

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.2678 of 2017

Arising Out of PS.Case No. -147 Year- 2004 Thana -BAJPATTI District- SITAMARHI

- =====
1. Anand Kumar Singh @ Kali Singh Son of Late Deo Narayan Singh
 2. Ramakant Singh S/o Late Raj Nandan Singh
 3. Rajeev Kumar S/o Anand Kumar Singh
- All residents of Village - Bhasepur, P.S. - Bajpatti, District - Sitamarhi.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Shiv Shankar Singh Son of Late Ram Dayal Singh Resident of Village - Bhasepur, P.S. - Bajpatti, District - Sitamarhi.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Surendra Kishore Thakur

For the Opposite Party/s : Mr. Sri Sanjay Kumar Pandey

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL ORDER

02/ 28-04-2017

Heard learned senior counsel for the petitioners and Mr. J.N. Thakur, learned counsel for the State.

The present application has been filed for quashing the order dated 22.09.2016, passed by learned 1st Additional Sessions Judge, Sitamarhi in Sessions Trial No. 209 of 2012, arising out of Bajpatti P.S. Case No. 147 of 2004 (Protest – cum- Complaint Case No. C1-371 of 2005), whereby the learned trial court has altered the charge from section 395 to section 396 of IPC on the petition dated 03.06.2016, filed by the prosecution.

The prosecution case is that, on the basis of fard-beyan of Shiv Shankar Singh, dated 6.12.2014 at 3.00 A.M.,



Bajpatti P.S. Case No. 147 of 2004 was registered under Sections 396 and 398 of the IPC against petitioner nos. 1 and 2 and fifteen-sixteen unknown persons, wherein it was alleged that on 06.12.2004 when the informant was sleeping in the house, accused persons entered into the house, committed dacoity and in course of dacoity, they exploded a bomb which resulted in the death of one Gopal Singh. Thereafter, the accused persons fled away with the robbed articles.

On conclusion of investigation, the accused persons were not sent up for trial as the final form was submitted on 9.4.2005 and the same was accepted by the learned Magistrate. One Kamlesh Singh, the father of the deceased Gopal Singh also filed Complaint Case No. C1-423 of 2004, which after being transferred under section 156(3) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') got registered as Bajpatti P.S. Case No. 141 of 2004 on 29.12.2004 under sections 302 and 120B of the Indian Penal Code, wherein the informant of the present case Shiv Shankar Singh and others were made accused. In the said case, after conclusion of investigation, final report (chargesheet) was submitted on 29.8.2005 under sections 302 and 120B of the IPC, under the Explosive Substances Act and Arms Act against Shiv Shankar Singh and others. As per the



impugned order, the said trial is pending though it is recorded in the order dated 22.11.2011, in SLP (Cri) No. 2768 of 2010, as contained in Annexure 4, that the same has already concluded. During investigation and before filing of the final form, protest petition was filed on 4.4.2005 by the informant Shiv Shankar Singh in Bajpatti P.S. Case No. 147 of 2004, but the said protest petition was not pressed. On submission of the final form on 9.4.2005, second protest petition was filed on 22.9.2005, which was registered as Protest-cum-Complaint Case No. C-1 371 of 2005. Thereafter, after examining the complainant on Solemn Affirmation and after examining several enquiry witnesses, the learned Judicial Magistrate Ist Class, Pupri, vide order dated 2.8.2008, directed for issuance of process after taking cognizance under section 395 IPC. The said order of cognizance was challenged by the accused Anand Kumar Singh alias Kali Singh before this court in Cr. Misc. No. 36335 of 2008. A bench of this court, considering the fact that on second protest the Magistrate treated the same as a complaint and proceeded, quashed the order of cognizance dated 2.8.2008, vide order dated 6.5.2009, as contained in Annexure 3 to the present quashing application.

The informant O.P. No. 2, Shiv Shankar Singh, challenged the order of the this court dated 6.5.2009,



passed in Cr. Misc. No. 36335 of 2008, before the Apex Court in S.L.P. (Cri) No. 2768 of 2010, which was subsequently converted in Cr. Appeal No. 2160 of 2011 and the Apex Court vide order dated 22.11.2011 (Annexure 4), set aside the order of this court dated 6.5.2009 (Annexure 3) and restored the order of the learned Magistrate, wherein it is recorded that the trial of Bajpatti P.S. Case No. 141 has already concluded.

On remand, Bajpatti P.S. case No. 147 of 2004 was committed to the Court of Sessions and consequently charge was framed under section 395 IPC and the trial commenced.

On the basis of the evidence of P.W. 1, Sonu Kumar Singh, the brother of deceased Gopal singh and P.W. 2, Nirmala Devi, the mother of the deceased, the prosecution filed a petition on 3.6.2016, under section 216 of the Code (Annexure 8), for altering the charge from section 395 to section 396 of the Indian Penal Code, on the ground that there was sufficient accusation in the FIR and the complaint that the informant's nephew Gopal Singh had protested, when the dacoits hurled bomb and he received injury and died on spot, this accusation has been supported by aforesaid P.W. 1 and P.W. 2 with the undertaking that the prosecution is ready to produce the witnesses



already examined.

Though the impugned order suggests that three rejoinder petitions to the alteration of charge have been filed, but only one rejoinder petition dated 18.6.2016 has been brought on record, filed on behalf of petitioner no. 1, Anand Kumar Singh, and petitioner no. 3, Rajeev Kumar, as contained in Annexure 9, wherein the stand of petitioner nos. 1 and 3 was that the accusation has been levelled on the basis of suspicion due to property dispute and P.W. 1 was admittedly not present at the place of occurrence and P.W. 2 did not identify any accused on the spot.

On considering the rival submissions of the parties and perusing the record, the learned Ist Additional Sessions Judge, Sitamarhi, vide order dated 22.9.2016, passed in S.Tr. No. 209 of 2012, arising out of Bajpatti P.S. Case No. 147 of 2004, allowed the petition of prosecution for altering charge from section 395 of 396 of the IPC on the ground that the P.W. 1- brother of the deceased Gopal Singh and P.W. 2 - mother of the deceased have supported the accusation levelled in the FIR and the complaint that during the course of dacoity the accused hurled bomb as a result of which Gopal Singh after receiving explosive injury, succumbed to the injuries on spot. This fact has been supported by P.W. 1 and though P.W. 2 was not present on the



spot but she was informed about the occurrence including the death of Gopal Singh on spot due to injuries caused by explosion. The postmortem report also corroborates the death of Gopal Singh due to explosive injuries. Hence, the learned court of 1st Additional Sessions Judge, Sitamarhi directed the accused persons to be present on 20.10.2016 for altering charge from section 395 to 396 of the IPC. The said order is under challenge in the present proceeding.

The learned counsel for the petitioners submits that the cognizance was taken under section 395 of the IPC, which was tested up to the Apex Court. For the murder of deceased Gopal Singh, a separate case was filed for which S.T. No. 865 of 2005 was pending against the informant of this case, namely Shiv Shankar Singh. The FIR of Bajpatti P.S. Case No. 147 of 2004 does not stipulate that the deceased was taken to the hospital by the police after preparing panchnama nor the postmortem report was submitted before the learned trial court.

Learned APP submits that the learned Additional Sessions Judge has passed the impugned order after considering the materials on record and the evidence of two witnesses, who are none else but brother and mother of the deceased.



Considering the rival submissions of learned counsels for the parties, this court is not inclined to pass the order for issuance of notice to the O.P. No. 2. In order to appreciate the issue in question, it is relevant to quote the provisions under sections 216 and 217 of the Code which read as follows:

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 defense 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.

217.Recall of witnesses when charge altered.-

Whenever a charge is altered or added to by the



Court after the commencement of the trial, the prosecutor and the accused shall be allowed –

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.

Section 216 of the Code confers jurisdiction on the court to alter or add to any charge at any time before judgment is pronounced. Sub-section (2) to (5) prescribes the procedure which has to be followed after addition or alteration of charge. Fair trial is the *sine qua non* of the criminal jurisprudence. Sub-section (4) of Section 216 of the Code clearly stipulates that if the alteration or addition of charge is likely to prejudice the accused or the prosecution, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. Section 217 of the Code stipulates recall of witnesses when charge is altered. This order of recall is equally permissible to the prosecution as well as the accused. To the extent of recall, re-summon, examination on alteration or addition, any witness who may have been examined if the prosecution and the accused



desired to recall or examine such witness unless the court comes to an opinion that such prayer for recall or examination is for vexation or delay the trial or for defeating the ends of justice. Clause (b) of Section 217 further gives liberty to the court to call any further witness whom the court may think to be material. Hence, the power of alteration and addition of charge is very wide. The trial court has only to see that it may not prejudice the accused or the prosecution. The same has been noticed by the Privy Council in the case of Thakur Shah Vs. King Emperor (1942-43) 70 IA 196 = AIR 1943 PC 192. The relevant portion reads as follows:

“The alteration or addition is always, of course, subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he is not fully aware of the charge made or is not given a full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred.”

The Privy Council further held that alteration or addition of charge must be for an offence made out by the evidence recorded during trial before the court but it does not necessarily mean that alteration can be done only in case the evidence is adduced.



The scope and ambit of Sections 216 and 217 of the Code has been elaborated by the Apex Court in the case of Jasvinder Saini and Others Vs. State (Government of NCT of Delhi) (2013) 7 Supreme Court Cases 256. Paragraph 11 reads as follows:

“11. A plain reading of the above would show that the Court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the Court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the Court after commencement of the trial. There can in the light of the above be no doubt about the competence of the Court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the Court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the Court.”



In the case of Anand Prakash Sinha Vs. State of Haryana (2016) 6 Supreme Court Cases 105, the Apex Court has held that the charge can be altered if there is some defect or something is left out. The test is that it must be founded on the materials available on record. If the court has not framed the charge despite the material on record, it has the jurisdiction to add and alter the charge if the materials produced before the trial court or the subsequent evidence comes on record. Paragraph 18 reads as follows:

“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 Code of Criminal Procedure.”

The Apex Court in the case of Jasvinder Saini (supra) has observed that alteration or addition of charge under section 216 of the Code is generally made either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.

The Apex Court in the case of Hasanbhai Valibhai Qureshi Vs. State of Gujarat and Ors. (2004) 5 Supreme Court Cases 347 has held that the court has to exercise such jurisdiction on consideration of broad probabilities of the case based upon total effect of the evidence and documents produced. Paragraph 10 reads as follows:

“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 addition 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.”



The scope and ambit of exercise of jurisdiction under section 216 of the Code has also been elaborated by the Apex Court in the case of Central Bureau of Investigation Vs. Karimullah Osan Khan (2014) 11 Supreme Court Cases 538. Paragraph Nos. 17 and 18 read as follows:

“17. Section 216 CrPC gives considerable powers to the Trial Court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add 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. (See Harihar Chakravarty v. State of West Bengal AIR 1954 SC 266). Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in in Section 216 CrPC and other related provisions.”

Hence, the consistent view has been that the charge can be altered at any stage of trial provided the material on record connects the accused with the offence. The only safeguard is that it may not cause prejudice to the prosecution and accused or for safeguarding the prejudice the ample provision has been made under sub-sections (2) to (5) of Section 216 and under section 217 of the Code.

Now, applying the aforesaid principle to the present case, it is apparent that there is specific case in the fardbeyan on the basis of which Bajpatti P.S. Case No. 147 of 2004 was registered with accusations that the nephew of the informant, namely, Gopal Singh, came out of the house, protesting



against the accused persons, when one of the accused hurled a bomb, which hit Gopal Singh, as a result he died on the spot. Similar averments were made in the protest petition also which reads as follows:

“.....कामेश्वर सिंह दौड़ते हुए घर से बाहर निकला और बोला कि हमारे दादा को नहीं मारिये इतने में एक डकैत गोपाल सिंह को बम से मार दिया जिससे गोपाल अपने घर के सामने जमीन पर गिर कर छटपटा कर मर गया हैं । डकैत लोग करीब 45 मिनट तक लूट पाट किये हैं।

P.W. 2, Nirmala Devi, who was present at the place of occurrence, has stated that the miscreants threw explosives which hit Gopal Singh and he died on the spot. P.W. 1 also suggested that he came to know about the use of explosives and injury caused to the victim through telephone call by his uncle. Hence, though there was material on record when the order of issuance of process was being passed but the cognizance was only taken under section 395 of IPC, but it is well settled view that even if the cognizance is taken under a provision or charge is framed under a provision but if the court feels that the charge has to be altered either on the basis of defective charge being framed or on the basis of material available on record connecting the accused with the alleged offence, then charge can be altered. Section 396 of the IPC prescribes penal provision for dacoity with



murder which reads as follows:

“396. Dacoity with murder - If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or ¹⁵²[imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

The aforementioned provision of the I.P.C. suggests that anyone of the five or more persons who are conjointly committing dacoity, commits murder while committing dacoity, every one shall be punished with death or imprisonment for life which may extend to ten years.

In the present case, the death of Gopal Singh on the spot with explosive injury which is being corroborated by the postmortem report is admitted. At the time of alteration of charge the court has not to see as to who out of five or more have actually committed the murder. The FIR was registered under section 396 and 398 IPC. Consequently, cognizance was taken under section 395 IPC and charges were framed under section 395 and since death of Gopal Singh is admitted in course of commission of dacoity, hence, this court finds no infirmity in alteration of charge.



Though the impugned order suggests that the father of the deceased, Kameshwar Singh, lodged Bajpatti P.S. Case No. 141 of 2004, on 29.12.2004, after about three weeks of the occurrence with accusation under sections 302 and 120B IPC and trial of the same is still pending but the same has not been pleaded by the petitioners either in the rejoinder to the application under section 216 for alteration of charge, filed by the prosecution or in the present application. The impugned order further suggests, it was passed on 22.9.2016, whereby the petitioners were directed to be present on 20.10.2016 for alteration of charge but there is nothing on record to suggest that the altered charge has been framed. Hence, this court has confined its finding only to the extent of court's jurisdiction of altering charge.

In view of the discussions made above, this court finds no merit in the present application. It is, accordingly, dismissed. However, it is clarified that any observation made in this order shall not prejudice the case of the accused or the prosecution during trial.

(Dinesh Kumar Singh, J)

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