

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2276 OF 2018

Ajay Bapurao Karne, Age 52 years,
Occ.Profession, R/o.At Post Dahiwadi,
Tal.Man, District Satara. Petitioner
versus
The State of Maharashtra Respondent

WITH
CRIMINAL WRIT PETITION NO.2277 OF 2018

Ajay Bapurao Karne, Age 52 years,
Occ.Profession, R/o.At Post Dahiwadi,
Tal.Man, District Satara. Petitioner
versus
The State of Maharashtra Respondent

Mr.Dilip Bodake for petitioner.
Mrs.M.R.Tidke, APP, for State.
Mr.S.R.Shinde, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 25th June 2018

PC :

1. Heard both sides for final disposal. The petitioner in both these petitions is aggrieved by order passed by Trial Court dated 19th December 2016 and the order of Sessions Court dated 7th March 2018. The Trial Court allowed the application of prosecution and decided to frame additional charge under Section 3 of Medical Termination of Pregnancy Act, 1971 ('MTP Act') read with Section 312 of Indian Penal Code ('IPC'). The Sessions Court directed that

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additional charge be framed against petitioner for the offence under Section 5(2) of MTP Act read with Section 312 of IPC.

2. The petitioner was prosecuted for offence under Section 4 read with Section 5(3) of Medical Termination of Pregnancy Act, 1971 ('MTP Act'). The first information report was registered on 6th July 2012 vide CR No.13 of 2012. It is alleged that the petitioner-accused had terminated pregnancy of four women namely Kalpana Chavan, Smt.Rupali Nimbalkar, Smt.Rekha Bhise and Smt.Sangita Khade without authority. The FIR was registered for offence under Sections 4, 5(3) of MTP Act.

3. During the course of investigation statements of aforesaid women were recorded. Smt.Rupali Nimbalkar stated that she did not visit any hospital and she had aborted at her residence. Smt.Sangita Khade had stated that she had visited hospital of accused and sonography was conducted. She was advised that on account of deformity she will have to undergo abortion. She took medicines prescribed by doctor and aborted at her residence. Smt.Rekha Bhise had stated that she had undergone abortion at Dr.Khade Hospital. Smt.Kalpana Chavan also stated that she aborted at home and she had never visited hospital of accused. On completing investigation charge sheet was filed for the aforesaid offences.

4. Petitioner preferred an application for discharge before the Trial Court which was rejected on 19th August 2014. Pursuant to that, on 6th September 2014, the charge was framed against the petitioner for offences under Sections 4 and 5(3) of MTP Act. In the

charge it was stated that the accused had unauthorizedly conducted abortion of Smt.Sangita Khade. The trial commenced and the prosecution examined witnesses. After recording the evidence of five witnesses the statement of petitioner-accused was recorded u/s 313 of Code of Criminal Procedure. Arguments were heard and the matter was due for judgment. At this stage an application was preferred by prosecution for alteration of charge on 29th November 2016. The petitioner objected to the said application by filing say. The Trial Court by order dated 19th December 2016 allowed the said application and directed that additional charge be framed against petitioner u/s 3 of MTP Act read with Section 312 of Indian Penal Code.

5. The order was challenged by both the parties by preferring revision applications before Sessions Court. The petitioner preferred Criminal Revision Application No.1 of 2017, whereas the prosecution had preferred Criminal Revision Application No.3 of 2017. Learned Sessions Judge by order dated 7th March 2018 dismissed the revision application preferred by the petitioner-accused and the revision application preferred by the prosecution was partly allowed. The Court directed that the accused be tried for offence u/s 4, 5(3), 5(2) of MTP Act read with Section 312 of Indian Penal Code. It was further directed that additional charge be framed against the petitioner-accused for the offence u/s 5(2) of MTP Act r/w Section 312 of Indian Penal Code. The Sessions Court further directed that the opportunity be given to both the parties to lead evidence after framing of additional charge. Being aggrieved by both the orders, the petitioner-accused has preferred these petitions.

6. Learned counsel for petitioner submitted that the Trial Court as well as Sessions Court has committed an error in passing the orders when there was no evidence to frame additional charge. It is submitted that the charge sheet was filed for offence u/s 4 read with Section 5(3) of the MTP Act. The application preferred by the petitioner was rejected on the ground that prima facie case is made out against the petitioner to frame the charge under Sections 4, 5(3) of MTP Act. The Court thereafter proceeded to record evidence and statement of petitioner-accused u/s 313 of Cr.P.C and after realising that the prosecution has not made out the case for the offences for which the petitioner is charged, the prosecution has filed an application for alteration of the charge. The charges which are sought to be altered, are clearly contradictory to the evidence recorded by the Court during the course of trial. He pointed out the evidence of witnesses recorded by the Court which according to him does not make out the charges which were already made, nor does it make out a case to frame charges as per the order of Court on the application filed by the prosecution for alteration of the charge. It is submitted that the charge sheet was not filed for offence u/s 312 of Indian Penal Code, which all of a sudden was directed to be framed by the Trial Court. It is submitted that the prosecution has not applied for framing of charge u/s 312 of IPC, but the Trial Court for no reason, had directed framing of the said charge, which was confirmed by the Sessions Court. He further submitted that even the Sessions Court while exercising the revisional powers has directed to frame additional charges which were not within the purview of charge sheet nor in the application filed by the prosecution.

7. Learned APP submitted that evidence of witnesses which is recorded by the Court, prima facie makes a case for framing of additional charges. It is submitted that an application u/s 216 of Code of Criminal Procedure can be made at any stage and on the basis of evidence before the Court, the Trial Court as well as the Sessions Court was justified in directing framing of additional charge. He pointed out the evidence of one of the witness namely Sangeeta wherein she has mentioned that after the medicines were prescribed by the petitioner, the witness had aborted. It is, therefore, submitted that there was evidence right from the inception against the petitioner qua the charges which were directed to be framed by the Court. He further submitted that the Trial Court has permitted the accused to lead evidence after framing of additional charge and no prejudice is caused to him by framing the altered charges. The petitioner will have liberty to defend himself by leading evidence. Hence, no interference is called for in the orders passed by the Court.

8. On going through the documents it can be seen that the FIR was registered on 6th July 2012 alleging offence u/s 4 r/w Section 5(3) of MTP Act. Section 4 relates to the place of termination of pregnancy and Section 5(3) provides punishment for termination at a place other than prescribed under Section 4. The investigation proceeded with the said charges and the charge sheet was filed on 9th February 2013. The FIR alleged that the accused had conducted termination of pregnancy without any authority/permission to do so. The petitioner while arguing the application for discharge had contended that the statements of patients Kalpana Chavan, Rupali Nimbalkar and Rekha Bhise do not show that they had visited hospital of accused in respect of any treatment for pregnancy. The

Court accepted the said submission. In the order dated 19th August 2014, it was further observed that charge against accused is that he is not having valid permit or licence to terminate the pregnancy as per provisions of the said Act. From the charge sheet one thing is clear that the accused had not stated that he holds permit or licence to terminate the pregnancy. The Court, however, observed that statement of Sangita Khade attributes overt act to the petitioner having given treatment to her regarding termination of pregnancy and medicines being prescribed to her which were allegedly consumed by her and on next day she aborted. The charge was framed by the Trial Court. The charge was framed for illegally terminating pregnancy of Smt.Sangita Khade during 12th week of her pregnancy and thereby accused had committed offence under Section 4 read with Section 5(3) of MTP Act, 1971.

9. PW-1 has stated in the evidence that the accused is not qualified to perform the termination of pregnancy. He was cross-examined by the defence. In the cross-examination he has stated that sonography centre is conducted in hospital of accused which is registered under Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The sonography is being conducted by Dr.Manoj Madne and he has the authority to do so. He also stated that he had no personal knowledge about the medicines being prescribed by the petitioner to the said witnesses. He also deposed that he could not notice that patient Sangita Khade was being treated at the said hospital. PW-2 Sangita Khade had categorically stated that the accused did not prescribe any medicines to her and that there was no termination of pregnancy due to consumption of medicine. Similarly PW-3 had also stated that she aborted at home

and not in the hospital of petitioner. Accused did not give any medicines. The evidence of all these witnesses does not spell out the case of prosecution about abortion being carried out at the premises of petitioner, whereas, there was license for conducting sonography which was being conducted by authorized doctor. In the light of this evidence, the Court proceeded to record the statement of accused u/s 313 of Cr.P.C and after hearing the parties, the matter was due for judgment. Taking the prosecution case as it is, it cannot be said that the case for framing of additional charge is made out by the prosecution. Since the case is pending before the Trial Court for judgment, I would refrain from making any observations on the merits of the case qua the earlier charges, which are already framed against the petitioner. However, on perusal of the evidence before the Court and the documents, prima facie, I am of the opinion that no case is made out for framing any additional charges.

10. Section 4 of MTP Act reads as under :

“4. Place where pregnancy may be terminated.- No termination of pregnancy shall be made in accordance with this Act at any place other than – (a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee :

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.”

Whereas, Sections 5(2) and 5(3) reads thus :

“5. Sections 3 and 4 when not to apply :

5(1)

5(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

5(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

5(4)”

Charge was framed under Sections 4, 5(3) of MTP Act.

After recording evidence statement of accused was recorded. In that statement the petitioner stated that in his hospital he never terminated pregnancy and there is a conography centre conducted by Dr.Madane who is qualified doctor having sonography machine. It was also stated that Dr.Madane has treated Smt.Sangita Khade and never gave treatment to her. The petitioner also produced documents along with his statement, including certificate of registration issued under PCPNDT Act for genetic counselling and pre-natal diagnostic procedure for ultrasound by Dr.Madane. On

29th November 2016 prosecution preferred application for additional charge. It was contended that it is necessary to frame additional charge under Section 5(2) of the said Act. The application was opposed by petitioner. The Court observed that when the person who is not a registered medical practitioner terminates pregnancy, it would be an offence under Indian Penal Code and not under Section 5(2) of the Act. It was also held that charge under Section 3 of MTP Act has to be framed. Hence, additional charge u/s 3 of MTP Act r/w Section 312 of IPC was directed to be framed.

11. In revision application filed by prosecution, the Sessions Court directed that additional charge be framed under Section 5(2) of MTP Act r/w Section 312 of IPC. In the absence of any evidence, the additional charge was directed to be framed. Even evidence of PW-4 and PW-5 is not sufficient to frame additional charge.

12. Section 216 of Cr.P.C provides that any Court may alter or add to any charge at any time before the judgment is pronounced. Section 216(3) of Cr.P.C provides that if the alteration or addition to the 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 and if, the altered or added charges had been the original charge. Section 216(4) of Cr.P.C further provide that 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. Therefore

Section 216(3) & (4) empowers the Court to alter or addition of charge before the trial is commenced and further the said alteration or addition should not prejudice to the accused in his defence.

13. The word “may” provided in Section 216 does not mean that Court can alter or add to any charge merrily at any stage of trial without considering the propriety of doing so as the word “may” used by the legislature does not signify that the Court can alter or add to any charge mechanically at any stage of the trial. Charge sheet is filed on 09.02.2013 and application below Exhibit-56 is filed on 29.11.2016 at the belated stage of delivering the judgment.

14. In several decisions the Hon'ble Supreme Court has laid down principles for exercising powers u/s 216 of Cr.P.C. Although the Trial Court may exercise such powers, in the interest of justice any time before conclusion of the trial, such powers are to be exercised in the light of evidence before the Court. Learned counsel for petitioner relied upon following decisions :

1	Anant Prakash Sinha Vs. State of Haryana	2016(2)-Bom.C.R. (Cri)-296
2	R.Rachaiah Vs. Home Secretary, Bangalore	2016(12)-SCC-172
3	Arif Ali Yusuf ali Sayyed Vs. State of Maharashtra	2012(4)-Bom.C.R (Cri)-613
4	Ravishankar so Jagannath Prasad Tiwari Vs. State of Maharashtra	2007-ALL MR (Cri)-325

In a decision in the case of **Anant Prakash Sinha @ Anant Sinha Vs. State of Haryana and another (2016{2}-Bom.C.R. (Cri.)-296)**, the

Supreme Court considered the scope of Section 216 of Cr.P.C. It would be relevant to quote paragraphs 15 to 17 of the said judgment viz. :

“15. After so stating, the Court opined that there was no material on which the trial Court could have amended the charge under section 227 CrPC and the learned Judge therefore had no power to direct an amendment and a continuation of the same trial as he purported to do. The purpose of laying stress on the said authority is that the trial Court could issue a direction for alteration of the charge if there were materials before it in the complaint or any evidence to justify such action. On the aforesaid three Judge Bench decision, it is quite vivid that if there are allegations in the complaint petition or for that matter in FIR or accompanying material, the Court can alter the charge. In *Thakur Shah Vs. King Emperor* (supra), what the Court has held is that 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. It does not necessarily mean that the alteration can be done only in a case where evidence is adduced. We may hasten to clarify that there has been a reference to the decision rendered in *Harihar Chakravarty* (supra) but the said reference has to be understood in the context. Section 216 CrPC, as is evincible, does not lay down that the Court cannot alter the charge solely because it has framed the charge. In *Hasanbhai Vaibhai Qureshi* (supra), it has been stated there is scope for alteration of the charge during trial on the basis of material brought on record. In *Jasvinder Saini and others* (supra), it has been held that circumstances in which addition or alteration of charge can be made have been stipulated in Section 216 CrPC and sub-sections (2) to (5) of section 216 CrPC deal with the procedure to be followed once the Court decides to alter or add any charge. It has been laid down therein that the question of any such addition or alteration 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. If the said decision is appositely understood, it clear lays down the principle which is in consonance with Harihar Chakravarty (supra).

16. 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 th 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 circumstances. 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.

17. In addition to what we have stated hereinabove, 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 216 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 Vs. State of Haryana, 1974(3).SCC.81 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 ben 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 Vs. State of Karnataka, 2012(9).SCC.650 :-

`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. 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 Vs. State of Bihar (2009)7-SCC-198 while considering the issue placed reliance upon various judgments of this Court particularly on (Topandas Vs. State of Bombay) AIR-1956-S.C.-33 (Willie (William) Slaney Vs. State of M.P. AIR-1956-SC-116 (Fakhruddin Vs. State of M.P.), AIR-1967-SC-1326 (State of A.P. Vs. Thakkidiram Reddy), 1998(6)-SCC-554 (Ramji Singh Vs. State of Bihar), 2001(9)-SCC-528 and (Gurpreet Singh Vs. State of Punjab), 2005(12)SCC-615 and came to the following conclusion : Sanichar Sahni case (supra), 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 Vs. State of M.P.), 2010(10)-SCC0259,.”

15. In the case of Rachaiah, the Supreme Court dealt with Section 216 of Cr.P.C. Paragraphs 10 and 11 of the said judgment reads as follows :

“10. The bare reading of Section 216 reveals that though it is permissible for any court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and (4) of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section (4) or Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

11. Even if the charge may be of some species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or resummon or examine any witnesses who have already been examined with reference to such alteration or addition. In such

circumstances, the court is to even allow any further witness which the court thinks to be material in regard to the altered or additional charge.”

The decisions of this Court referred to above reiterate the law relating to scope of Section 218 of Cr.P.C.

16. Keeping in mind the aforesaid principles and applying the same in the facts and circumstances of the present case, I find that the Trial Court as well as the Sessions Court have committed an error in passing impugned orders. There is no evidence on record to frame said additional charges. The charge under Section 312 of IPC is completely new charge, which was not even pleaded by prosecution. It is contrary to the object of Section 216 of CrPC and prejudicial to the accused. For the reasons stated hereinabove, the petitions are required to be allowed by setting aside the orders passed by both the Courts below. Hence, I pass following order :

ORDER

- (i) Criminal Writ Petition No.2276 of 2018 and Criminal Writ Petition No.2277 of 2018 are allowed;;
- (ii) Impugned order dated 19th December 2016 passed by learned Judicial Magistrate, First Class, Dahiwadi below Exhibit-56 in RCC No.36 of 2013 and the order dated 7th March 2018 passed by learned Additional Sessions Judge, Vaduj in Criminal Revision Application No.1 of 2017 and Criminal Revision Application No.3 of 2017 are quashed and set aside.

(PRAKASH D. NAIK, J.)