

Court No. - 81

Case :- MATTERS UNDER ARTICLE 227 No. - 8979 of 2023

Petitioner :- Rajkumar

Respondent :- State of U.P. and Another

Counsel for Petitioner :- Vinod Kumar Tirpathi, Kunj Bihari Pandey

Counsel for Respondent :- G.A.

Hon'ble Mrs. Jyotsna Sharma, J.

1. Heard Sri Vinod Kumar Tirpathi, learned counsel for the petitioner and Sri S.C. Mishra, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed with the following reliefs:-

"I. Set aside the impugned Judgment and Order dated 26.07.2023 passed by Additional Sessions Judge, Court No. 3, Muzaffar Nagar in Criminal Revision No. 284 of 2022 (Jaipal and others Vs. State of U.P. and Another) as well as impugned order dated 03.11.2022 passed by Additional Civil Judge (Junior Division), Court No. 4, Muzaffar Nagar in Criminal Case No. 694/9 of 2019 (State Vs. Jaipal and others) arising out of Case Crime No. 374 of 2017 under section 147, 148, 149, 323, 324, 325, 504, 506 I.P.C. Police Station Kakrauli, District Muzaffar Nagar. (Annexure No. 5 and 7 of the writ petition).

II. Direct the learned court below to delete the section 326 IPC which is imposed upon the petitioner and other co-accused persons which is not made out against them."

3. Submissions of the petitioner are as below:-

On the basis of an FIR case crime no. 374 of 2017 was registered and investigated upon. The accused persons were chargesheeted and cognizance was taken by the concerned Magistrate. During the course of the proceeding, an application dated 07.06.2018 was moved before the Magistrate with the contention that besides offences mentioned in the chargesheet, an offence under section 326 IPC is prima facie disclosed from prosecution papers, therefore a charge under section 326 IPC may also be framed. The court concerned heard on the application and allowed the same. Aggrieved by the order passed by the Magistrate on 03.11.2022, the accused persons preferred a criminal revision no. 284 of 2022 (Jaipal and others vs. State of UP and another). This criminal revision was decided by the District and Sessions Judge, Muzaffar Nagar on 03.11.2022, whereby the revision was rejected and the order of the Magistrate was affirmed.

4. The contentions of the petitioner are that false FIR in this case has been lodged in collusion with the police, as a counter blast to an FIR, case crime no. 373 pf 2017, lodged from his side. Further that the injury reports of the injured in the instant case are doubtful documents. Another contention is that from the papers, no offence under section 326 IPC is made out and that the Judicial Magistrate passed an arbitrary order. The revisional court

also did not consider the factual and legal position and wrongly passed the order affirming the order of the Magistrate.

5. One of the most vehement legal arguments of the petitioner is that after taking of cognizance, the Magistrate is not empowered to add or alter any sections. It is further argued that once charge has been framed, the court cannot change or add any section before any evidence has been led by the prosecution. In support of this argument, the judgment given by learned Single Bench of Allahabad High Court in **Matters under Article 227 No. 2014 of 2023 (Vikul vs. State of U.P. and Another)** has been placed before me.

6. Before I take up the legal issue raised by the petitioner, it shall be useful to refer to some more relevant facts as below:-

- After investigation, the police filed charge-sheet under sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC. The court concerned took cognizance on 09.10.2017 and proceeded.
- The first informant moved an application dated 07.06.2018 with the submission that on the basis of the medical report of injured-Yashveer prima facie, besides other offence, offence under section 326 IPC is clearly made out. The investigating officer ignored the above evidence and deliberately filed a charge-sheet excluding the offence under section 326 IPC. The learned Assistant Prosecuting Officer moved an application with similar submissions and applied for framing of charge in additional section 326 IPC besides sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC.
- The medical examination report of Yashveer dated 15.08.2017 is on record. The perusal of the above medical examination, admittedly done at primary health centre by the medical officer in charge, reveals that injured had 4 injuries on his person, out of which injury no. 2 was grievous and rest were kept under observation. Injury nos. 2 and 3 were found to have been caused by some sharp edged weapon. The description of injury no. 2 is as below:-
“2.3 x 0.4 cm through and through over left ear lobule. Margin are clear cut. Clotted blood present. Part of left ear lobule missing & facial disfigurement.”

7. Chapter XIX of Cr.P.C. provides for procedure for trial of warrant cases by Magistrate. Section 240 Cr.P.C. provides that if upon consideration of police report and the documents sent with it under section 173 Cr.P.C. and making such examination, if any, the Magistrate forms an opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing, a charge against the accused.

Chapter XVI of Cr.P.C. deals with ‘charge’. This Chapter begins with Section 211 Cr.P.C. which says that every charge under the Code shall state the offence with which the accused is charged, and the section of the law

against which the offence is said to have been committed shall be mentioned in the charge.

The charge should contain particulars as to time, place etc as are reasonably sufficient to give the accused notice of the matter with which he is being charged.

This Chapter comprehensively deals with the matter of framing of charge, what particulars are required to be mentioned, the requirement of mentioning the particular section of the law etc. The purpose is to make the accused aware of all the necessary details of the offence for which he is going to face the trial, so that he is not prejudiced in defending himself. In my view, though the procedural part of the proceeding before a trial court as regard framing of charge is contained in section 240 Cr.P.C., but the substantive part is dealt with Chapter XVI of Cr.P.C.. Chapter XVI of Cr.P.C, apart from dealing with the essential ingredients which should a charge contain, also deals with another very important and substantial provisions of law, which is contained in section 216 Cr.P.C. Section 216 Cr.P.C. is as below:-

“216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

8. At this juncture, it should be kept in mind that section 240 provides for giving an opportunity of hearing to both the sides. It should also be kept in mind that when the court takes cognizance as per provisions under section 190, the accused is not in picture. The Magistrate or the court concerned has to depend upon the facts as revealed from material on record collected by the investigating officer or produced by the complainant. At that stage, the accused is having no opportunity to be heard in defence or to place before the court, his side of the story. In this limited sense, the matter is dealt with by the court concerned in an ex-parte manner at the time of cognizance. The Magistrate definitely applies its mind at the time of cognizance, however when the accused has appeared on the scene, he is given an opportunity to be heard before framing of charge and at that time, the Magistrate can take a more balanced view, on the basis of material before it. The necessary corollary is that at that time, the court has an

opportunity to go through the prosecution papers once again. In case the Magistrate/court concerned finds that from the very same papers, which were available at the time of cognizance, some other offence or say an offence under which the chargesheet was not submitted, is also made out, he cannot just turn a blind eye. Where things are there on the face of record, the court cannot look the other way on such technical argument that once cognizance has been taken, he cannot add or alter the charge. It may happen that by oversight or any reason of like nature, any important fact may miss the attention of the court. The court concerned/Magistrate is not powerless, in such circumstances, to correct its own mistake whenever it is detected. The provisions of section 216 Cr.P.C. have been enacted to deal with such eventualities. There may be myriad of circumstances which may set the grounds for altering or adding the charge. In my view, one of such circumstances may include an error by oversight. The legislature had definitely keeping in mind the unforeseen circumstances, which may arise in any criminal trial, has worded the section 216 Cr.P.C. in a most comprehensive manner. Section 216(1) Cr.P.C. has put no conditions or limitations on the court's power to alter or add any charge. Section 216(2) to section 216(5) Cr.P.C. simply deal with the situation which arises after alteration/addition of the charge.

9. This power to add or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or non-framing of charge and whether they are discovered at the inception of the trial or at subsequent stages till prior to the pronouncement of the judgment. Court' power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. An erroneous and improper charge may be corrected under Section 216 Cr.P.C. by re-framing it properly or by addition or altering it for an offence provable by the evidence. It is discretionary power and of course the discretion should be exercised judicially and not arbitrarily.

10. The Supreme Court in **Anant Prakash Misra @ Anant Sinha vs. State of Haryana and Another; (2016) 6 SCC 105** has observed in para-16 as below:-

“16. From the aforesaid, it is graphic that the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.”

11. I find it useful to refer to the observations of the Supreme Court in **Criminal Appeal No. 1934 of 2019 (Dr Nallapareddy Sridhar Reddy vs. the State of Andhra Pradesh and Others) decided on 21.01.2020**. The

facts before the Supreme Court were that after further investigation, an additional/supplementary chargesheet was filed by the investigating officer, however that chargesheet was never brought to the attention of the court concerned or may be it just escaped the attention of the court by oversight or some reason of like nature. The trial court proceeded and reached the stage of the pronouncement of the judgment. At that stage, an application for alteration of charge under section 216 Cr.P.C. was moved. The trial court on the basis of additional/supplementary chargesheet proceeded to frame the charge under section 406 and 420 IPC. The Supreme Court refused to interfere in the order for addition of charge observing that there existed sufficient material for framing of charge which necessitated the addition and dismissed the appeal. In the aforesaid judgment the Supreme Court referred to following observations by two-Judge Bench of itself in ***P. Kartikalakshmi vs. Sri Ganesh; (2017) 3 SCC 347*** as below:-

“The decision of a two-judge Bench of this Court in P Kartikalakshmi v Sri Ganesh¹², dealt with a case where during the course of a trial for an offence under [Section 376](#) of the IPC, an application under [Section 216](#) was filed to frame an additional charge for an offence under [Section 417](#) of the IPC. Justice F M Ibrahim Kalifulla, while dealing with the power of the court to alter or add any charge, held:

“6. ... [Section 216](#) CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under [Section 216](#) CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.”

In the same judgment, the Supreme Court also referred to the observations made in ***CBI v Karimullah Osan Khan; (2014) 11 SCC 538***.

The para reproduced by the Supreme Court is being reproduced here as below:-

“17. [Section 216](#) CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions “at any time” and before the “judgment is pronounced” would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court.”

12. The above judgment of the Supreme Court reinforced the impression that the court's power to alter or add any charge is unlimited and unrestrained. The charges can be altered or added at any time till the judgment is pronounced. It may be noted that the addition can be made at the time of framing of any charge or at any subsequent stage. The court's power to add or alter charge cannot be taken away on the basis of the fact that no cognizance was taken in a particular section. This is not to say that the power can be exercised in an arbitrary manner. The only rider is that there must be some material on record justifying the addition or alteration. The legislature has even given the power to frame charge in alternative which further goes on to show that the powers of the courts are comprehensive and unrestrained. The provisions of section 221(1) and (2) Cr.P.C. give a glimpse of unlimited powers of the court.

13. The judgment referred to by the petitioner in **Vikul case (supra)**, does not apply to this case. In the above noted case, the court dealt with a intervening stage after taking of cognizance and before the point of hearing on the issue of framing of charge had reached.

14. Now coming to the facts of the instant case. From the papers on record, this is categorically revealed that the application moved on behalf of the prosecution through APO was heard at the time of framing of charge. This is not the case where once charge had been framed and an addition of some section was made subsequently. Hence, the arguments of the petitioner that no new material was there on the basis of which addition of section was made by the court has no legs to stand.

15. In such circumstances, a pertinent question may arise that the order of framing of charge in additional section of section 326 IPC should be equated with taking of cognizance in additional section. Such an argument sans logic. If such argument is accepted, the only inference can be drawn that the court, in going through the documents/material produced by the prosecution once again at the time of hearing on charge is powerless in drawing any inference for the purpose of framing of charge. Such an interpretation would render the section 240 Cr.P.C. redundant and meaningless. The courts should remain alive to some realities and accept the proposition that there may arise situations where the sections which are mentioned at the time of taking cognizance may defer with the sections of law, under which appropriate charges are found to be framable. To clarify my point of view, I refer to section 190 Cr.P.C., which are as below:-

“190. Cognizance of offences by Magistrates.

1. Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence

***(a) upon receiving a complaint of facts which constitute such offence;
(b) upon a police report of such facts;
(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.***

2. The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-Section (1) of such offences as are within his competence to inquire into or try.”

The above provisions speak of “taking cognizance of an offence”. In my view, offence is a wider term and cannot be construed to mean only particular sections defining any particular offence in IPC or any other penal law. When an offence is committed, more than one sections may be attracted. At the time of taking cognizance, the court shall broadly look into material to find out what offence/offences are made out, however at the time of framing of charge, the court is expected to look into material on record and decide upon, in which particular section the offence is falling. This is not to say that at the time of taking cognizance particular section of law have not be mentioned or need not to be mentioned. This is just to make a distinction between the two stages in a case. I do not agree with the proposition that once cognizance of an offence is taken and particular sections are mentioned in the cognizance order, the court shall have no scope to alter or add, on those sections at the time of framing of charge, whether at the stage of section 240 Cr.P.C. or section 246(1) Cr.P.C.

Broadly, there are four stages in a criminal proceeding; the stage of taking cognizance, the stage of framing of charge, the stage of evidence and the stage of judgment. A distinction has to be maintained as regard duty entrusted on a court, the powers of the court to proceed and difference in judicial approach at different stages. Definitely, as the case proceeds from the stage of cognizance to stage of framing of charge, and onwards the proceedings begins to take shape, the loose ends are tightened and the approach becomes more and more penetrative.

16. In this case, at the time of framing of charge, the learned trial court heard both the sides. The attention of the court was brought to the fact that medical report of Yashveer showed grievous injuries caused by sharp edged weapon and that there was facial disfigurement and that the lobule of the ear had been cut through and through and was missing. On the basis of material already on record, the court came to a conclusion that besides charges under sections under sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC, a charge under section 326 IPC is also needed to be framed and accordingly proceeded.

17. In view of the above discussion, I do not find any merit in the petition, therefore, it is **dismissed**.

Order Date :- 2.11.2023#Vikram/-