

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

**Cr. Rev. Application No.157/2016**

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Date                      Order with signature of Judge  
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1. For hearing of case.
2. For hearing of MA No.11318/17.

**10.05.2018**

Syed Nasir Hussain Jafri advocate for applicant.  
Mr. Abdul Mateen Khan advocate for  
respondent. Mr. Abrar Ali Khichi, APG.

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**Salahuddin Panhwar, J:** Through instant revision application, applicant who is complainant has challenged order dated 01.11.2016 passed on application under section 227 Cr.P.C. whereby his application for alteration of charge was dismissed.

At the outset learned counsel for applicant has emphasized that initially in this case charge was framed by the learned District Judge (in Sessions Case No.75/2007) under section 324 and 506-B alongwith section 34 PPC. Subsequently this case was transferred to Additional District and Sessions Judge who amended the charge and section 324 PPC was excluded which was available in the earlier charge.

2. Learned APG refers supplementary challan showing therein that medical evidence reflects that case falls within section 337-F(i) and 337-F(v) PPC.

3. Perusal of record *prima facie* shows that the Court of Sessions framed the charge against the accused which is that:-

“I, Zaheeruddin S. Laghari, District & Sessions Judge,  
Karachi South, do hereby charge you:-

1. Mubarak Hussain Zaidi s/o Baqar Hussain Zaidi, age 65 years,
2. Mst. Ishrat Zaidi w/o Mubarak Hussain Zaidi, 60

years

3. Rehan Zaidi s/o Mubarak Hussain Zaidi, 29 years.

as under:-

“That on or about the 2<sup>nd</sup> day of January 2007 at about 1700 hours inside bungalow No.63/1, street 29, khayaban-e-Mujahid, phase V, Defence Housing Authority, Karachi, you accused Rehan Zaidi s/o Muhammad Hussain Zaidi intentionally and knowingly attacked upon complainant Syed Muhammad Maisham Abbas s/o Syed Anwar Haider with iron rod, with such intention (or knowledge) and under such circumstances, that if by that act you had caused his death (qatl) due to which he received injuries on his right hand, you would have been guilty of qatl-e-amd and that you thereby committed an offence punishable under section 324 of the Pakistan Penal Code and with the cognizance of this Court.

I hereby further charge you above named accused persons namely Mubarak Hussain Zaidi s/o Babar Hussain Zaidi, Mst. Ishrat Zaidi w/o Mubarak Hussain Zaidi and Rehan Zaidi s/o Mubarak Hussain Zaidi that on the aforesaid date, time and place you all in furtherance of your common intention served the above name complainant with threats of dire consequences, thereby attracting the provisions of section 506(b), 34 PPC and within the cognizance of this Court.

**And I hereby direct that you be tried by this Court on the aforesaid charges.”**

From above, it is evident that the learned Sessions Judge did find the offence **324** PPC (*exclusively triable by a court of Sessions*) made out. There can be no denial to the legally established principle of law that trial commences on **framing of charge** hence no court can frame a charge for offences which it (Court) legally cannot try and even in case of *co-extensive / concurrent jurisdiction*, the trial must always be conducted by a court of *lower-grade* so as to keep right of accused regarding

*appellate* forum protected. Reference may be made to the case of Muhammad Farooq v. Ahmed Nawaz Jagirani (PLD 2016 SC 55)

wherein at relevant page 61 it is held as:

“...Another rule of propriety, that has evolved by precedent law must not lose sight is that **where two Courts have coextensive or concurrent jurisdiction, than the propriety demands that jurisdiction of Court of lower grade is to be invoked in the first instance.**”

Before reverting to merits of the case, I would not hesitate in admitting the legally established principle of law that trial court is always competent to alter or add to any charge at any stage of *trial* before pronouncement of judgment. Reference may be made to case of Muhammad Jameel Azeem v. Ghulam Shabbir (2011 SCMR 1145) that:

“7. .... The learned trial Court is competent to amend the charge if circumstances so justify subject to one condition that it should have been done prior to the pronouncement of judgment in order to eliminate the possibility of any prejudice to the accused person. ...”

however, this legally established principle of law would not cause any prejudice to other *principle*, detailed above regarding competence of Court in trying the case as well following the rule of *propriety*.

4. In view of above touchstone, it would be conducive to refer the *second* charge, framed by trial Court (Additional Sessions Judge) that is :-

“I, Shahid Hussain Chandio, 1<sup>st</sup> Additional Sessions Judge, Karachi South, do hereby charge you:-

Mubarak Hussain Zaidi s/o Baqar Hussain Zaidi, age 70 years

Mst. Ishrat Zaidi w/o Mubarak Hussain Zaidi, 65 years

That on or about the 2<sup>nd</sup> day of January 2007 at about 1700 hours inside bungalow No.63/1, street 29, khayaban-e-Mujahid, phase V, Defence Housing Authority, Karachi, you above named alongwith

absconding accused Rehan Zaidi s/o Mubarak Hussain Zaidi in furtherance of your common intention served the above named complainant with threats of dire consequences, thereby attracting the provisions of section **506(b)/34 PPC** and within the cognizance of this Court.

**And I hereby direct that you be tried by this Court on the aforesaid charges.”**

The underlined portion of the charge is sufficient to indicate that Additional Sessions Judge did *direct* for trial of accused persons by court of Sessions for offence u/s 506(b) PPC which, per column-8 of Schedule-II of Cr.PC is triable by **“Court of Sessions, or Magistrate of the first class”**. Co-extensive / concurrent jurisdiction though will protect the trial of such *offence* by the court of **higher grade** yet the **rule of propriety** would always require trial of such offence by the court of **lower grade**. In such eventuality, if the Court of Sessions (Additional Sessions Judge) was of opinion that section **324 PPC** is no more applicable then he was required to have followed the **rule of propriety** i.e make a reference for return of file to court of lower *grade* i.e **Magistrate**.

5. Without prejudice to above, precisely, FIR was lodged for an allegation of an act of attempt of **qatl-i-amd** (324 PPC) which *legally* is never dependant upon nature of *injury* as shall stand evident from direct referral to section 324 PPC which is:

**“324. Attempt to commit qatl-i-amd.** Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused *qatl*, he would be guilty of *qatl-i-amd*, shall be punished with ..... , **and if hurt is caused to any person by such act, the offender shall also be liable to the punishment provided for the hurt caused”**

Thus, merely for reason of medical report (certificate) the learned trial court judge (Additional Sessions Judge) was not competent to have *excluded* the section 324 PC, particularly when he (learned Additional Sessions Judge) *himself* observed in the last paragraph of

impugned order that **nature of allegation is same** so framing of charge under section 506-B, 34 PPC would not change the scenario. I am surprised that if nature of allegation was same then how the section 324 PPC could be excluded particularly when on same allegation the section 324 PPC was included while framing *first* charge.

6. Further, allegedly, respondent No.4 attacked him (*complainant*) with iron rod to commit his murder and complainant received injuries. The impugned order nowhere suggests that there came any such material during trial which had allowed him (learned Additional Sessions Judge) to form an opinion that prosecution parted from such allegation i.e. '*attack with iron rod was with intention to commit qatl-i-amd*'. This shows that learned trial Court judge completely ignored of legal position that while framing charge, the court is not competent to deal with matter in such a manner as *normally* can be done while evaluating evidence (writing judgment). Framing of charge legally can never be taken as synonym to that of *judgment*. In former, the court only determines whether to proceed further or *otherwise* while in later it determines the *guilt* or *innocence*.

7. The learned trial Court judge (*Additional Sessions Judge*) while admitting about **no change in allegation** was never legally justified in *excluding* the section 324 PPC from the *first* charge when cognizance for such **offence** was not only taken by Magistrate (190 Cr.PC) but also by learned Sessions Judge (193 Cr.PC). The purpose of section 227 Cr.PC is to avoid a *prejudice* to accuse and not to defeat the purpose of Section 237 of Code which permits a court to convict the accused even for an offence with which he was never charged. e never to defeat

8. From above discussion, it is quite clear that learned trial Court judge entirely failed in appreciating the legally established principles of law while framing the *second* charge as well passing *impugned* order. Such attitude is not expected from an **Additional Sessions Judge** because a **judge** may err in exercising jurisdiction but is never expected to depart from the well established **principles of law** as well **rule of propriety** because every judge is supposed to have all laws, including settled principles of law, on his sleeves.

9. Under these circumstances, both learned Additional District and Sessions Judges who amended the charge on 24.05.2012 and who dismissed application on 01.11.2016 have failed to apply their judicial mind and consequences of the case with regard to jurisdiction and ultimate fate of the case. Such attitude is not expected from a Sessions Judge. Accordingly impugned order is set aside; charge framed on 29.05.2007 would remain intact. The trial Court shall proceed with the case.

Copy of this order shall be communicated to both the learned Judges as well be placed in their personal files.

**J U D G E**

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