

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-08-2015

Coram

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Criminal Revision Case No. 713 of 2015

State represented by
The Inspector of Police
H-8, Thiruvottriyur Police Station

.. Petitioner

Versus

1. K.P. Sankar
2. Dilli @ Dilli Babu
3. Raju @ Dison
4. Yobu @ Muraiarasu
5. Kumar
6. Chokkan @ Chokkalingam
7. KPP Sami @ Pakkirisami

.. Respondents

Criminal Revision Case filed under Sections 397 read with Sec. 401 of Cr.P.C. to set aside the Order dated 23.06.2015 passed in C.M.P. No. 164 of 2015 on the file of the IV Additional District and Sessions Judge, Ponneri.

For Petitioner : Mr. Shanmugavelayutham
Public Prosecutor

For Respondents : Mr. John Sathyan

ORDER

The prosecution has come forward with this Criminal Revision Case aggrieved by the order dated 23.06.2015 passed by the learned IV Additional District and Sessions Judge, Ponneri in C.M.P. No. 164 of 2015 dismissing the application filed by them under Section 216 of Code of Criminal Procedure to alter the charges levelled against the respondents/accused by including Section 302 of IPC as an additional charge.

2. According to the prosecution, the defacto complainant in this case is the wife of victim Velu, who has given a complaint complaining that on 25.09.2006, her husband was forcibly taken by the accused persons towards the sea with an intention to murder him. It is the specific case of the defacto complainant that the 7th respondent herein had given command to his men to bring her husband and on the basis of such command, the accused 1 to 6 have forcibly

taken her husband towards the sea. It is also the specific complaint of the defacto complainant that after that incident, the whereabouts of his husband was not known or he was not seen alive by any one from that date. On the basis of such complaint given by the defacto complainant, the case in Crime No. 988 of 2011 came to be registered under the caption "man missing" on 26.07.2011. After investigation, it came to light that A2 to A5, based on the instigation of A1, A6 and A7 have kidnapped the husband of the defacto complainant. Therefore, after completion of the investigation, the charge sheet was filed for the offence punishable under Sections 147, 323, 364, 506 (i) read with 149 IPC against the accused/respondents herein and it was taken on file in S.C. No. 229 of 2014 on 02.06.2014.

3. According to the prosecution, it came to light that the deceased was forcibly kidnapped and he might have been murdered by the respondent/accused. The prosecution arrived at such a conclusion on the basis of the statement recorded under Section 161 of Cr.P.C. Therefore, pending trial, the prosecution has filed the petition in CMP No. 164 of 2015 under Section 216 of Cr.P.C. to include the offence under Section 302 of IPC also against the accused in S.C. No. 229 of 2014. The said application was dismissed by the trial court on 23.06.2015 against which the present Criminal Revision Case is filed.

4. The learned Public Prosecutor appearing for the petitioner would contend that it is the specific case of the prosecution that the victim was forcibly kidnapped by the respondents 1 to 6 at the instance of the respondent No.7. According to the prosecution, the victim was forcibly taken from his house by the respondents 1 to 6 at the instance of the 7th respondent as the victim often quarrelled regarding non-disbursement of the Tsunami relief fund. According to the prosecution, the victim specifically raised allegations against the 7th respondent for non-disbursement of Tsunami relief fund and because of such allegations raised by the victim, the 7th respondent instigated his men to do away with his life. Accordingly, the respondents 1 to 6 have kidnapped the victim forcibly from his house and taken him towards the sea. Thereafter, the victim was not heard or seen alive by any one. The whereabouts of the victim was not known for seven years and therefore, he is presumed to be murdered by the accused. In the above facts, the prosecution thought it fit that invocation of Section 364 of IPC alone is not enough and the accused have also to be tried for the offence under Section 302 of IPC. The prosecution also gained strength over the statement of witnesses given under Section 161 of Cr.P.C. regarding the manner in which the victim was forcibly taken away from his house with an intention to murder him. The learned Public Prosecutor further submits that the Court below dismissed the application filed by them mainly on the ground that the corpus delicti of the victim has not been recovered or produced or any evidence has been shown that the victim was murdered by the respondents or he died unnaturally that too at the instance of the respondents. The court below also erred in holding

that merely on the basis of the statement of the witnesses under Section 161 of Cr.P.C. regarding the manner in which the victim was forcibly taken away from his house with an intention to murder him, it cannot be concluded that the deceased died unnaturally or his death is homicidal in nature. In such circumstances, the Court below ought to have allowed the plea of the prosecution to include the offence under Section 302 of IPC and non-consideration of the same warrants interference by this Court.

5. In support of his contention, the learned Public Prosecutor relied on the decision of the Honourable Supreme Court in the case of (Sajjan Kumar vs. Central Bureau of Investigation) 2010 9 SCC 368 for the proposition that in the event of murder of an abducted person, an inference of murder can safely be drawn either by direct or presumptive evidence and it would not be necessary to prove the corpus delicti.

6. The learned Public Prosecutor also relied on the decision of the Honourable Supreme Court in the case of (Japani Sahoo vs. Chandra Sekhar Mohanty) (2007) 7 Supreme Court Cases 394 to contend that delay in preferring the complaint will not vitiate the prosecution case.

7. Contra, the learned counsel for the respondents/accused would contend that the complainant is the wife of the victim. The case has been foisted against the respondents, especially against the 7th respondent, who was the former Minister for Fisheries Department. According to the prosecution, on 25.09.2006 respondents 2 to 5, along with one Yobu and Dyson allegedly asked the victim to come out of his house as the 7th respondent wanted to see him. By saying so, they have forcibly taken the victim from his house towards the sea. Thereafter, the victim was never seen alive. It is to be stated that the complaint itself was given only on 26.07.2011, after five years from the date of alleged occurrence. Even in the complaint, according to the complainant, the victim was taken away at the instigation and instruction of the 7th respondent and her husband was murdered only by the accused. Apart from this generic allegation, there is no other allegation made against the accused. For inclusion of the offence of murder under Section 302 of IPC, the corpus delicti has to be proved and only in exceptional circumstances, where the murder is proved by other witness, the offence under Section 302 of IPC can be included. Merely on the basis of the statement of witnesses, the offence under Section 302 of IPC need not be included. In the absence of proof of corpus delicti, it is not proper on the part of the prosecution to file the petition under Section 216 of Cr.P.C. The trial Court is therefore right in dismissing such petition filed by the prosecution. There is no evidence available to include the charge under Section 302 of IPC. The word "evidence" can mean and include the statement of the witnesses adduced before the Magistrate concerned during the course of trial and the evidence collected by the Police Officer under

Section 161 of Cr.P.C. will not be construed as "evidence" for the purpose of filing the petition under Section 216 of Cr.P.C. The petition under Section 216 of Cr.P.C. filed by the prosecution is therefore pre mature. Even if it is shown that the respondents/accused are guilty of the offence of murder, it is only for the Trial Court to decide the same on the basis of the evidence made available against them during the course of trial. The application filed under Section 216 of Cr.P.C. by the prosecution is therefore not maintainable and it was rightly rejected by the trial Court. In this context, the learned counsel for the respondents relied on the decision of this Court in the case of (H.A. Hurul Firdhouse, represented by her power agent H.A. Abdul Jabbar vs. State, represented by Inspector of Police, W-22, All Women Police Station, Mylapore, Chennai - 2 and others) 2010 (3) Madras Weekly Notes (Crl.) 368 for the proposition that neither the prosecution nor the petitioner/accused has any right to seek for inclusion or deletion of a charge and it is for the trial Court, in its discretion, consider such inclusion of a charge. It was also held in the above said decision that as against an order passed by the trial Court, dismissing an application under Section 216 of Cr.P.C. a Criminal Revision Case is not maintainable.

8. The learned counsel for the respondents/accused also relied on the decision rendered by this Court in the case of (Chellapandi vs. Dy. Superintendent of Police, C.B.C.I.D., Madurai District and others) (2012) 1 MLJ Criminal 246 wherein this Court has held that the power under Section 216 of Cr.P.C. to alter or amend the charges is vested with the Court on the Court being satisfied, based on the documents produced, that the charges framed has to be amended or altered. In the present case, the prosecution has filed the petition under Section 216 of Cr.P.C. to include the charge under Section 302 of IPC merely on the basis of the evidence given by the witnesses before the police officer to the effect that the victim was taken towards the sea with a view to commit the murder. In fact, in the present case, there is a long delay in giving the complaint itself for about five years and therefore also, the petition filed by the prosecution is not maintainable. In such circumstances, the learned counsel for the respondents prayed this Court to dismiss the Criminal Revision Case.

9. I heard the learned Public Prosecutor appearing for the State and the learned counsel appearing for the respondents/accused. At the outset, it has to be stated that the occurrence took place on 25.09.2006 and the complaint was given by the defacto complainant on 26.07.2011, after five years from the date of alleged occurrence. In the complaint, it was complained specifically that at the instance of the 7th respondent herein, who was a former Minister for Fisheries Department during the year 2006 to 2011, the other accused came to his house and forcibly taken her husband towards the sea with an intention to murder him. As the seventh respondent herein was a Minister during the relevant time, the complaint was given belatedly.

10. According to the learned Public Prosecutor, the delay in filing the complaint will not vitiate the case of the prosecution. In this regard, the learned Public Prosecutor relied on the decision in the case of (Japani Sahoo vs. Chandra Sekhar Mohanty) (2007) 7 Supreme Court Cases 394 to contend that the delay in preferring the complaint by the complainant for about five years will not vitiate the prosecution case especially when the 7th respondent was the Minister for Fisheries Department between 2006 to 2011.

11. At this stage, this Court need not consider the question of delay in preferring the Complaint. In this Criminal Revision Case, this Court is only called upon to consider the validity or otherwise of the order passed by the trial Court dismissing the petition filed by the prosecution under Section 216 of Cr.P.C. for inclusion of charge under Section 302 of IPC. This Court is also not expressing any opinion on the question of delay in preferring the complaint in this case. It is needless to mention that mere delay in preferring a complaint will not always vitiate the case of the prosecution.

12. The only question arise for consideration in this Criminal Revision Case is whether the prosecution has a right to file an application under Section 216 of Cr.P.C. to include the charge under Section 302 of IPC or whether such an application is maintainable.

13. In this case, after investigation in to the complaint given by the defacto complainant, the prosecution has filed the charge sheet for the offences punishable under Sections 147, 323, 364, 506 (i) of IPC read with Section 149 against the accused 1 to 7. According to the prosecution, during the course of investigation, as per the statement given by the witnesses Valli (defacto complainant), Vijay, Murugan, Arumugam, Lakshmi, Gandhi, Vennila, Selvi, Megavannan and Velumayil under Section 161 of Cr.P.C. to the effect that the victim Velu was dragged from his house forcibly by A2 to A5 at the instigation of A1, A6 and A7 towards the sea with an intention to murder him. It is also specifically stated that after that incident, the victim Velu was never seen alive by any one or his whereabouts were not known. On the basis of this statement, the prosecution inferred that the victim Velu was murdered by the accused and he was thrown in to the sea. In such circumstances, according to the prosecution, the corpus delicti need not be proved by the prosecution and it will not be a bar for the prosecution to seek for inclusion of the charge under Section 302 of IPC. In this context, the learned Public Prosecutor relied on the decision of the Honourable Supreme Court in the case of (Sajjan Kumar vs. Central Bureau of Investigation) reported in (2010) 9 Supreme Court Cases 368 wherein it was held that grave suspicion is enough to frame a charge even for having committed the offence of Murder.

14. It is true that a grave suspicion is enough to frame a charge of murder as contemplated under Section 302 of IPC, but the question is whether the prosecution is entitled to seek for inclusion

of such an offence as an additional charge. It is needless to mention that in the present case, the respondents/accused are already facing trial for the offence under Section 364 of IPC which relates to abduction with an intention to murder. As rightly pointed out by the Court below, neither the prosecution nor the petitioner/accused has any right to seek for alteration or addition or deletion of a charge and it is for the trial Court to either alter or amend a charge depending on the material evidence made available before it.

15. In the present case, when we analyse the evidence available on record, they are in the form of statements made under Section 161 of Cr.P.C. before the investigation officer and they were not recorded during the course of trial before the trial Court. As mentioned above, the complaint itself was given after five years on 26.07.2011 and the statements under Section 161 of Cr.P.C. were recorded thereafter. Even as per the statement under Section 161 of Cr.P.C. it is stated that the victim made allegations against the seventh respondent for non-disbursement of Tsunami relief fund or compensation. Aggrieved by the same, the seventh respondent directed his men to secure the victim and stated to have uttered the word "mtid moj;J flypy; nghL';fs;". PW1/defacto complainant in her statement has stated that the victim was taken towards the sea and she went behind her husband. At that time, she was threatened by the accused not to follow them, else she and her children will be eliminated. PW4 in his statement has stated that the 7th accused had directed his men to kill the victim and to throw his body in to the sea. He has also stated that the men of the 7th respondent have dragged the victim towards the Sea. In the same line, other witnesses have also deposed as to the manner in which the victim was taken from his home towards the Sea. At any rate, these statements have been recorded only before the investigation officer and not before the trial Court during the course of trial or the witnesses were subjected to cross-examination. The trial in the Sessions Case is yet to commence. At this stage, whether the application filed by the prosecution under Section 216 of the Cr.P.C. is not maintainable.

16. This Court, in series of decisions, has categorically held that neither the prosecution nor the accused have any right to seek for alteration or adding of a charge already framed by the Court. Section 216 of Cr.P.C. specifically provides as follows:-

"S.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 for the same facts as those on which the altered or added charge is founded."

17. It is evident from Section 216 of Cr.P.C. that alteration or amendment or addition of a charge can be done only by the Court and the trial Court alone got such power. This position is reiterated in the decision rendered by this Court in the case of (Krishnammal vs. The Revenue Divisional Officer and others) reported in 2008 Criminal Law Journal 2845 wherein in Para Nos. 9 to 11, it was held as follows:-

"9. From the conjoint reading of the provisions of the said Sections, it is pellucid that only the Court is having power to frame charge or alter it or add new charges at any time before judgment is pronounced. Neither the prosecution nor the person interested has right to file petition by invoking either of the said Sections so as to delete the existing charges or add new charges. In short, either the prosecution or the person interested has no right to ask the Court either to alter the existing charges or to add new charges.

10. In the instant case, the Court below after considering all the materials available on record, has framed a charge simpliciter under Section 302 of the Indian Penal Code against the accused found therein. After framing a charge under Section 302 of the Indian Penal Code, the revision petitioner has filed Criminal Miscellaneous Petition No. 269 of 2007, praying to frame additional charges against the accused under Sections 302 read with 34, 120 (b), 201, 217, 218, 220, 331, 342, 348 and 367 of the Indian Penal Code. The Court below has found that the charge sheet under Section 302 of the Indian Penal Code has been framed on the basis of available materials on record. Since the Court below has framed charge under Section 302 of the Indian Penal Code on the basis of available records, it is totally unwarranted on the part of the revision petitioner to file Civil Miscellaneous Petition No. 269 of 2007 and further, as stated earlier, the revision petitioner has no right to file the present petition under Section 216 of the Code of Civil Procedure and further it is totally

unwarranted on her part.

11. In fact, the revision petitioner has made a faint attempt to dictate the Court below so as to frame charges as per the Sections mentioned supra. Since the petition itself is not legally maintainable, it is needless to say that the order passed by the Court below is perfectly correct and the same needs no interference. Therefore, the argument advanced by the learned counsel appearing for the revision petitioner is totally against law and whereas the argument advanced by the learned counsel appearing for the respondents 2 to 11 is really having acceptable force."

18. Yet another argument raised on behalf of the respondent is that as against the order of dismissal passed by the Trial Court, dismissing the application filed by the prosecution under Section 216 of Cr.P.C. the present Criminal Revision Case is not maintainable. This view is reiterated in the decision of this Court in the case of (H.A. Hurul Firdhouse, represented by her power agent H.A. Abdul Jabbar vs. State, represented by Inspector of Police, W-22, All Women Police Station, Mylapore, Chennai - 2 and others) reported in 2010 (3) Madras Weekly Notes (Cr1.) 368 wherein it was held that an order passed by the Trial Court dismissing an application filed under Section 216 of Cr.P.C. cannot be regarded as a final decision and therefore, as against that order, a Criminal Revision Case is not maintainable. The relevant portion of the order in paragraph Nos. 8 to 10 reads as follows:-

"8. Section 216, Cr.P.C. does not contemplate any application being filed either by the prosecution or by any witness including the de facto complainant. It simply states the power of the Court to alter the charge or add any charge to the charge already framed. The stage at which such alteration or addition to charge can be made is also indicated thereon. Such an alteration or addition can be made at any time before judgment is pronounced. The Section also provides for the follow up action to be taken in the case the alteration or addition to the charges is made after considerable progress in the trial of the case.

9. In the light of the said provision we have to consider the order passed by the learned Trial Magistrate. A reading of the order of the learned Trial Magistrate will show that, on a proper understanding of the context of the said provision, the learned Trial Magistrate has passed the impugned order. The learned Trial Magistrate has expressed a clear opinion that the petition itself was premature one as none of the witnesses for prosecution was cross examined and five more witnesses were to be examined and that the question of framing an additional charge could be considered at a later stage in the light of the evidence to

be adduced during the course of the trial. The said opinion is in tune with the intention of the legislature in enacting the said provision. Therefore, as rightly contended by the learned Senior counsel for the Respondent, there is no defect infirmity in the order passed by the Trial Court warranting interference by this Court.

10. In addition to the above, this Court is also convinced with the substance in the contention raised by the learned Senior Counsel for the respondent that the order sought to be impugned in this Revision cannot be termed "not an interlocutory order" so as to exclude the bar provided in sub-clause (2) of Section 397 of Cr.P.C. As rightly contended by the learned Senior Counsel for the Respondent no final opinion or finding is rendered deciding a right or obligation of any of the parties to the petition. The present order refusing to frame an additional charge does not preclude the Trial Court to frame an additional charge at a later stage of the proceedings, if it may, be warranted. In other words, the power conferred on the Court under 216 is not barred by the dismissal of the present petition filed by the de facto Complainant before the Trial Court. At any time before the pronouncement of judgment, such a power can be exercised. If the order of the lower Court is considered in the light of the said explanation, the contention raised on behalf of the Respondent that the impugned order cannot be stated to be "not an interlocutory" order has got to be countenanced."

19. Again, this Court in the decision in the case of (P. Krithikalakshmi vs. Sri Ganesh and others) 2013 (3) Madras Weekly Notes (Cr1) 521 has reiterated the legal position that neither the prosecution nor an accused has a right to file a petition under Section 216 of Cr.P.C. requiring the Court to frame additional charge. It is within the domain of Court to frame additional charge or alter an existing charge. It was also held that a revision under Section 397 of Cr.P.C. is not maintainable as against an order passed by the Court below in the application filed under Section 216 of Cr.P.C in view of the specific bar under Section 397 (2) Cr.P.C. that no Revision could be filed as against an order passed in an interlocutory Petition. Since the present Revision has been filed from the order passed in a similar application, the Criminal Revision Case is not maintainable.

20. Thus, the legal position emanates from the above decisions it that neither the prosecution nor the defacto complainant or any one interested in the criminal case is entitled to file an application under Section 216 of Cr.P.C and it is only for the Trial Court to decide about framing of an additional charge or alter an existing charge upon arriving at a subjective satisfaction on the basis of existence of materials available on records. It can also be

culled out that as against an order passed by the Trial Court in an application under Section 216 of Cr.P.C. a Criminal Revision Case under Section 397 of Cr.P.C. is not maintainable as such an order did not finally determine the prosecution case and it is an interlocutory in nature. Thus, the Trial Court, in the present case, is right in dismissing the application. filed by the prosecution under Section 216 of Cr.P.C. for inclusion of an additional charge under Section 302 of IPC against the respondents/accused.

21. As rightly pointed out by the Trial Court, before evidence is let in by the prosecution and the prosecution witnesses are subjected to cross-examination, it is too early for the prosecution to have filed the petition under Section 216 of Cr.P.C. for inclusion of the charge under Section 302 of IPC. I am fully in agreement with such a conclusion arrived at by the trial Court and hold that there is no infirmity in the order passed by the Trial Court. It is always open to the trial Court, in exercise of power under Section 216 of Cr.P.C., to frame an additional charge or alter the existing charge, if it is convinced to do so, after completion of evidence, and before pronouncing the judgment in the Sessions Case

22. With the above observation, the Criminal Revision Case is dismissed. Connected Miscellaneous Petition is closed.

-Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

To

1.The IV Additional District and Sessions Judge
Ponneri.

2.-do-Thro The Principal Sessions Judge
Thiruvallur

+1 cc to Mr.R.John Sathyan Advocate sr.42210

+1 cc to Public Prosecutor sr.42554

Cr1.R.C. No of 713 of 2015

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