

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.04.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Crl.R.C.No.654 of 2016 and
Crl.M.P.Nos.4589 and 4590 of 2016

Kumar ..Petitioner/Petitioner/Accused
Vs.

State rep. by
The Deputy Superintendent of Police,
Arakkonam Division,
Vellore District ...Respondent/Respondent/
Complainant

Prayer: Petition filed under Sections 397 and 401 of Cr.P.C.,
to set aside the Order in Criminal M.P.No.5302 of 2015 in
Spl.S.C.No.5 of 2006 passed by the Learned Principal District
and Sessions Judge, Vellore dated 11.01.2016.

For Petitioner : Mr.P.Krishnan
For Respondent : Mr.V.Arul
Government Advocate (Crl.Side)

O R D E R

Heard both sides. With consent of both sides, the main
Criminal Revision Petition itself is taken up for final disposal.

2.The Petitioner/Accused has focused the instant Criminal
Revision Petition before this Court as against the Order dated
11.01.2016 in Crl.M.P.No.5302 of 2015 in Spl.S.C.No.05 of 2006
passed by the Learned Principal District and Sessions Judge,
Vellore.

3. The Learned Principal District and Sessions Judge,
Vellore while passing the Impugned Order on 11.01.2016 in
Crl.M.P.No.5302 of 2015 in Spl.S.C.No.05 of 2006 (filed by the
Respondent / Complainant as Petitioner) at Paragraph No.8 had
interlia observed that

" I am of the opinion that though, the
respondent raised as may as grounds not to frame
additional charge, the same is not sustainable, since
because of the reason that it is crystal clear from the

above citations, that additional charge may be framed, that when the Court feels that there is sufficient ground to presume that the accused has alleged to have committed the offence of 376(1) of IPC. Further, it is not out of place to mention that further framing of additional charge will no doubt will pave way for complete adjudication but also will certain meet the ends of justice at all corners of Law and thereby, I incline to allow this Petition..."

and resultantly allowed the Petition and directed additional charge for the offence under Sections 376(1) of IPC instead of under Section 376 read with 511 of IPC., besides under Section 3 (1) (XI)(XII) and 3(2) (v) of SC/ ST (POA) Act, 1989 to be framed against the Petitioner / Accused.

4. The Learned Counsel for the Petitioner / Accused submits that this Court in the Judgment in C.A.No.23 of 2007 on 22.09.2015 had directed the trial court to frame questions under Section 313 of Cr.P.C., 1973 in consonance with the available evidence on record and to dispose of the Special Sessions Case No.05 of 2006 before the end of December, 2015. However, it is represented on behalf of the Petitioner / Accused that the Learned Principal District and Sessions Judge, Vellore had erroneously entertained a Petition in C.M.P.No.5302 of 2015 in Spl.S.C.No.5 of 2006 (filed by the Respondent / State / Complainant/ Prosecution) and allowed the Same by giving necessary direction for framing of an additional charge in respect of an offence under Sections 376(1) of IPC instead of under Section 376 read with 511 of IPC., besides under Section 3 (1) (XI)(XII) and 3(2) (v) of SC/ ST (POA) Act, 1989.

5. The core contention advanced on behalf of the Petitioner / Accused is that there is no question of framing additional charge in Spl.S.C.No.05 of 2006 on the file of Learned Principal District and Sessions Judge, Vellore and in fact the Impugned Order is quite in negation of the Judgment dated 22.09.2015 in C.A.No.23 of 2007 passed by this Court.

6. The Learned Counsel for the Petitioner draws the attention of this Court to the fact that in Crl.A.No.23 of 2007 on 22.09.2015 (filed by the Appellant therein / Revision Petitioner before this Court) at Paragraph No.10 and thereafter had observed the following:-

" 10. In fact, this Court has closely perused the evidence adduced by the prosecutrix, who has been examined as P.W.1. In fact, in Question Nos.3, 4 and 9, certain words have not been uttered by he prosecutrix. Therefore, it is quite clear that certain questions posed to the accused under Section 313 of the Criminal Procedure Code, 1973 are not in consonance with the evidence available on record. Since certain

questions posed under Section 313 of the Criminal Procedure Code, 1973 are not in consonance with the available evidence on record, it is needless to state that the entire convictions and sentences passed by the trial court, are liable to be set aside and matter is liable to be remitted to the file of the trial court.

In fine, this criminal appeal is allowed. The convictions and sentences passed by the trial court are set aside and Special Sessions Case No.5 of 2006 is remitted to the file of the trial court. The trial court is strictly directed to frame questions under Section 313 of the Criminal Procedure Code, 1973 in consonance with the available evidence on record. The trial court is also directed to dispose of the Special Sessions Case No.5 of 2006 before the end of December, 2015. The fine amounts paid by the appellant / accused are ordered to be refunded forthwith. The Registry is directed to send all records."

7. It is further projected on behalf of the Revision Petitioner that obviously the Learned Principal District and Sessions Judge, Vellore had misconstrued the direction issued by this Court in C.A.No.23 of 2007 dated 22.09.2015 and incorrectly had entertained C.M.P.No.5302 of 2015 filed by the Respondent / State and passed orders resulting in serious miscarriage of justice.

8. At this stage, this Court has perused the C.M.P.No.5302 of 2015 (filed by the Respondent / Complainant / State as Petitioner before the Trial Court) and is of the considered view that the same was filed under Section 216 of Cr.P.C., Moreover in the said Miscellaneous Petition, a relief was sought for to frame additional charge under Section 376(1) of IPC instead of under Section 376 read with 511 of IPC., besides under Section 3 (1) (XI) (XII) and 3(2) (v) of SC/ ST (POA) Act, 1989 against the accused (Revision Petitioner)

9. The Learned Counsel for the Revision Petitioner seeks in aid of the Order dated 12.08.2015 in CrI.R.C.No.713 of 2015 filed by the State represented by the Inspector of Police, H8, Thiruvottriyur Police Station V. K.P.Sankar and Six Others whereby and whereunder at Paragraph Nos.19 to 21 it is observed as follows:-

"19. Again, this Court in the decision in the case of (P.Krithikalakshmi Vs. Sri Ganesh and others) 2013 (3) Madras Weekly Notes (CrI) 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 is 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."

10. The Learned Counsel for the Petitioner cites the Order dated 30.09.2011 in CrI.O.P.(MD) No.11823 of 2011 between Chellapandi V. Deputy Superintendent of Police, C.B.C.I.D., Madurai District and Others wherein at Paragraph Nos.7 to 9, it is observed as under:-

"7. On a careful consideration of the above ratio laid down and in the light of the discussion made above, this Court is of the considered view that the Court below has not exercised the power under section 216 of the Code of Criminal Procedure in the manner known to law as there is absolutely no material available on record to add the charge punishable under section 302 IPC.

8. It is settled law that a judgment cannot be read like a statute. The Hon'ble Supreme Court has rendered the above judgment by taking into consideration of facts involved therein. The Hon'ble Supreme Court, while issuing such direction, has held that the Trial court shall ordinarily add the charge punishable under Section 302 IPC to the charge of Section 304(B) IPC. The word "ordinarily" will have to be interpreted in consonance with the exercise of Power under Section 216 of the Code of Criminal Procedure. Therefore, the said pronouncement of the Hon'ble Supreme Court cannot be read like a statute or an enactment to apply to all the cases in which charges have been framed for the alleged offence punishable under Section 304(b) IPC.

9. As discussed above, this Court does not find any iota of material for altering the charges for alleged offence punishable under Section 302 of IPC. Accordingly, the order of the learned District and Sessions Judge, Sivagangai dated 04.08.2011 made in S.C.No.91 of 2008 is hereby set aside and this Criminal Original Petition stands allowed. It is made clear that the Trial court shall decide the case in S.C.No.91 of 2008, on its own merits without being influenced by the order of this Court, as it pertains to addition of the charges for the alleged offence punishable under Section 302 IPC alone. The learned District and Sessions Judge, Sivagangai, is further directed to proceed with the charges framed against the petitioner for the alleged offences punishable under Sections 306, 498(A) and 304(B) IPC. Consequently, connected miscellaneous petitions are closed."

11. One cannot ignore a primordial fact that a Court of Law has requisite power to add to a charge. In fact, the Court has power to make alteration in the charge at any stage after the charge has been framed. The words 'Add to' means addition of a new charge and not mere addition of few words or corrections. The Court may alter or add to any charge upon its own motion or on application by the prosecution which should be made immediately after the charge is explained. Further the charge

may be altered or added under Section 216 only when there is evidence to support it. To put it succinctly a new charge can be added and a charge can be altered only if there is enough material before the court either in the complaint or in the evidence to justify action. A Court of Law may alter or add any charge before the Judgment is pronounced and the said power may be exercised when the prosecution evidence is being adduced in the case. However, it should exercise its sound discretion in this regard.

12. It is to be remembered that addition or alteration of a charge does not open up the trial from the beginning and the Court may proceed with the trial if it is of the opinion that there will be no prejudice to the accused as per decision *Shamlal Kalwar V. Emperor* reported in (1921) 1 Patna at Page 54.

13. At this juncture, this Court aptly points out the decision of Hon'ble Supreme Court *Sabbi Mallesu and Others V. State of Andhrapradesh* reported in AIR 2006 Supreme Court at Page 2747 and at Special Page 2749 whereby and whereunder at Paragraph No.19 it is observed as under:-

"19. The power of the Court to alter the charges is neither in doubt nor in dispute but in terms of Sub-section (2) of Section 216 Cr.P.C., it was obligatory on the part of the learned Sessions Judge to bring it to the notice of the accused and explain the same to the accused. The same having not been done, it cannot be said that the requirements of Section 216 of the Criminal Procedure Code stood complied with. It must also be borne in mind that all the accused were acquitted for commission of an offence under Section 147 of the Indian Penal Code."

14. Also this Court worth recalls and recollects the decision of Hon'ble Supreme Court *Hasanbhai Valibhai Qureshi V. State of Gujarat* and others reported in AIR 2004 Supreme Court at Page 2078 and at Special Page 2080 wherein at Paragraph No.10, it is observed as follows:-

"10. Therefore, if during trial the trial Court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any additional or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

15. As far as the present case is concerned, it transpires that the Learned Principal District and Sessions Judge, Vellore had entertained C.M.P.No.5302 of 2015 in Spl.S.C.No.05 of 2006 (filed under Section 216 of Cr.P.C) and consequently passed an Order to frame additional charge under Section 376(1) of IPC instead of under Section 376 read with 511 of IPC., besides under Section 3(1) (XI)(XII) and 3(2) (v) of SC/ ST (POA) Act, against the accused. The filing of the said Criminal Miscellaneous Petition before the trial court by the Respondent / Complainant as Petitioner is not correct because of the simple reason that only the concerned court / trial court has got the power to make alteration in the charge at any stage after the charge has been framed as per decision of Hon'ble Supreme Court Kuriachan Chacko V. State of Kerala reported in (2008) 8 SCC at Page 708.

16. In the instant case, the Learned Principal District and Sessions Judge, Vellore has entertained the Crl.M.P.No.5302 of 2015 filed by the Respondent / Complainant / Prosecution thereon, which in the considered opinion of this Court is not quite in tune with the spirit and tenure of the ingredients of Section 216 of Cr.P.C., Added further even in C.A.No.23 of 2007, this Court on 22.09.2015 had only directed the trial court to frame questions under Section 313 of Cr.P.C., in consonance with the available evidence on record etc., Therefore, looking at from any angle the Impugned Order dated 11.01.2016 passed by the trial court is not per se and legally tenable in the eye of law. As such, this Court is perforced to interfere with the said Order dated 11.01.2016 in C.M.P.No.5302 of 2015 and sets aside the same in furtherance of substantial cause of justice. Consequently, the Criminal Revision Petition succeeds.

In fine, the Criminal Revision Petition is allowed. Consequently, connected Miscellaneous Petitions are closed. The Order dated 11.01.2016 in Crl.M.P.No. 5302 of 2015 in Spl.S.C.No. 05 of 2006 on the file of Learned Principal District and Sessions Judge, Vellore District is set aside by this Court for the reasons assigned in this Criminal Revision Petition. Resultantly, the Crl.M.P.No.5302 of 2015 filed by the Respondent / Complainant / State (before the trial court) is dismissed. However, this Court makes it abundantly clear that allowing of the present Revision Petition will not preclude the trial court to make alteration in the charge subject to there being any available material on record in this regard. Also that the trial court in that event is to provide necessary opportunity to the Revision Petitioner / Accused and at that point of time, it is open to the Revision Petitioner to raise all factual and

legal pleas before the trial court in the manner known to Law
and in accordance with Law.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssd

To

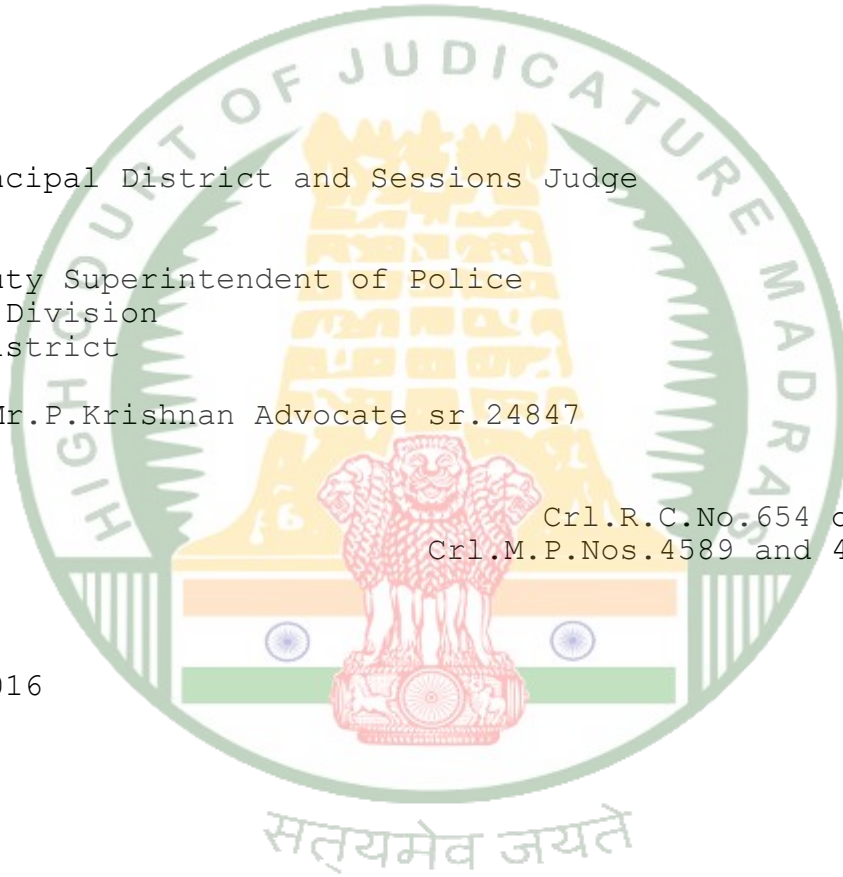
1.The Principal District and Sessions Judge
Vellore

2.The Deputy Superintendent of Police
Arakkonam Division
Vellore District

+1 cc to Mr.P.Krishnan Advocate sr.24847

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