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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1369 OF 2016

1. Mahendra Tangu Sapkale,
Age : 47 years, Occu. Business,
R/o Shivaji Nagar, New Dudh
Federation, Jalgaon,
Dist. Jalgaon
2. Chudaman Shankar Patil,
Age : 64 years, Occu. Business,
R/o 262, Shivaji Nagar, Jalgaon,
Dist. Jalgaon
3. Shivcharan Kanyalal Dhandore,
Age : 71 years, Occu. Business,
R/o Baliram Peth,
Near Brahman Wadi, Jalgaon,
Dist. Jalgaon
4. Saraswatibai Ramdas Koli,
Age : 69 years, Occu. Business,
R/o Plot No.69, Pimprala
Dandekar Nagar,
Jalgaon, Dist. Jalgaon
5. Vasudev Parsuram Sonawane,
Age : 60 years, Occu. Business,
R/o 2, Ramnagar, Mehrun, Jalgaon,
Dist. Jalgaon
6. Saubhadrabai Suresh Naik,
Age: 63 years, Occu. Business,
R/o: Shree Santh Dyneshwar Chowk,
Mehrun, Jalgaon,
Dist. Jalgaon
7. Iqbalodin Giyaddin Pirjade,
Age: 58 years, Occu. Business,
R/o: Pirjade Wada, Mehrun, Jalgaon,
Dist. Jalgaon
8. Shantaram Chindu Sapkale,
Age: 69 years, Occu. Business,
R/o: 97, Joshi Peth, Jalgaon,
Dist. Jalgaon

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9. Suresh Bhikamchand Jain,
Age: 73 years, Occu. Business,
R/o: 7 Shivaji Nagar, Jalgaon,
Dist. Jalgaon
10. Devidas Baliram Dhande,
Age: 45 years, Occu. Business,
R/o: 18, Janki Nagar, Near Old Neri Naka,
Jalgaon, Dist. Jalgaon
11. Dattu Devram Koli,
Age: 61 years, Occu. Business,
R/o: 37, Kanchan Nagar, Jainabad,
Jalgaon, Dist. Jalgaon
12. Digambar Dalpad Patil,
Age: 66 years, Occu. Business,
R/o: 6, Joshi Peth, Near Panjarapl Water Tank,
Jalgaon, Dist. Jalgaon
13. Manjula Dharmendra Kadam,
Age: 47 years, Occu. Business,
R/o: Near Noorani Masjid, Shaunagar,
Jalgaon, Dist. Jalgaon
14. Nirmala Suryakant Bhosle,
Age: 58 years, Occu. Business,
R/o: 36, Polan Peth, Jalgaon,
Dist: Jalgaon
15. Vimal Budha Patil,
Age: 48 years, Occu. Business,
R/o: Haivitthal Nagar, Mahadev Chowk,
Jalgaon, Dist. Jalgaon
16. Sadhana Radhesham Kogta,
Age: 51 years, Occu. Business,
R/o: 172, Vishanji Nagar, Jalgaon,
Dist. Jalgaon
17. Alka Nitin Laddha,
Age: 58 years, Occu. Business,
R/o: Laddha Farm House, Ajanta Chowk,
Jalgaon, Dist. Jalgaon
18. Mutajbi Husekha,
Age: 51 years, Occu. Business,
R/o: Plot NO. 1, Nasheman Colony,
Jalgaon, Dist. Jalgaon

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19. Meena Amrutlal Mandhan,
Age: 51 years, Occu. Business,
R/o: 495, Siddhi Colony, Jalgaon,
Dist. Jalgaon
20. Rekha Chatrubhuj Sonawane,
Age: 44 years, Occu. Business,
R/o: Plot No. 45/2, Indraprasta Colony, Jalgaon,
Dist: Jalgaon
21. Bhagirathi Budho Sonawane,
Age: 79 years, Occu. Business,
R/o: Walmik Nagar, Asoda Road,
Jalg29aon, Dist. Jalgaon
22. Meena Anil Wani,
Age: 44 years, Occu. Business,
R/o: 162, Shanipeth, Jalgaon,
Dist. Jalgaon,
23. Pushpalata Shaligram Atarde,
Age: 56 years, Occu. Business,
R/o: Yesh Apartment, Block NO. 1 / 2,
Old Nashirabad Road, Jalgaon,
Dist. Jalgaon
24. Ashok Kashinath Sapkale,
Age: 2951 years, Occu. Business,
R/o: Vasusapna Building, Shivaji Nagar No. 1,
Jalgaon, Dist Jalgaon
25. Vijay Ramdas Wani,
Age: 61 years, Occu. Business,
R/o: 302, Lake Residency Near Mehrun
Talva, Shirol Road, Jalgaon,
Dist. Jalgaon
26. Ajay Ram Jadhav,
Age: 49 years, Occu. Business,
R/o: Prabhat Colony, In front of Khake
Hospital, Jalgaon,
Dist. Jalgaon
27. Chtrabhuj Soma Sonawane,
Age: 53 years, Occu. Business,
R/o: Shivbnhakta Nivas Near Shanimandir,
Shanipeth, Jalgaon, Dist. Jalgaon

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28. Kailas Narayan Sonawane,
Age: 47 years, Occu. Business,
R/o: 9, Shanipeth, Jalgaon,
Dist. Jalgaon
29. Lata Ranjit Bhoite,
Age: 61 years, Occu. Business,
R/o: Ahilya Niwas, Jalgaon,
Dist. Jalgaon
30. Sadashiv Ganpat Dhekale,
Age: 64 years, Occu. Business,
R/o: 75, Shivne29ri Adarshh Nagar,
Jalgaon, Dist. Jalgaon
31. Liladhar Nattu Sarode,
Age: 56 years, Occu. Business,
R/o: 461, Vitthal Peth, Jalgaon,
Dist. Jalgaon
32. Ashok Ramdas Perdeshi,
Age: 59 years, Occu. Business,
R/o: Plot No. 45/2, Indraprasta Colony,
Jalgaon, Dist. Jalgaon
33. Sunanda Ramesh Chandelkar,
Age: 56 years, Occu: Business,
R/o: 310, Joshi Peth, Jalgaon,
Dist. Jalgaon
34. Pandharinath Dhondiba Kale,
Age: 57 years, Occu. Service,
R/o: JDCC Bank Colony,
Bhikamchand Jain Nagar,
Jalgaon
35. Jagannat Natthu Wani,
Age: 75 years, Occu. Nil,
R/o: Pitru Chhaya, Nehru Chowk,
Jalgaon

..PETITIONERS

VERSUS

State of Maharashtra,
Through Police Station Officer,
Jalgaon City Police Station,
Jalgaon 29

..RESPONDENT

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Mr R. B. Thakare, Senior Advocate instructed by Mr A. M. Chimankar,
Advocate holding for Mr S. S. Bora, Advocate for petitioners;
Mr P. P. Chavan, Special Public Prosecutor for respondent

**WITH
CRIMINAL WRIT PETITION NO.1405 OF 2016**

Rajendra Anil Mayur,
Age: 74 years, Occu. Nil,
R/o: 303, Shivaji Nagar, Jalgaon,
Dist. Jalgaon
Presently staying at 2,
Madhupushpa Apt.,
Bhavsar Colony,
Dhule, Dist. Dhule

..PETITIONER

VERSUS

State of Maharashtra,
Through Police Station Officer,
Jalgaon City Police Station,
Jalgaon

..RESPONDENT

Mr Mukul S. Kulkarni, Advocate for petitioner;
Mr P. P. Chavan, Special Public Prosecutor for respondent

CORAM : N.W. SAMBRE, J.

DATE : 25th October, 2016

ORAL ORDER :

Both these petitions are heard together and are being decided by this common order as the same orders are questioned by the petitioners-accused.

2. Learned Special Judge, Dhule, on 29th September, 2016, below Exh.3862 i.e. an application in Special Case No.1 of 2014, for alteration of charge, has passed an order allowing the same, and vide order dated 3rd October, 2016, below Exh.3892 in said Special Case allowed application for re-calling of witnesses, which orders are questioned in the present petitions.

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3. The facts as are necessary for decision of these petitions are as under :-

On 2nd February, 2006, first information report came to be filed against 94 accused persons and the charge-sheet was filed against four of the 94 accused on 24th March, 2012. On 1st June, 2012 a supplementary charge-sheet was filed against 53 accused.

4. On 13th July, 2012, one of the co-accused i.e. accused no.42, namely, Smt. Sindhutai Kolhe prayed for pardon vide Exh.88, which came to be allowed and charge came to be framed against accused at Exh.289 on 30th May, 2013. On 17th November, 2014, an application (Exh.826) came to be filed by the Special Public Prosecutor for framing of additional charge against all accused, which too came to be allowed on 24th December, 2014.

5. On 25th August, 2016 approver Sindhutai Kolhe (accused no.42) filed an application Exh.3776 expressing her inability to give her evidence and, as such, her status as that of approver came to be resiled and charge came to be framed against her on 14th September, 2016. On 26th September, 2016, application Exh.3862 came to be filed by the prosecution for alteration and re-framing of charge, which as well came to be allowed by order dated 30th September, 2016 and charge Exh.218 came to be amended.

6. On 30th September, 2016, application Exh.3893 for separation of trial of Smt. Sindhutai Kolhe was moved by various accused and it is informed across the bar that the same is allowed by the learned Special Judge.

7. In the above background, an application Exh.3892 for re-calling certain witnesses, in view of alteration of charge vide order below Exh.3862, was moved, which came to be allowed on 30th September, 2016.

8. In the above background, while inviting attention of this court to the consequences provided under section 308 of the Code of Criminal Procedure (for short "CrPC") *qua* a person not complying with the conditions of pardon, Mr Thakare, learned Senior Counsel appearing on behalf of the petitioners would urge that the trial of the said accused, having been ordered at the behest of the other accused, to be separated and charge against the said accused i.e. accused no.42, having been framed, there is hardly any material on record, much less additional evidence so as to infer that the requirement of section 216 of CrPC is satisfied for alteration of charge.

9. So as to substantiate his contention, learned Senior Counsel would invite attention of this court to the judgment of the Apex Court, in the matter of **State (Delhi Administration) vs Jagjitsingh**, reported in

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MANU/SC/0585/1988. In addition, learned Senior Counsel would urge that the scheme of section 216 of CrPC does not contemplate that in a simpliciter manner and for no reasons merely at the behest of the prosecution, the court should go on altering charge. He would also attack the order of the learned Special judge on the ground that there are no reasons speaking satisfaction of section 216 of CrPC and there is enormous prejudice caused to the accused particularly when the trial has reached at an advanced stage. According to him, the orders impugned are liable to be quashed and set aside.

Mr Kulkarni, learned Counsel appearing on behalf of the petitioner in Criminal Writ Petition No.1405 of 2016 made submissions in line with that of learned Senior Counsel Mr Thakare and prays for allowing his petition.

10. Mr Chavan, learned Special Public Prosecutor, while opposing the claim would urge that section 216 of CrPC which provides for alteration of charge permits the Trial Court to do so at any stage of the trial, provided judgment is not pronounced. According to him, the said section does not differentiate the right of the prosecution or that of the accused. He would rather try to read down the said section to the benefit of the accused as he would urge that alteration of charge is provided only with an intention to provide proper representation to the defence so as to answer the particular case. According to him, no prejudice would be caused to the accused on alteration of charge and as such, prays that the petitions need to be rejected.

11. From the rival submissions of the parties, what could be noticed is that the court has framed charge vide Exh.218 against accused nos.1 to 52, but for accused nos.42, 51 and 53. Against accused nos.1,2, 4 and 5, the charge for offence punishable under section 120-B of the Indian Penal Code (for short "IPC") was framed. Against accused nos.3, 6 to 41, 43 to 50 and 52, the charge under section 120-B of IPC came to be framed. Against accused no.3, the charge for offences punishable under section 409 read with section 420 of IPC and under section 13 (1) (c) of the Prevention of Corruption Act came to be framed. Against accused no.5, the charge for offences punishable under section 409 read with section 120-B, 420, 411 of IPC and under section 13 (1) (c) and 13 (1) (d) of the Prevention of Corruption Act came to be framed. Against accused nos.1, 2 and 4, the charge is framed for an offence punishable under section 411 of IPC. Against accused nos.2, 6 to 41, 43 to 50 and 52, the charge for offences punishable under sections 406, 120-B read with section 34 of IPC came to be framed.

12. After the supplementary charge-sheet came to be filed against the remaining accused, on 24th December, 2014, applications Exh.826 and 856 came to be allowed and additional charge was framed for offences punishable under sections 465, 466, 468, 471 read with section 120-B against accused nos.1 to 41, 43 to 50 and 52.

13. The approver (accused no.42) thereafter made an application resiling from her such status and pursuant to a certificate issued by the

Special Public Prosecutor, the learned court below ordered to proceed against her pursuant to the provisions of section 308 of CrPC and the charge came to be framed against her vide order dated 14th September, 2016.

14. It is in this background, it appears that Exh.3862, an application under section 216 of CrPC seeking alteration of charge came to be moved and same came to be allowed vide order dated 29th September, 2016, with following observations :-

“01. The application is hereby allowed.

02. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 120-B r/w 190, 177, 201, 406, 409, 411, 465, 468, 471, 34 of the Indian Penal Code and Section 13 (1) © and (d) r/w 13 (2) of Prevention of Corruption Act.

03. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 409 r/w 120-B, 109, 34 of Indian Penal Code.

04. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 406 r/w 120-B, 109, 34 of Indian Penal Code.

05. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 465 r/w 120-B, 109, 34 of Indian Penal Code.

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06. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 468 r/w 120-B, 109, 34 of Indian Penal Code.

07. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 471 r/w 120-B, 109, 34 of Indian Penal Code.

08. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 420 r/w 120-B, 109, 34 of Indian Penal Code.

09. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 177 r/w 120-B, 109, 34 of Indian Penal Code.

10. The charge be altered against accused Nos. 1 to 52 for the offence punishable under Section 201 r/w 120-B, 109, 34 of Indian Penal Code.

11. The charge be altered against accused Nos. 1, 4 and 5 for the offence punishable under Section 411 r/w 120-B, 109, 34 of Indian Penal Code.

12. The charge be altered against accused Nos. 2, 3, 5 to 52 for the offence punishable under Section 13 (1) (c) r/w 13 (2) of Prevention of Corruption Act, r/w Section 120-B, 109, 34 of Indian Penal Code.

13. The charge be altered against accused Nos. 2, 3, 5 to 52 for the offence punishable under Section 13 (1) (d) r/w 13 (2) of Prevention of Corruption Act, r/w Section 120-B, 109, 34 of Indian Penal Code.”

15. Accordingly, the charge came to be framed against the accused persons. The alteration of charge appears to be based on the subsequent developments, viz. resiling by accused no.42 of her status as approver, the framing of charge against her and the material that was brought on record during the course of recording of evidence. It is required to be noted here that the Apex Court, while dealing with an issue of alteration of charge provided under section 216 of CrPC observes that the said provision confers jurisdiction on courts to alter or add any charge framed earlier at any time before judgment is pronounced. However, such power is required to be exercised by the court in existence of some material before it and which has some connection or link with the charge sought to be amended, added or modified. The addition or alteration of the charge must be for an offence made out by the evidence recorded during the course of the trial before the court. It is also required to be noted that such alteration or addition is with an intention to let the accused know and make him fully aware of the exact charge against him, so that he gets ample and fair opportunity of meeting it and putting forward defence, if any.

16. Just because the accused has disclosed his defence *qua* the charge earlier framed, in my opinion, that by itself would not put an embargo on the right of the prosecution to plead for alteration of charge under section 216 of CrPC. The language employed in section 216 of CrPC provides for alteration or addition of charge, at any point of time before judgment is pronounced. The stage as is prescribed, which is the

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outer limit for exercise of powers under section 216 of CrPC is before pronouncement of judgment, which includes the position that even if the defence of the accused is disclosed, still the charge can be altered or added.

17. The Apex Court, in the matter of **Main Pal vs. State of Haryana**, reported in **(2010) 10 SCC 130**, in paragraphs 12 and 13 has observed thus :-

“12. In *Willie (William) Slaney vs. State of Madhya Pradesh* [AIR 1956 SC 116] this court explained the concepts of "prejudice to the accused" and "failure of justice" thus:-

"6. 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

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vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which [the Code](#) is based.

7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by [the Code](#) and wherever that is the case full effect must be given to its provisions."

13. This Court then examined the question as to when a procedure adopted could be said to have worked actual injustice to the accused and held :

"13.....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

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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.

44.... [The Code](#) is emphatic that 'whatever' the irregularity it is not to be regarded as fatal unless there is prejudice.

It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.

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

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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.

45. In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage.....

But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases however alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even judges, are sometimes prone to argue and to act as if there were."

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18. It is required to be noted that the technicalities qua achieving the goal of substantive justice are some time required to be ignored. In judging the prejudice to an accused, the court is required to have broader vision and to look into the substance and not the technicalities. The main concern of the court is to ensure whether the accused had fair opportunity to stand to trial and he actually gets such opportunity to defend himself.

19. Again, while dealing with the similar principle *qua* the right of the respective parties under section 216 of CrPC as regards alteration or addition of charge, the Apex Court, in the matter of **Anant Prakash Sinha alias Anant Sinha vs. State of Haryana & anr.**, reported in **(2016) 6 SCC 105**, after recapitulating the law laid down till date on the said issue, has observed in paragraphs 18 and 19 thus :-

“18. 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](#).

19. In addition to what we have stated herein above, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in [Section 16 CrPC](#). It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial. It has been held in [Amar Singh v. State of Haryana](#) that the accused must always be made aware of the case against them so as to enable him to understand the defence that he can lead. An accused can be convicted for an offence which is minor than the one he has been charged with, unless the accused satisfies the court that there has been a failure of justice by the non- framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. While so stating, we may reproduce the following two passages from [Bhimanna v. State of Karnataka](#):

“25. Further, the defect must be so serious that it cannot be covered under [Sections 464/465 CrPC](#), 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 charges has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not.

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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).

26. This Court in [Sanichar Sahni v. State of Bihar](#), while considering the issue placed reliance upon various judgments of this Court particularly on *Topandas v. State of Bombay*, *Willie (William) Slaney v. State of M.P.*, *Fakhruddin v. State of M.P.*, *State of A.P. v. Thakkidiram Reddy*, *Ramji Singh v. State of Bihar* and *Gurpreet Singh v. State of Punjab* and came to the following conclusion: (Sanichar Sahni case, SCC p. 204, para 27)

“27. Therefore ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.”

A similar view has been reiterated in *Abdul Sayeed v. State of M.P.*”

20. In this background, if the law as is discussed by the Apex Court in the aforesaid judgments is considered in the light of factual matrix of the

present case, it is required to be considered that original accused no.42, who resigns from her status as an approver, is required to face trial independently and her trial came to be separated at the behest of all accused. After the charge was framed and altered, sufficient evidence has been recorded by the court and perhaps that appears to be a reason to order alteration/addition of the charge as is prayed by the prosecution. While doing so, the learned Special judge, in my opinion, was alive to the fact that the accused must get a proper and fair opportunity of representing his defence before the court, so as to achieve the object of compliance with the principles of natural justice.

21. In view thereof, in my opinion, the stage at which the powers under section 216 of CrPC are exercised by the learned court below and the considerations which weighed for exercising such powers appear to be in tune with the requirement of section 216 of CrPC. As such, no prejudice could be noticed to the accused or demonstrated by the prosecution before this court because of passing of the order in exercise of powers under section 216 of CrPC. As such, the said contention of the petitioners-accused stands rejected.

22. This takes me to the next contention wherein the order of the court re-calling witnesses no.1 to 14, 17, 23, 24, 25 and 38 came to be passed below Exh.3892. The learned Special Judge, in fact, in clear terms has stated about the status of the matter, the number of witnesses examined, the separation of trial of accused no.42 after she resiled from her status as

an approver. While dealing with such an eventuality in the matter of **State (NCT of Delhi) vs. Shiv Kumar Yadav & anr.**, reported in **(2016) SCC 402**, the Apex Court, in paragraphs 10 to 14, has observed thus :-

“10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of

the decisions for the principles laid down which are relevant for this case.

12. In Rajaram case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall under Section 311 Cr.P.C. which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed :

"13. .. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 CrPC, as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

"311. Power to summon material witness, or examine person present.- Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

Section 138, Evidence Act

'138. Order of examinations.- Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

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The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.'

14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court.

The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription

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contained in Section 311 CrPC. It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind :

"17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

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17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be

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impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and

circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

14. In Hoffman Andreas case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed :

"6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal

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view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

23. In view of alteration of the charge as is allowed and for the reasons stated herein above, in my opinion, the order of re-calling of witnesses appears to be just and proper. No case for interference is made out. As such, writ petitions fail and stand rejected.

24. At this stage, learned Counsel appearing on behalf of the petitioners prayed that the proceedings before the learned trial court be stayed for a period of fifteen days as the petitioners want to exhaust their right of appeal. The prayers stands rejected for the reason that the Apex Court has already expedited the matter and even the additional charge is already framed.

(N.W. SAMBRE, J.)

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