

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.58212 of 2017

Arising Out of PS.Case No. -99 Year- 2016 Thana -BANKA District- BANKA

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1. Md. Shah Alam @ Babloo @ Shah Alam @ Bablu son of Fazal Mahmood.
 2. Md. Kalim @ Kalim Ansari @ Md. Kalim Ansari son of Takkar.
 3. Md. Chhotu @ Islam son of Alauddin.
 4. Md. Fazal Mahmood @ Fazlu @ Fazal Mahmood @ Faizlu @ Fazlu son of Ismail Hussain.
 5. Md. Mazhar Hussain @ Mazhar Hussain @ Mazhar Ansari son of Ismail.
 6. Murtaz Ansari @ Md. Murtaza son of Liyakat Ansari
 7. Sajid Ansari son of Taj Ali
 8. Sahul Ansari son of Noor Mohammad.

All resident of village- Singarpur, P.S.- Dhouniya, District- Banka (Bihar)

.... Petitioners

Versus

1. The State of Bihar
2. Quayum Ansari son of late Maqbook Ansari, resident of village- Barahat, P.S.- Barahat, District- Banka (Bihar)

.... Opposite Parties.

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Appearance :

For the Petitioner/s : Mr. Raju Giri, Advocate
Mr. Santosh Kumar Mishra, Advocate
For the State : Mr. Jharkhandi Upadhyay, APP
For the informant : Mr. Omprakash Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 17-01-2018

This application under Section 482 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') has been filed by the petitioners for quashing the order dated 10.08.2017 passed by the learned Additional Sessions Judge-II, Banka in Sessions Trial No.



303 of 2016, arising out of Banka (Barahat) P. S. Case No. 99 of 2016 by which he has allowed the petition filed under Section 216 of the Cr.P.C. on behalf of the prosecution and directed for addition of charge under Section 376-D read with 34 of the Indian Penal Code (for short 'IPC').

2. The first information report (for short 'FIR') has been instituted on the basis of written report of Quayum Ansari, son of late Maqbool Ansari, resident of village- Barahat, P.S.- Barahat, District- Banka on 20.12.2016.

3. The prosecution case, in brief, is that on 12.02.2016 at about 11 am, the informant's daughter Rani aged about 14 years went to market to bring shampoo but did not return till late hours. The informant started searching but could not locate her. It has been alleged that on 13.02.2016, the informant saw the photograph of his daughter in the newspaper and came to know that she has been kept in Anathalaya at Bhagalpur. According to the informant at about 08.00 am., he got information on phone from Nath Nagar Ramanandi Anathalaya that the health of his daughter is not good and he should come to take her. When he went to Bhagalpur then the staff of the Anathalaya told him that after her statement in the court and medical examination he could take her. According to the informant, her daughter was not handed over to him.



4. It has been submitted by Mr. Raju Giri, learned counsel for the petitioners that though the victim returned to her house on 13.02.2016, neither the victim nor her father lodged the case. The case was lodged only on 20.02.2016 without giving any explanation for the delay caused in institution of the FIR. In the statement made under Section 164 of the Cr.P.C. on 24.02.2016, the victim did not whisper a single word in her statement against the petitioners about rape or any ill-treatment. Even in the statement made under Section 161 of the Cr.P.C., she did not allege that the rape was committed upon her. But later on, in her statement made under Section 161 of the Cr.P.C. before the police on 09.11.2016, she alleged that the petitioners committed rape with her. He submitted that on submission of the police report, cognizance was taken for the offence punishable under Section 366-A read with 34 of the IPC and after commitment charge was also framed only under Section 366-A read with 34 of the IPC. According to him, before the court of session, two petitions were filed for amendment of charge by the prosecution. In the first petition on 16.05.2017, a prayer was made for addition of charge under Sections 363, 364, 120-B & 376-D of the IPC. Again, on 25.05.2017, a petition was filed for further addition of charge under Section 328 of the IPC. After hearing the parties, the trial court,



vide its order dated 20.06.2017, rejected both the petitions dated 16.05.2017 and 25.05.2017 filed under Section 216 of the Cr.P.C. But, subsequently after examination of two prosecution witnesses, a petition was filed on 20.07.2017 for addition of charge under Section 376-D read with 34 of the IPC, which was allowed by the learned Additional Session Judge-II, Banka vide order dated 10.08.2017.

5. Mr. Giri, learned counsel for the petitioners further submitted that the impugned order dated 10.08.2017 is bad in law, as the court below has reviewed its own order dated 28.11.2016 by which a petition under Section 216 of the Cr.P.C. filed on the basis of the same evidence was rejected. He submitted that the order is also bad because the court below failed to appreciate that there was no sufficient evidence to direct for addition of charge under Section 376-D of the IPC.

6. *Per contra*, learned counsel for the State and learned counsel appearing for the informant submitted that there is no illegality in the order dated 10.08.2017 passed by the court below. They submitted that the said order cannot be said to be review of the earlier order in view of the fact that the order dated 10.08.2017 was passed after recording the evidence of the victim and her brother and both of them had categorically stated in their



deposition that these petitioners had ravished her on the fateful day. They submitted that while rejecting the earlier petition under Section 216 of the Cr.P.C. filed on behalf of the prosecution, the court below had accepted the submissions made on behalf of the accused persons that the materials on which charges were framed, were the same and there was no change of circumstance for addition of charge, as no evidence was led before the court, but subsequently when the court directed for addition of charge under Section 376-D of the IPC, the evidence of victim was on record wherein she had narrated the vivid detail of the manner in which she was gang raped. Thus, the court below rightly directed for addition of charge in the interest of justice.

7. I have heard learned counsel for the parties and perused the record.

8. Under Section 216 of the Cr.P.C., the court has power to add to a charge. The court has also power to make alteration in the charge, at any stage after the charge has been framed. Whether proper charge has been framed in the case is to be decided by the trial court at appropriate stage of the trial. If during trial, the trial court on a consideration of 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 object of Section 216 of the Cr.P.C. is to ensure a fair trial and the court is required to see as to whether alteration or addition of any charge at any time before judgment is pronounced is called for or not and if it is called for, such alteration or addition to any charge, must be on the basis of some evidence on record.

9. In the present case, when earlier petition filed under Section 226 of the Cr.P.C. was rejected, no evidence was led before the court. However, in course of trial, when the victim and her brother were examined, a petition was filed seeking addition of charge.

10. Having perused the evidence of the victim, which is annexed as Annexure-6 to the present application, I find that she has categorically stated that she had been bodily lifted by the accused persons and seated in a car. They raped her in a moving car one after another. Thereafter, she was taken to a lonely place and once again, some of the accused persons ravished her. The brother of the victim, in his deposition, has also supported the case of the victim that the petitioners gang raped her.

11. After the deposition of the two prosecution witnesses, the prosecution filed another application seeking addition of charge under Section 376-D of the IPC. On appreciation of evidence of the



two prosecution witnesses, the court below found it just and proper to add Section 376-D of the IPC to the charge.

12. Under Section 216 of the Cr.P.C., the court has power to add or alter to a charge at any stage after the charge has been framed if it is called for on the basis of some evidence on record at any time before judgment is pronounced. Thus, it cannot be said that at a stage, when the application for addition was premature and if the court below has dismissed the application under Section 216 of the Cr.P.C., there would be fetter on the power of the court to add to the charge if at a latter stage evidence comes for addition of charge.

13. It is true that Section 362 of the Cr.P.C. prohibits the court from altering or reviewing any judgment or final order disposing of a case after it has been signed except for the purpose of correction of clerical or arithmetical error. However, this bar against review under Section 362 of the Cr.P.C. cannot be made applicable if at a premature stage, an application under Section 216 of the Cr.P.C. is rejected by the court but later on, clenching evidence comes against the accused in respect of commission of an offence for which charge has not been framed and in such case, the court would be free to add to the charge new offence and proceed with the trial because it would not amount to review of earlier order



rather the same would be a fresh order in view of additional evidence comes on record in course of trial.

14. In the considered opinion of this Court, the order passed by the court below is just and proper. I see no merit in the contention made by the learned counsel for the petitioners that the impugned order amounts to review under Section 362 of the Cr.P.C. Apparently, when the earlier order was passed, no evidence was led before the court below and as such, the court below refused to allow the prayer of the prosecution to add to the charge Section 376-D of the IPC. However, subsequently, after evidences were led before the court below, it allowed the petition for addition of the charge on appreciation of evidences, which were not available earlier before the court below. The court below rightly exercised its power within ambit and scope of Section 216 of the Cr.P.C. to ensure a fair trial on the basis of evidence on record.

15. Accordingly, the application, being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J.)

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AFR/NAFR	NAFR
CAV DATE	NA
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