

2 SCOB [2015] HCD 18**HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)**

Mr. Yousuf Hossain Humayun with
Mr. Md. Shahjahan and
Ms. Nasrin FerdousFor petitioner.

CRIMINAL REVISION NO.433 OF 2003

Mrs. Sakila Rawshan, D.A.G. with
Ms. Sharmina Haque, A,A,G, and
Mr. Md. Sarwardhi,A.A.G
.....For the opposite party.

Salauddin Mahamud JahidPetitioner.

-Versus-

Heard and judgment on 11th August, 2015.

The State..... Opposite party.

PRESENT:

**MS. JUSTICE SALMA MASUD CHOWDHURY
AND
MR. JUSTICE F.R.M. NAZMUL AHASAN**

Section 227 of the Code of Criminal Procedure, 1898:

The Court under section 227 of the Code of Criminal Procedure is competent to alter or amend the charge at any stage of the proceeding before pronouncement of judgment. Since section 302 of the Penal Code is not applicable even after framing a charge under section 302 of the Penal Code, there is no legal bar to find the accused guilty under lower section of 304 Part II of the Penal Code on proper examination of the facts, circumstances and evidence of the case.

...(Para 8)

JUDGMENT**SALMA MASUD CHOWDHURY, J.**

1. This Rule arising out of an application under section 439 read with section 435 of the Code of Criminal Procedure at the instance of the accused petitioner was issued calling upon the Deputy Commissioner, Dhaka to show cause as to why the order No.14 dated 28.4.2003 passed by the Metropolitan Additional Sessions Judge, Court No.4, Dhaka should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. The prosecution case in short is that on 5.8.2002 one Kazi Golam Kibria lodged a first information report with Uttara Police Station against the petitioner under section 326/307 of the Penal Code alleging that he gave in marriage of his daughter Kazi Faria Akter Khoma with one Abu Taleb in 1985, out of which wedlock, a daughter named Umme Dardi Tonni was born in 2002 and she was aged about 15 years and in 2001 Abu Taleb divorced the informant's daughter Faria and thereafter in the middle of 2001 he again gave his daughter in marriage with the petitioner Salauddin Mahmud Jahid and they started to live at their residence at House No.10, Road No.20, Sector-7, Uttara Model Town, Dhaka and at about 11.45 p.m. on 4.8.2002 informant's daughter tried to talk with the informant through telephone but the informant failed to understand what she was trying to say and thereafter the informant's grandson Jewel called the informant through telephone asking him to go to the hospital saying that accused petitioner Salauddin Mahmud gave bullet shots to informant's daughter Faria Akter Khoma and granddaughter Tonni and caused grievous injuries and the informant rushed to Dhaka Medical College Hospital and found both of them in injured condition by receiving bullet injuries and the informant came to know that at about 11.30 P.M. when his daughter asked the petitioner to take dinner, the petitioner became furious and at about 11.40 P.M. the petitioner gave shots from his personal pistol towards the chest of the informant's daughter Faria Akter Khoma and hearing the sound of firing, victim Tonni and their maid servant Mukta, made an attempt to resist him,

but the petitioner again shot towards victim Tonni who received two bullet injuries, one is her chest and another on her right waist, and thereafter he again shot towards Faria Akter who received injuries and hence the present case.

3. The police investigated the case and submitted charge sheet against the accused persons under section 302/326/307/212 of the Penal Code.

4. The case record was transmitted to the Court of the Metropolitan Sessions Judge, Dhaka who transferred it to the Court of the Additional Metropolitan Sessions Judge, 4th Court, Dhaka for holding trial who framed charge against the accused persons under section 326/307/302 of the Penal Code which was read over to the accused petitioner who pleaded not guilty of the charge and prayed to be tried.

5. Being aggrieved thereby, the present petitioner filed an application under section 439 of the Code of Criminal Procedure before this Court and obtained the present Rule.

6. Mr. Yusuf Hossain Humayun appearing with Mr. Md. Shahjahan and Ms. Nasrin Ferdous, the learned Advocates on behalf of the petitioner submits that from the plain reading of the first information report, charge sheet and postmortem it appears that the ingredients of section 302 of the Penal Code could not be established against the petitioner and the charge ought to have been framed under section 304 Part II of the Penal Code. He next submits that in view of the fact that the victim died after 13 days of the occurrence and the post mortem report showing that the death was due to septic shock, the charge of a culpable homicidal amounting to murder is not attracted in the present case. The learned Advocate brings into our notice that although the petitioner failed to file an application under section 265C of the Code of Criminal Procedure, but if the Court of Sessions fails to discharge its duty properly, this Court shall interfere in order to prevent the abuse of the process of the Court and vexatious trial and thereby save innocent people from being harassed. In support to his contention the learned Advocate has referred to a decision as reported in 49 D.L.R. (H.C.) page 373. He next submits that no matter whether an application under section 265C of the Code of Criminal Procedure is presented before a Court or not, the trial Court at the time of framing of charge must take into consideration the materials on record presented before it and on hearing the parties frame proper charge. In support to his contention the learned Advocate has referred to a decision as reported in 50 D.L.R. (H.C.) page 103. The learned Advocate next submits that if the injury inflicted did not cause instant death and the victim was alive for about some days at the hospital, this shows the injury inflicted was not likely to cause death, but it endangered the life and ultimately resulted in death and thus the accused appellant cannot be held guilty under section 302 of the Penal Code. In support to his contention the learned Advocate has referred to decisions as reported in 51 D.L.R. (H.C.) page 433 and 36 D.L.R. (H.C.) page 245.

7. Ms. Sakila Rawshan, the learned Deputy Attorney General representing the State opposes the Rule.

8. We have heard the learned Advocate for the petitioner and the learned Deputy Attorney General representing the State and perused the application under section 439 of the Code of Criminal Procedure along with other materials on record. It appears that when there was an altercation between the accused petitioner and his wife, the daughter of the informant, the deceased came in between them being the granddaughter of the informant and the step daughter of the accused petitioner and got the injuries as a result of which she died after 13 days and the postmortem report reveals that the death was caused due to the septic shock. The trial Court framed charge under section 302 of the Penal Code. Admittedly no application under section 265C of the Code of Criminal Procedure was filed before the trial Court. It is the contention of the learned Advocate for the petitioner that the ingredients of section 300 of the Penal Code are not attracted in the present case against the petitioner rather it is under Exception 4 of section 300 of the Penal Code for which charge cannot be framed against the accused petitioner under section 302 of the Penal Code. It appears that the injury inflicted did not cause instant death. The victim was alive for 13 days at the hospital. This shows the injury

inflicted was not likely to cause death but it endangered the life and ultimately resulted in death. It was not a pre-planned attack on the deceased. Incident took place suddenly. It is admitted that the accused and the wife, the informant's daughter, started quarrel and pistol shot was given by the accused on the informant's daughter when the granddaughter of the informant appeared at the place of occurrence and got injuries by pistol shot and after 13 days she died. There was no intention or mensrea to kill the victim on the part of the accused. However faint the doubt may be, benefit must in all fairness go to the accused. No doubt offence has been committed by the accused, but it is for the trial Court to decide, on adducing evidence, whether the allegation comes under section 302 of the Penal Code or section 304 Part II of the Penal Code. In order to dispense fair justice proper charge should be framed, which can be altered at any stage of the proceeding. The Court under section 227 of the Code of Criminal Procedure is competent to alter or amend the charge at any stage of the proceeding before pronouncement of judgment. Since section 302 of the Penal Code is not applicable even after framing a charge under section 302 of the Penal Code, there is no legal bar to find the accused guilty under lower section of 304 Part II of the Penal Code on proper examination of the facts, circumstances and evidence of the case. The trial Court is directed to take into consideration the observations made above.

9. With this direction, the Rule is disposed of.

10. Communicate a copy of the judgment and order to the Courts concerned.