

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

**CRMC No.101/2011, IA No. 99/2011 c/w
CRR No.37/2011**

Date of order:30.11.2018

Mohd Ashraf Beig and ors.

Vs

State of J&K

Coram:

Hon'ble Mr. Justice Sanjay Kumar Gupta, Judge

Appearing counsel:

For Petitioner(s)	:	Mr. Ved Raj Wazir, Sr. Advocate with Mr. Abhishek Wazir, Advocate in CRMC No.101/2011. Mr. P. N. Goja, Advocate in CRR 37/2011
For respondent (s)	:	Mr. Rajnesh Oswal, Advocate

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| i) | Whether to be reported in
Digest/Journal | : | Yes/No. |
| ii) | Whether approved for reporting
in Press/Media | : | Yes/No. |
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1. By this common judgment, petition filed under Section 561-A Cr. P.C. bearing CRMC No.101/2011 and connected CRR No.37/2011 are being disposed of as both the petitions are directed against the same order dated 16th of April, 2011 passed by the Munsiff, Judicial Magistrate 1st Class, Ramban.
2. In **CRMC No.101/2011** petitioners seek quashing of order dated 16.04.2011, passed by Munsiff, Judicial Magistrate 1st Class, Ramban, by virtue of which, case has been committed to Sessions Judge without deciding the application of petitioner no.4, the juvenile, and **CRR No. 37/2011** has been filed by complainant-Filal Ahmed against order dated 16.04.2011 passed in File No.200-A titled **Filal Ahmed Malik vs. State and ors.**, being protest petition regarding Challan filed under Sections 173 Cr.P.C arising out of FIR No.196/2009 Police Station, Banihal so far

as it relates to the order of commitment of case under Sections 304, 323, 354, 352 and 147 RPC instead of Sections 302, 354, 323, 352 and 147 RPC.

3. In **CRMC No.101/2011**, the grievance of the petitioners is that a false and a baseless FIR has been lodged against the petitioners at Police Station, Banihal, on 9.9.2009 at the instance of one Filal under Section 452/147/354 RPC i.e. FIR No. 196/2009.
4. Case in brief is that on 09.09.2009 one Filal lodged a written complaint in Police Station Banihal against 11 persons including the accused, alleging therein that on the day of occurrence he (complainant) along with his other family members were waiting to break the fast of ramzan (Roza) in the evening in their house, some accused five in numbers entered into the premises of the complainant and started abusing and thereafter left, but after some time the other accused, who also reside in the same village at a distance came again and started abusing, and giving kicks and blows to the entire family members of the complainant. It is also alleged that the accused gave a cudgel (danda) blow on the head of the father of the complainant due to which he got injury on the head, over the eye and fell down and became unconscious, he was taken to emergency hospital Banihal wherefrom he was referred to SKIMS for further treatment. It is further alleged in the complaint that the accused molested the sister of the complainant and other female members of the family. On this report, an FIR No.196/2009 was registered in Police Station, Banihal for commission of offences under Sections 452/147/354 RPC. The father of the complainant, namely Mohammed Ramzan Malik who was referred to SKIMS, died on 11.09.2009 and after his death the offence under section 302 RPC was added, investigation was entrusted to one Dy.SP Jamail Ahmed who started investigation and during the course of investigation, he recorded the statements of witnesses under Section 164-A before the competent

Magistrate, but in the meanwhile, the investigation came to be transferred to Crime Branch, Jammu vide PHQ order No.3634 dated 15.10.2009. The Crime Branch Jammu handed over the investigations to one Inspector Ghulam Hassan Kamal, who visited the spot of occurrence, prepared the site plan, collected the post-mortem report, and also recorded the statements of witnesses under section 161 Cr.P.C.

5. The charge sheet came to be presented before the Court below on 08.02.2010 and the protest petition was filed on 12.04.2010 by the complainant seeking inclusion of the offences under Section 302/354/148 RPC. The court below committed the case to Sessions Judge without deciding the application of petitioner no.4 for declaring him juvenile.
6. The petitioners are aggrieved of the above said order dated 16.04.2011, and questioned the same on the following grounds:-

i) That the Protest petition was not maintainable because the challan produced by the investigating agency i.e Crime branch and proceedings in the challan were to be conducted by the trial court under the Criminal Procedure Code. Once an application of petitioner No.4 was filed, praying therein that the petitioner No.4 is a juvenile, is required to be tried under the Juvenile Justice Act of 1997, it was obligatory for the trial court to first decide the application filed by the petitioner No.4, conduct an enquiry for determination of the age for the purposes of finding out whether the petitioner No.4 is a juvenile or not. The trial court cannot defer the decision on the said application and proceed to decide the alleged Protest petition, which Protest petition was not maintainable, thus the order impugned suffers from material illegalities and irregularities, which are apparent on the face of the record liable to be quashed.

ii) That once a prayer was made before the trial court that petitioner No 4 is a juvenile, it was obligatory for the trial Court to initiate an enquiry and take all evidence, as may be necessary to find out whether the petitioner No 4 is application on behalf of the person brought before it, the trial

Court was to initiate an enquiry in terms of Section 32 of the juvenile justice Act, the trial court having failed to discharge its responsibility placed make the benefits available under the Juvenile Justice Act to the petitioner No 4 The passing of the order impugned without deciding the application filed by the petitioner No.4 of his being a juvenile and requires to be tried under the juvenile Act. The trial court has defeated the mandate of law and deprived the petitioner No 4 of the benefit of the Juvenile Justice, thus the order impugned is not in conformity with law and is liable to be quashed.

iii) That the trial court was required to dispose of the application filed by the petitioner No.4 through his father, the natural guardian at an earliest, even at the cost of postponement of the trial. The trial court having failed to discharge its responsibility placed upon it under the Juvenile Justice Act. Under section 24 of the Act no juvenile is to be charged with or tried for, any offence together with a person who is not a juvenile and it was obligatory for the trial court to order separate trial of the juveniles and other persons. The trial court having ignored the mandate of Section 24 as well as Section 32 of the juvenile Justice Act, thus deprived the petitioner No 4 of the benefits available to him under the Juvenile Justice Act. Thus the order impugned on the face of it is illegal, incorrect and is liable to be quashed.

iv) That the trial court having further committed a glaring error which is apparent on the face of the record by taking cognizance of the offence under section 304, 323, 354, 452 and 147 RPC against the petitioner No4 without determining and without disposing of the application by the petitioner for giving the benefits of the Juvenile Justice Act. Thus the order impugned is liable to be quashed.

v) That bare perusal of the order impugned the trial court has nowhere made a reference of the application submitted by the father of the petitioner No.4, the juvenile, when the application was already filed and entertained by the trial court, failed to decide the said application and proceeded to pass the impugned order, which order is not warranted

under law, thus, the trial court having abused the process of the court by passing the impugned order.

v) That from the bare perusal of the challan produced by the Crime branch no case under section 304 RPC is made out against the petitioners, Even the medical report has wrongly been interpreted by the trial court and the cognizance has been taken under section 304 RPC alongwith other offences punishable under the Ranbir Penal Code, though triable by a Magistrate. Even on going through the medical report the doctor has clearly stated that the case of death is cardiac arrest trauma head in view the improved GLS and general conditions of the deceased. The trial court has exceeded its jurisdiction by passing the impugned order which has resulted in miscarriage of justice.”

7. The complainant-Filal Ahmad Malik (petitioner in CRR No. 37/2011), who is aggrieved of the investigation conducted by the Crime Branch, filed a protest petition before the Court of Munsiff, Judicial Magistrate 1st Class, Ramban for inclusion of the offence under Section 302/354/148 RPC. The said protest petition came to be disposed vide impugned order dated 16.04.2018. In the present revision petition filed by the complainant-Filal Ahmad Malik (petitioner herein), it has been averred that as per the Board of doctors, who conducted the Post mortem, had opined that deceased-Mohd. Ramzan Malik had received injuries on his head with multiple ab reactions and T/P Contusions and Paretal Contusions because of assault; and that on the basis of the medical evidence as well as the statements recorded under Section 164-A, Police Station Banihal added offence under Section 302 RPC. That in order to shield the accused deliberately investigation came to be transferred to the crime branch without any rhyme or reason. He has prayed for setting aside the order of committal and commit the case under section 302 RPC after deciding the protest petition.
8. I have heard both counsels, who have reiterated the grounds taken in memo of petition.

9. The order of court below reads as under:-

“Thus, the above discussion leads me to the conclusion that there is every probability of involvement of the accused in using cudgel while assaulting the deceased who fell down and was admitted to emergency hospital Banihal, wherefrom he was shifted to SKIMS where the deceased died. The statements of witnesses recorded by the investigating office and the other record, makes it further clear that there is a grave suspicion of involvement of the accused in commission of crime and a strong prima-facie evidence is on record against the accused, involving he accused for commission of the offences under section 304, 452,147,323,354 RPC.

On the discussion and the conclusion arrived at hereinabove, I disagree with the conclusion of the investigating officer of Crime Branch, Jammu. This is surprising to note that how the I.O has come to the conclusion that there has been no use of button (cudgel) in the quarrel and none of the party in the quarrel has suffered any physical injury despite the fact that the statements of all those witnesses recorded under section 164-A discloses use of force, use of cudgel (button) and outraging the modesty, but the I.O has completely ignored the statements of the witnesses recorded u/s 164-A along with the medical certificate. Even the supervisory officer i.e. SSP seems to be very casual on his part and has not gone through the investigation conducted I.O.

Thus, on the basis of the evidence on record, and the discussion made above, cognizance for the offences, under section 304, 323, 354,452 and 147 RPC is taken. Since among the offence under Sections 304,323, 354,452, 147 TPC, the offence under Section 304 RPC is exclusively triable by Court of sessions, as such, the charge sheet is committed to the Court of Hon’ble Principal District and Sessions Judge, Ramban with the direction to the accused to appear before the Court of Sessions on 23rd of April 2011.

Office to submit the entire record of the charge sheet along with all the ancillary applications in the court of Hon’ble principal District and Sessions Judge, Ramban before 23rd of April 2011, learned CPO shall intimate public prosecutor of the concerned court regarding committal of the case. Petition accordingly disposed of.”

10. I have given my thoughtful consideration to whole aspects of the matter and gone through the law on the subject.
11. In order to appreciate the contentions of the parties, it may be noticed that Section 268 and 269 of Cr.P.C., relate to the trial of cases before the courts of Sessions. It is to be seen whether prima facie case has been

made out for framing charge or not. It is apt to quote sections 268 and 269 of Cr.P.C., which read as under: -

“268 Discharges:

If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is no sufficient ground for proceedings against the accused, he shall discharge the accused and record his reasons for so doing.

269 Framing of charge

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which –

a) is not exclusively triable by the Court of Sessions, he may frame charge against the accused and by order, transfer the case to the Chief Judicial Magistrate or any Judicial Magistrate competent to try the case, and thereupon the Chief Judicial Magistrate or any Judicial Magistrate to whom a case may have been transferred shall try the offence in accordance with the procedure provided for the trial or warrant cases instituted on police report,

b) is exclusively triable by the Court , he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub section (1) the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

12. A conjoint reading of sections 268 and 269 of Cr.P.C., would reveal that upon consideration of the record of the case and documents submitted, if judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and if after such consideration and hearing, judge is of the opinion that there is ground for presuming that accused has committed offence, he may frame charges against the accused or transfer the case to CJM or Judicial Magistrate if he is of the opinion that offence made out against the accused is triable by a Magistrate. Further trial court is not to act as post office and frame charges for penal sections for which challan has been produced by police. Trial court has ample power to frame charges under relevant

penal sections, which appear to have been committed by accused, after analyzing the evidence on record and after hearing the State and accused.

13. From bare perusal of grievance projected by the parties, both the petitions can be **disposed of** by directing the trial court to hear the arguments of parties before framing of charges, because as already held that trial court has ample power to frame charges under penal sections for which accused persons appear to have committed offence after appreciating the evidence collected during investigation by police and hearing the accused, because trial has yet not been commenced as on 26.04.2011 this court had stayed the trial. Further, the grievance of petitioner no.4 (Junaid Ahmad Mir) can be re-addressed by directing the trial court to decide his application for declaring him juvenile under law, before proceeding with trial against him. If application has not been filed, petitioner is at liberty to file same afresh. **Both the petitions are disposed of.** Stay is vacated. Order be communicated to concerned court.

(Sanjay Kumar Gupta)
Judge

Jammu
30.11.2018
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