REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1568 OF 2015

KAMIL **…..Appellant**

VERSUS

STATE OF UTTAR PRADESH **…..Respondent**

J U D G M E N T

R. BANUMATHI, J.

This appeal arises out of the judgment dated 28.07.2014 passed by the High Court of Allahabad in Criminal Appeal No.1047 of 1989 in and by which the High Court has dismissed the appeal filed by the appellant thereby affirming his conviction under Section 302 IPC and for other offences and sentence of life imprisonment imposed upon him passed by the trial court.

2. Brief facts of the case are that on 03.01.1986 at about 09.00 AM, complainant-Baboo Khan (PW-3) who is the maternal uncle of deceased Akhlaq was informed by his father that his sister's daughter Parveen had gone to fetch water from the tank where accused Rashid (A1) and Adil (A3) had misbehaved with her.

However, no further action was taken by them to save their reputation. On the same day, at around 04.00 PM, when complainant/PW-3 along with his nephew deceased Akhlaq and Aadil Hussain (PW-2) were going towards his shop, they saw accused Rashid armed with knife, Nasir (A2) armed with hockey, accused Adil and appellant-Kamil (A4) armed with *danda* in their hands coming towards them and surrounded PW-1, deceased Akhlaq and PW-3. Thereafter, appellant-Kamil gave a *danda* blow on the head of PW-2 and when deceased Akhlaq tried to snatch the hockey stick from accused Nasir, appellant-Kamil also gave a *danda* blow on the head of deceased from behind and when he tried to run away, accused Nasir and Adil caught hold of deceased and thereafter accused Rashid stabbed the knife in the chest of deceased on which deceased fell down on the ground with the knife which was stabbed on his chest. On raising alarm by PW-3, Jamal Uddin (PW-1) along with other people came there for help. Thereafter, all the accused ran away and deceased was taken to the hospital, where he died. Upon completion of investigation, charge sheet was filed against the accused persons.

3. Charges were framed against the accused under Sections 302, 302 read with Section 34, 323 and 323 read with Section 34

IPC. To bring home the guilt of the accused, the prosecution examined eight witnesses and exhibited number of documents.

4. Upon consideration of evidence adduced, the trial court *vide* its judgment dated 01.05.1989 convicted the accused as under:-

Accused	Conviction	Sentence
Rashid (A1)	Section 302 IPC Section 323 read with Section 34 IPC	Life Imprisonment One month R.I.
Nasir (A2)	Section 302 read with Section 34 IPC Section 323 read with Section 34 IPC	Life Imprisonment One month R.I.
Adil (A3)	Section 302 read with Section 34 IPC Section 323 read with Section 34 IPC	Life Imprisonment One month R.I.
Kamil (A4)	Section 302 read with Section 34 IPC Section 323 IPC	Life Imprisonment One month R.I.

5. Being aggrieved, the appellant/accused filed appeal before the High Court which came to be dismissed vide impugned judgment dated 28.07.2014. Further, appeal preferred by the accused Nasir before the Supreme Court in SLP(Crl) No.9886 of 2014 was dismissed vide order dated 22.01.2015.

6. Prosecution relies upon the evidence of eye-witness Babu/Baboo Khan (PW-3), Jamaluddin (PW-1) and Aadil (PW-2) who have categorically stated that on the date of incident i.e on 03.01.1986 at 04.00 PM, PW-3 along with his nephew deceased Akhlaq and Adil Hussain (PW-2) was going to his shop at Jogipura

and when they reached near the temple at Lalpur, they saw all the four accused persons standing and waiting for them. PW-3 further deposed that at that time accused Rashid was having knife in his hand whereas accused Nasir and Kamil were having hockey and *danda* in their hands respectively. Immediately thereafter, appellant/accused Kamil gave a *danda* blow on the head of Adil Hussain (PW-2). When deceased Akhlaq tried to snatch hockey stick from accused Nasir, appellant/accused Kamil gave a *danda* blow on the head of deceased Akhlaq from behind. When deceased Akhlaq tried to run away in order to escape himself, accused Nasir and Adil caught hold of his both hands and at the same time, appellant/accused Kamil assaulted Adil (PW-2) with *danda*. When PW-3 snatched *danda* from appellant/accused Kamil and tried to retaliate to the attack with the same *danda*, accused Rashid pierced knife in the chest of deceased Akhlaq. At this, PW-3 shouted for help and on hearing this, Jamaluddin (PW-1), Afsar Ali Khan and Shamshad Hussain who were taking tea at the stall of PW-3 rushed towards the spot. On seeing them, accused persons fled away from the spot. Thereafter, PW-3 took a cycle-rickshaw and took deceased Akhlaq to district hospital. Deceased Akhlaq was struggling for his life as the knife was still penetrated in his heart. PW-3 deposed that he himself took out the knife from the chest of

deceased. In the hospital, deceased succumbed to injuries. The evidence of PW-3 and injured eye-witnesses Aadil Hussain (PW-2) and Jamaluddin (PW-1) is cogent and consistent.

7. Contention of the appellant is that charge under Section 302 IPC was not framed against him and therefore the conviction of the appellant/accused under Section 302 IPC is not maintainable. Contention of the appellant is that non-framing of charge under Section 302 IPC has caused prejudice to him. It was further submitted that even though the question being a substantive question, the appellant is at liberty to raise the same at any stage.

8. Placing reliance upon Section 464 Cr.P.C., learned counsel appearing for the respondent-State submitted that a conviction would be valid even if there is any omission to frame charge provided it has not occasioned a "*failure of justice*". Taking us through the judgment of the trial court and the High Court, the learned counsel submitted that the appellant was well-aware of the gist of charges under Section 302 IPC against him and in fact the appellant has taken the "*plea of alibi*". It was submitted that even if there was absence of charge, the appellant has not proved "*failure of justice*" has in fact been occasioned and the conviction of the appellant recorded by the concurrent findings of the trial court and the High Court under Section 302 IPC cannot be interfered.

9. We have considered the rival contentions and perused the impugned judgment and materials placed on record.

10. Section 464 of the Code relates to the effect of omission to frame, or absence of, or error, in charge. Sub-section (1) thereof provides that no finding, sentence or order of 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 charge, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. Section 464 Cr.P.C. 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 recommenced 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."

11. Absence of charge would vitiate the conviction only if it has caused prejudice to the accused and has in fact been occasioned thereby. In ***Willie (William) Slaney* v. *State of Madhya Pradesh*** AIR 1956 SC 116, the Constitution Bench explained the concept of

"*prejudice caused to the accused"* and "*failure of justice*" and held as under:-

> "5. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. *The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice*.
> *If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based*. (**Underlining added**)

12. The Constitution Bench then examined as to whether the procedure followed by the court has caused actual injustice to the accused and held as under:-

> "12. ……Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once. Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.
> 43. ….. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to

> defend himself. If all these elements are there and no prejudice is shown, the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one."

13. Following the Constitution Bench in ***Willie Slaney case***, the bench of three Judges of this Court in ***Gurbachan Singh v. State of Punjab,*** AIR 1957 SC 623 observed that the Court is not to looking into technicalities, but to the substance and held as under:-

> "7. …..in judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself……."

14. After considering the meaning of the expression *"failure of justice"* and after referring to the Constitution Bench in ***Willie Slaney*** and ***Gurbachan Singh***, this Court in ***Main Pal v. State of Haryana*** (2010) 10 SCC 130, held as under:-

> **15.** In *Shamnsaheb M. Multtani* v. *State of Karnataka* (2001) 2 SCC 577, this Court considered the meaning of the expression "failure of justice" occurring in Section 464 Cr.PC. This Court held thus:
>
> "……
>
> *22*. … a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.
>
> *23*. … The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.
>
> ……."
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> **16.** The above principles are reiterated in several decisions of this Court, including *State of W.B. and Another* v. *Laisal Haque and Others* (1989) 3 SCC 166, *State of A.P.* v. *Thakkidiram Reddy and Others* (1998) 6 SCC 554, *Dalbir Singh* v. *State of U.P.* (2004) 5 SCC 334, *Dumpala Chandra Reddy* v. *Nimakayala Balireddy and Others* (2008) 8 SCC 339 and *Sanichar Sahni* v. *State of Bihar* (2009) 7 SCC 198.
>
> **17.** The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations:

(*i*) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(*ii*) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(*iii*) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. (**Underlining added**)

15. In ***Darbara Singh* v. *State of Punjab*** (2012) 10 SCC 476, this Court considered the similar issue and came to the conclusion that the accused has to satisfy the court that there is any defect in framing the charge which has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the court may interfere. The Court elaborated the law as under:-

"*20*. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a *failure of justice*. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or

guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

21. 'Failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide *Rafiq Ahmad alias Rafi* v. *State of U.P.* (2011) 8 SCC 300, SCC p. 320, para 36; *Rattiram and Others* v. *State of M.P. Through Inspector of Police* (2012) 4 SCC 516 and *Bhimanna* v. *State of Karnataka* (2012) 9 SCC 650)" (**Underlining added**)

16. The question falling for consideration is whether non-framing of charge has caused prejudice in the present case. In order to judge whether a failure of justice has been occasioned, it is relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether they were explained to him and whether he got a fair chance to defend. The crux of the issue is whether in this case, omission to frame charge under Section 302 IPC has vitiated conviction of the appellant/accused.

17. The charges framed against the accused are as under:-

"Charges

I, C.P. Singh, Special Judge (E.C. Act), Budaun hereby charge you

1. Nasir s/o Wali Mohammad r/o Oopar Para P.S. Kotwali, Badaun
2. Adil r/o
3. Kamil s/o Banney Min as follows:-

Firstly:- That you Rashid on 03.01.1986 at about 04.00 PM in Mohalla Oopar Para near Lalpul Budaun, P.S. Kotwali Budaun, formed common intention to make murderous assault on Akhlaq and anyone else who came to his rescue and in furtherance of said common intention Rashid did commit murder by intentionally causing the death of aforesaid Akhlaq and you thereby committed an offence punishable under Section 302/34 of the Indian Penal Code and within my cognizance.

Secondly:- That you Adil on aforesaid date, time and place voluntarily caused Adil and thereby committed an offence punishable under Section 323 of the Indian Penal Code and within my cognizance.

Thirdly:- That on aforesaid date, time and place you Kamil and Nasir along with Rashid and Adil formed common intention to cause hurt to Adil and anyone else and in furtherance of said common intention Adil voluntarily caused hurt to Adil and you thereby committed an offence punishable under Section 323/34 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charges.

(C.P. Singh)
Addl. District Judge,
Special Judge (E.C. Act),
Budaun 18.09.1986”

18. As seen from the above, charge was not framed against the appellant under Section 302 read with Section 34 IPC. But it is for the accused to prove that omission to frame charge has occasioned in a failure of justice. Though specific charge under Section 302 read with Section 34 IPC was not framed, the gist of the charge sheet filed against the appellant/accused clearly shows that the accused has been charged for the offence under Section 302 read with Section 34 IPC as seen from the following:-

“Sir,

On 03.01.1986, the complainant came to the Police Station Kotwali and orally informed that his niece went to take water from the tap.

> She was teased by the accused but they did not make it an issue due to the respect in the society. However, there was an ugly quarrel over there. He pacified his niece. I along with Adil and Akhlaq today were going to my shop situated at Jogipuraat about 04.00 PM, when we reached near Lalpur Mandir, accused mentioned in Column No.2 and 3 were present there. **Kamil was carrying a *Danda* Nasir was carrying a hockey and Rashid was carrying knife in their hands.** They surrounded us. They abused my nephew Adil. Adil protested about abusing and said that it would not be good if you continue. On **this accused hit my nephew with *danda*. I snatched *danda* from Kamil to save my nephew. Accused Nasir and Adil caught hold my nephew and Rashid poked the knife in his chest**. My nephew sat down on the earth and his condition started deteriorating. I carried him to hospital where he died. On the basis of this information a crime case No.2/86 u/s 302/323/34 IPC. Accused Rashid and others were arrested and were sent to jail. Accused Kamil is not available and the investigation is going on against him. The charge sheet is filed u/s 302/323/34 IPC against these accused persons. Dated 13.01.1986."

In the charges framed, even if the appellant and accused Nasir were charged only under Section 323 read with Section 34 IPC, the gist of the charge sheet clearly alleges their sharing of common intention in committing the murder of Akhlaq with the first accused Rashid.

19. It is pertinent to note that after filing of the charge sheet, case was committed to the court of Sessions. The trial court has pointed out that the accused persons were charged under Sections 302, 302/34, 323 and 323/34 IPC to which they pleaded not guilty and opted for trial. The appellant/accused has thus clearly understood that charge has been framed against him under Section 302 IPC read with Section 34 IPC. If really, the appellant was under the impression that no charge was framed against him under Section 302 read with Section 34 IPC, the appellant would have raised the

objection for his committal to the Sessions Court. It is also to be pointed out that the appellant has not raised the objection as to non-framing of charges at the earliest point of time namely the trial court and the first appellate court - High Court.

20. Learned counsel for the appellant made submissions contending that even the relevant questioning showing sharing of common intention of the appellant has not been put to the accused during questioning under Section 313 Cr.P.C. The above contention does not merit acceptance as seen from the following:-

> "Q.4 It has come in the evidence that on 03.01.1986 at about 04.00 PM near Lal Pul Mandir, you accused Kamil and Nasir carrying *danda* and hockey caused injuries to Adil (nephew of witness). You accused Nasir and Adil caught hold Akhalq and at the instance of accused Kamil you accused Rashid stabbed the knife in the chest of Akhlaq and caused murder. What do you say about it?
> Ans. It is wrong."

Question No.5 relates to the lodging of complaint by the informant Babu. Question No.10 relates to the filing of the charge sheet against the appellant and other accused. As pointed out in para (14) above, the gist of the charge sheet clearly alleges sharing of common intention by the appellant/accused. In our considered view, the procedure followed by the Court in the instant case has neither caused prejudice to the appellant nor deprived him of principles of Natural Justice.

21. It is also to be pointed out that in the High Court, the appellant has not raised any grievance as to non-framing of charge under Section 302 read with Section 34 IPC and that it has caused prejudice to him. On the other hand, the learned counsel appearing for the appellant only contended that the appellant Kamil ought not to have been convicted by invoking the principle of vicarious liability enshrined by Section 34 IPC. All these aspects clearly show that the appellant clearly understood that charge under Section 302 read with Section 34 IPC has been framed against him and throughout he has been defending himself only for the charge under Section 302 IPC. In such facts and circumstances, it cannot be said that the failure of justice has occasioned to him and the absence of a charge under Section 302 read with Section 34 IPC cannot be said to have caused any prejudice to him.

22. In ***Mohan Singh v. State of Bihar*** (2011) 9 SCC 272, where the appellants therein for the first time raised the points relating to errors in framing of charge before the Supreme Court, this Court held as under:-

> **"14.** In a case where points relating to errors in framing of charge or even misjoinder of charge are raised before this Court for the first time, such grievances are not normally considered by this Court. Reference in this connection may be made to the decision of a three-Judge Bench of this Court in *Mangal Singh and Others* v. *State of Madhya Bharat* AIR 1957 SC 199. Imam, J. delivering a unanimous opinion of the Court held in para 5 at p. 201 of the Report as follows:
>
> "*5*. It was, however, urged that there had been misjoinder of charges. This point does not seem to have been urged in the High

> Court because there is no reference to it in the judgment of that Court and does not seem to have been taken in the petition for special leave. The appellants cannot, therefore, be permitted to raise this question at this stage."

23. It is also pertinent to point out that the appeal preferred by the similarly situated co-accused Nasir has been dismissed by this Court. A conviction for the substantive offence without a charge can be set aside only if the accused shows that prejudice has been caused to him and that *"failure of justice"* has occasioned thereby. No such argument was ever made before the trial court or before the High Court. As discussed above in our considered view, no prejudice has been caused to the accused nor failure of justice has been shown to have been occasioned warranting interference with the impugned judgment.

24. In the result, the appeal is dismissed.

……J.
[R. BANUMATHI]

……J.
[INDIRA BANERJEE]

New Delhi;
October 31, 2018