

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

THE HON'BLE MR.JUSTICE B.A.PATIL

AND

THE HON'BLE MRS.JUSTICE M.G.UMA

CRIMINAL APPEAL NO.100281/2017

DATED: 01-07-2020

HASHAM UMARALI @ BABU SHAIKH VS THE STATE OF KARNATAKA

JUDGMENT

B.A.PATIL J.,

The present appeal has been preferred by the appellant – accused, being aggrieved by the judgment of conviction and order of sentence passed by the Special Judge, Uttara Kannada, Karwar (hereinafter referred to as the Trial Court) in Special Case No.26/2014 dated 11.07.2017, whereunder the accused was convicted for the offences punishable under Sections 376 and 506 of the Indian Penal Code (hereinafter referred to as 'IPC') and under Sections 3(1)(xii) and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'SC & ST Act'). The appellant – accused is acquitted for the offences punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act').

2. We have heard the learned counsel Sri.K.M.Shiralli for the appellant – accused and the learned Additional S.P.P. Sri.V.M.Banakar for the respondent – State.

3. The case of the prosecution in brief is that the

victim – complainant, who was minor, was belonging to scheduled caste. It is further alleged that she was studying in 8th standard and during school holidays, she used to go to the house of the accused for cleaning and cutting of cashew nuts. When the complainant used to go to the house of the accused, he used to tease her and was behaving indecently by putting his hands over her body. It is further alleged that on 02.02.2014, as it was a Sunday, at about 02:30 p.m., when the victim had been to the house of the accused for breaking cashew nuts, nobody was there in the house and at that time, accused with an intention to fulfill his sexual desire, told the complainant that there are some cashew seeds in the bathroom and asked her to go inside and break them. Believing the words of the accused, the complainant went inside. Subsequently, accused also came inside and told her that he will not leave her and committed penetrative sexual assault on her. Thereafter, accused gave life threat not to inform the said incident to anybody else. Subsequently, the complainant became pregnant. By noticing the change in the body structure of the victim, the mother of the victim made enquiry and she came to know about the act of the accused and as such, the complaint was registered. On the basis of the complaint, a case was registered in Crime No.118/2014 of Sirsi Rural P.S. and after investigation, the charge sheet was filed.

4. It is the submission of the learned counsel for the appellant – accused that the Trial Court has committed a grave error in convicting the accused for the offences punishable under Sections 3(1)(xii), 3(2)(v) of the SC & ST Act. It is his further submission that the Trial Court

has framed charge only in respect of the offence under Section 3(1)(xii) of the SC & ST Act. But subsequently, while delivering the judgment, the Trial Court has convicted the appellant – accused for the offence punishable under Section 3(2)(v) of the SC & ST Act and he has been sentenced to undergo imprisonment for life and to pay fine of Rs.10,000/- with default sentence.

5. It is his further submission that when a charge has not been framed under Section 3(2)(v) of the SC & ST Act, then under such circumstances, the Trial Court ought not to have convicted the accused for the alleged offences. It is his further submission that the accused will not be knowing the ingredients of the offence for which he is going to be tried, if no proper charge has been framed. It is his further submission that unless a specific charge is not framed, the accused will be kept in darkness or dilemma. Under such circumstances, the Trial Court ought not to have convicted the accused. On these grounds, he submits that until and unless the said issue is decided, he is unable to submit his arguments on other grounds made out on merits. He also submits that if the matter is remanded to the Trial Court and after framing the proper charge and giving after full opportunity to the accused, if the case is decided on merits, then it is going to meet the ends of justice. On these grounds he prays to allow the appeal.

6. Per contra, it is the submission of the learned Additional S.P.P. that non-framing of the charge is not fatal to the case of the prosecution. As per Section

3(2)(v) of the SC & ST Act, the accused is going to be convicted for the offence which has been tried under the provisions of IPC and if the sentence in those offences is major and if it is punishable with imprisonment for 10 years or more or if it is punishable with life imprisonment, then under such circumstances, Section 3(2)(v) of the SC & ST Act is attracted. It is his further submission that as per Section 222 of Cr.P.C. when offence proved is included in the offence charged, consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

7. It is his further submission that the appellant – accused has not raised the said issue at an earliest point of time. If the matter is remanded to the Trial Court, then again it may take some more time and it is a herculean task to get all the witnesses and to have a retrial of the case once again. On these grounds, he prayed to dismiss the appeal.

8. We have carefully and cautiously gone through the submissions made by the learned counsel appearing for the parties and perused the records.

9. We are cautious of the fact that remitting of a case has to be done in rarest of rare cases and the Court has to adjudicate the matter on hand after properly analyzing the material placed before it. It is the contention of learned counsel appearing for the

appellant that no charge has been framed for the offence punishable under Section 3(2)(v) of the SC & ST Act and at a later stage, the accused has been convicted for the alleged offence which is punishable with imprisonment for life and hence, much prejudice has been caused to him.

10. A charge under the Code of Criminal Procedure is required to be framed to give clear notice to the accused person about the definite charges under which he is going to be tried by the Court.

11. When the charge was framed in the present case as against the accused on 27.10.2014, admittedly it was framed only for the offence punishable under Section 3(1)(xii) of the SC & ST Act along with the offences punishable under Sections 376 and 506 of the Indian Penal Code and also under Section 4 of the POCSO Act. On perusal of the judgment, the learned trial Judge has raised as many as four points for consideration, wherein the third point reads as under:

“3) Whether the prosecution proves beyond all reasonable doubt that on the aforesaid date, time and place the accused knowing fully well that the complainant belongs to SC & ST community has committed forcible sexual assault on her and made her to become pregnant and thereby the accused has committed the offence punishable under

Section 3 (1)(xii) and Section 3 (2) (v) of SC and ST (Prevention of Atrocities) Act?"

12. On going through the above said point framed by the trial Judge, no doubt he has taken into consideration the charge framed under Section 3(1)(xii) of the SC & ST Act, but, he has included Section 3(2)(v) of the SC & ST Act while delivering the judgment, even though no charge has been framed for the alleged offence. Under such circumstances, definitely the accused will not be knowing the fact for which offence he is going to be tried and subsequently, he is going to be convicted. The conviction which has been provided under Section 3(2)(v) of the SC & ST Act is major sentence which includes imprisonment for life.

13. Now we have to consider as to what is the effect of omission to frame the charge? In order to see the same, we feel it just and proper to refer to Section 464 of Cr.P.C. which reads as under:

"464. Effect of omission to frame, or absence of, or error in, charge -

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be

recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

14. On careful perusal of the above said Section, mere non framing of charge would not vitiate the judgment of conviction, if no prejudice has been caused to the accused and there is no failure of justice. If the Appellate Court is of the opinion that failure of justice has in fact been occasioned, it may order for framing the charge and for re-trial. To judge whether there is failure of justice or not, the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he has been convicted and whether the relevant facts have been explained to the accused to defend himself. This proposition of law has been laid down by the Hon'ble Apex Court in the case of **DALBIR SINGH VS. STATE OF UTTAR PRADESH** reported in **AIR 2004 SC 1990** wherein at paragraph 17 it has been held as under:

"17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which

he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself.....”

15. Keeping in view the above said ratio, on perusal of Section 3(2)(v) of the SC & ST Act, it reads as under:

“3(2)(v): commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.”

16. As per this Section, if the accused is alleged to have committed an offence under the provisions of IPC punishable for a term of ten years or more against a person governed under the Act, he shall be sentenced with imprisonment for life and with fine. In the present case, the accused is charged of commission of penetrative sexual assault on a minor girl belonging to scheduled caste. The offence is said to have been committed on 02.02.2014. Before amendment to IPC by Act No.22 of 2018 which came into effect from 21.04.2018, the offence in question, if proved, is punishable under Section 376(2)(i) of IPC as it stood then, and the minimum punishment prescribed is 10 years which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and also with fine. Therefore, automatically Section 3(2)(v) of the SC & ST Act will be invoked where under the punishment prescribed will be imprisonment for life and with fine. Under such circumstances, if no charge is framed notifying the accused that he will be tried for such an offence, where if the guilt is proved, he is liable to be

sentenced with imprisonment for life and with fine, it cannot be considered as a minor offence as referred to in Section 222 of Cr.P.C. In that light, we are of the opinion that definitely the accused is prejudicial by invoking of the penal provision under the Act, which is a major offence punishable with imprisonment for life and with fine, if it is included only at the time of judgment without notifying him by framing specific charge under Section 3(2)(v) of the SC & ST Act and convicting him.

17. Though, the learned Additional S.P.P. referred to Section 215 of the Cr.P.C. to know the effect of framing the charge, on careful perusal of Section 215 of the Cr.P.C., it is clear that omission to frame charge may or may not result in failure of justice. Ordinarily such plea should not be allowed to be raised for the first time before the Court unless the materials on record are such which would establish that the non-framing or error in framing that charge has occasioned failure of justice. On perusal of the records, admittedly, no charge has been framed under Section 3(2)(v) of the SC & ST Act. If no proper charge has been framed and if it is not within the knowledge of the accused, then that itself would cause injustice to the accused and it is nothing but failure of justice.

18. We want to place it on record that when a charge is going to be framed, the accused may not be knowing of the charge for which he is going to be punished and sentenced with imprisonment for a term of 10 years or more in the alleged offence under the IPC. As could be seen from Section 3(2)(v) of the SC & ST Act, if an offence has been committed under the IPC and if it is punishable with imprisonment for a term of 10 years or more against a person or a property and when such person belongs to Scheduled

Caste and Scheduled Tribe, then the punishment will be imprisonment for life and with fine. In that light, as and when the accused has been charged for the offence punishable with imprisonment for a term of 10 years or more, under such circumstances the specific charge under Section 3(2) (v) of the SC & ST Act must be framed, so that the accused will be knowing or informed that in the event he being convicted for an offence under the IPC which is punishable with imprisonment for a term of 10 years or more, then he is also liable to be convicted and sentenced under Section 3(2)(v) of the SC & ST Act. In that light, the trial Court before taking points for consideration and convicting the accused for the alleged offence, it could have framed proper charge or at least accused could have been notified and he could have been heard in this regard.

19. Taking into consideration the above said facts and circumstances, we are of the considered opinion that there is failure of justice to the accused. In that light, the matter requires to be remitted back to the trial Court with a direction that proper charge has to be framed in accordance with law. Thereafter, if the prosecution proposes to lead any additional evidence and the accused wants to cross-examine those witnesses who have been further examined, opportunity may be given to both the sides. Thereafter, the Trial Court has to dispose of the matter in accordance with law, by considering the evidence that is already available on record and the further evidence which may be led in the matter.

20. As this Court has often observed that while framing the charge under the SC & ST Act, if no proper charges are framed as observed above, in that light, the

Registry is directed to circulate this judgment to the trial Courts so as to keep the above observation and frame the charge/charges in accordance with law. A copy of this judgment may also be sent to the Karnataka Judicial Academy for enlightening the trainee Judges in this regard.

For the aforesaid reasons, we pass the following:

ORDER

- i) The appeal stands allowed,
- ii) The judgment of conviction and order of sentence passed by the Special Judge, Uttara Kannada, Karwar in Special Case No.26/2014 dated 11.07.2017, is hereby set aside and the matter is remanded back to the trial Court with a direction to frame proper charge for the offence punishable under Section 3(2)(v) of the SC and ST Act and to dispose off the matter in accordance with law, keeping in mind the observations made above and after giving opportunity to both the parties to lead further evidence, if they are advised to do so.
- iii) The trial Court is directed to expedite the trial expeditiously.