the statements of the prosecution witnesses *inter se* as also between their statements recorded under Section 161 of the Cr. P. C and those recorded under Section 164 of the Cr. P. C. Learned senior counsel has taken me through the statements recorded during the investigation of the case to substantiate his point. I am afraid that this Court, in these proceedings and even the Sessions Court while considering the

question of framing the charges, cannot meticulously examine or sift the statements of witnesses recorded during investigation of the case in order to determine the effect of contradictions, if any, appearing in these statements. The fact of the matter remains that all the prosecution witnesses, during the investigation of the case, have stated that juvenile accused, Jan Mohammad Changa, was driving a tractor which he dashed against the tin sheeted gate of compound of the complainant and they have also stated that other accused, who were armed with lathies, were accompanying him. The contradictions in the statements of the prosecution witnesses here and there may not help the case of the petitioners, at least at the time of framing of charges. The contention of learned counsel for the petitioners is, therefore, without any basis.

16) It has been contended by learned senior counsel for the petitioners that in view of the provisions contained in Section 3(i) of the Juvenile Justice (Care and Protection of Children) Act, 2015, juvenile accused, Jan Mohammad Changa, has to be presumed innocent of any *mala fide* or criminal intent. On this ground, it is urged that if the main accused is to be presumed free of any *mala fide* intent, the petitioners cannot be roped in by invoking the provisions contained in Section 34 of the IPC. The argument advanced by learned senior counsel appearing for the petitioners appears to be misconceived for the reason that presumption under

Section 3(i) of the Juvenile Justice (Care and Protection of Children) Act, 2015, is applicable to the case of juvenile accused i.e. Jan Mohammad Changa and not to the cases of other adult accused, who, from the circumstances appearing in the material on record of the case, clearly shared a common intention of launching a murderous attack on the complainant party. The contention of learned senior counsel is, therefore, without any merit.

17) For the foregoing discussion, it is clear that there is sufficient material on record to frame charges for offences under Section 147, 148, 447, 323, 427, 302 IPC read with Section 34 of IPC against the accused including the petitioners herein and I find no justification to interfere with the impugned order passed by the trial court. The petition is, therefore, dismissed being devoid of merit.

Bail App. No.146/2021

Bail App. No.147/2021

18) Accused/petitioner Ali Mohammad Changa has moved bail application No.146/2021 whereas accused/petitioners Mst. Taja Begum and Ms. Ulfat have moved bail application No.147/2021. Both these bail applications arise out of the case which is subject matter of CRM(M) No.411/2021. The facts leading to filing of charge sheet against the petitioners/accused need not to be narrated as the same have already been narrated hereinbefore.

19) While deciding CRM(M) No.411/2021, it has already been held that there is, prima facie, material on record of the challan that the petitioners/accused are involved in commission of various offences including the offence under Section 302 IPC read with offence under Section 34 IPC. The legal position relating to grant of bail in heinous offences like murder has been laid down by the Supreme Court in its catena of judgments, according to which the matters to be considered in such cases are as under:

1. *Whether there is a, prima facie, reasonable ground to believe that the accused had committed the offence;*
2. *Nature and gravity of the charge;*
3. *Severity of punishment in the event of conviction;*
4. *Danger of accused absconding or fleeing, if released on bail;*
5. *Character, behavior, means, position and standing of the accused;*
6. *Likelihood of the offence being repeated;*
7. *Reasonable apprehension of the witnesses being tampered with;*
8. *Danger of course of justice being thwarted by grant of bail;*

20) So far as the instant case is concerned, the petitioners are facing the charge of murder which is punishable with death sentence or imprisonment for life. The Supreme Court in the case of **Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav &**

anr, (2004) 7 SCC 528, while laying down the guidelines for grant or refusal of bail in serious offences like murder, has observed as under:

“11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are,

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

(b) Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(c) Prima facie satisfaction of the Court in support of the charge; (See Ram Govind Upadhyay Vs. Sudarshan Singh and others and Puran Vs. Rambilas and another.

12. In regard to cases where earlier bail applications have been rejected there is a further onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the court is of the opinion that

bail has to be granted then the said court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. (See Ram Govind Upadhyay, supra)

21) In the aforesaid judgment, the Supreme Court has also observed that the conditions laid down in Section 437(1)(i) of the Cr. P. C are sine qua non for granting bail even under Section 439 of the Code, meaning thereby that in a case where a person is alleged to be involved in an offence punishable with death sentence or imprisonment for life, he cannot be released on bail if there appear reasonable grounds for believing that he has been guilty of such an offence. So, the petitioners in the instant case, in order to succeed in making out a case for grant of bail in their favour on merits, have to satisfy this Court that on the basis of the evidence led by the prosecution and the evidence that is proposed to be led by the prosecution, there is absence of reasonable grounds for believing that they have committed the offence.

22) As already noted, there is enough material on record to suggest involvement of the petitioners in the alleged crime including the one for offence under Section 302 IPC. Majority of the material prosecution witnesses cited in the challan are yet to be examined and these witnesses in their statements recorded under Section 161/164 of the Cr. P. C have clearly implicated the petitioners. Therefore, it cannot be stated that there are no

reasonable grounds for presuming that the petitioners are not involved in the alleged crime. The petitioners, therefore, are not entitled to grant of bail on merits.

23) The applications are, accordingly, dismissed. However, it shall be open to the petitioners to move the trial court upon change of circumstances that may occur with the recording of statements of more prosecution witnesses.

(SANJAY DHAR)
JUDGE

Srinagar,
27.06.2022
"Bhat Altaf, PS"

Whether the order is speaking:

Yes/No

Whether the order is reportable:

Yes/No

