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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 21.02.2019

PRONOUNCED ON : 19.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

CrI.O.P.[MD]No.2635 of 2019

and

CrI.M.P. (MD)No.1457 of 2019

S.Rajendran

: Petitioner/Respondent/Accused

Vs.

State represented by
The Inspector of Police,
Papanasam Police Station,
Thanjavur District.

(In Crime No.105/2010)

: Respondent/Petitioner/Complainant

PRAYER : Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records of the order dated 31.01.2019 passed by the learned II Additional District and Session Judge, Thanjavur in Cr.M.P.No.37 of 2019 in S.C.No.118 of 2012 and set aside the same as illegal.

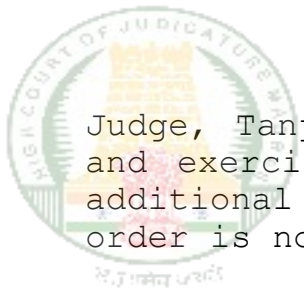
For Petitioner : Mr.C.Arul Vadivel @ Sekar
For Respondent : Mr.V.Neelakandan
Additional Public Prosecutor

O R D E R

This petition has been filed seeking to set aside the order dated 31.01.2019 passed by the learned II Additional District and Session Judge, Thanjavur in Cr.M.P.No.37 of 2019 in S.C.No.118 of 2012.

2.The petitioner is the sole accused in Crime No.105 of 2010 and he faced trial for the offence punishable under Sections 302, 324, 326, 506(ii) IPC and Section 27 1(B) of the Arms Act, 1959.

3.The quaintness of the charge is that when the victim / the police official went to arrest the accused, he was done to death. The learned counsel for the petitioner submitted that the prosecution had cited 44 witnesses and all the witnesses have been examined and at the stage when the case is posted for questioning the accused under Section 313 Cr.P.c., the prosecution filed Cr.M.P.No.37 of 2019 seeking the Court to invoke its power under Section 216 Cr.P.C., to add additional charge of Section 28 of the Arms Act along with the charges earlier framed. This was opposed by the accused by his counter. The learned II Additional District



Judge, Tanjore, by his order allowed the prayer of the prosecution and exercised his power under Section 216 Cr.P.C., and added the additional charge under of Section 28 of the Arms Act, 1959. This order is now under challenge.

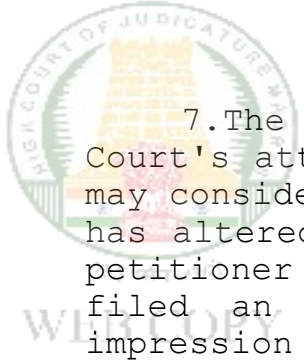
4.1.Placing reliance on the authority in **K.Kartikalakshmi Vs. Sri Ganesh & another** [(2017) 3 SCC 347], the learned counsel for the petitioner submitted that the power to invoke Sec.216 Cr.P.C., for altering the charges and it is not given to the prosecution to prompt the Court to do it.

4.2.The learned counsel further argued that the petitioner herein took trial to the entire case and all the 44 witnesses cited by the prosecution have been examined. Any alteration of charge at this point of time will be against his interest as he will be constrained to go through the ordeal of trial again. He further submitted that even if the order goes, the Court will have its suo motu power to alter the charges and not the prosecution. He would further placed reliance of the order reported in **2010 (3) MWN (Cr.) 368 [H.A.Hurul Firhous, represented by her Power Agent, H.A.Abdul Jabbar Vs. State, rep. By Inspector of Police and others]**.

5.In the aforesaid judgment in Kartikalakshmi case, the Hon'ble supreme Court has held:

"It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 Cr.P.C., to either alter or add the charge and that such power is available with the court at any time before the judgment is pronounced."

6.The first leg of the argument is founded on a technical point, in that even the learned counsel for the petitioner conceded that even if the impugned order is set aside, still the Court has its power to alter the charge. In other words, the trial Court may still can frame the altered-charge that it has now framed pursuant to its Order now impugned, even if the said Order is held as bad in law. It is true that no party has a right vested in him to alter the charge, as it falls within the exclusive domain of the Court, yet a party may alert the Court to avert miscarriage of justice. After all, before framing Charges both under Sec.226 Cr.P.C., by the sessions Court and under Sec.239 by the Magistrate in a Warrant case, the Court of Sessions or the Magistrate, as the case may be, the prosecution has a right to inform the nature of the Charges, on a hearing, as the case may be. In both the circumstances, what in effect, the prosecution attempts is to suggest to the Court, or prompt the Court as to the nature of the charge that may have to be framed.



7.The duty however, is only on the Court. Similarly, the Court's attention may be drawn to the circumstance, where the Court may consider it appropriate to alter the Charge. If the prosecution has altered the Court and if the Court has altered the Charge, the petitioner possibly may not have a cause to question it. Since, it filed an application for the said purpose, it has given an impression as if it is doing as a matter of right.

8.Turning to the Order per se, the learned Sessions Judge has given a speaking Order justifying why the Charge needs to be altered. Here, the petitioner does not question the reasoning of the Sessions Court to alter the Charge, but his concern is only as to the mode adopted by the trial Court. This now a matter of semantics, as ultimately no real purpose would be served even if the Order is set aside, since the learned Sessions Judge, having been altered now irrespective of the mode adopted will still have power to alter the Charge in the identical manner, which only would contribute to the delay involved.

9.The accusation against the accused is that at the point of arrest, he had not shot dead a police official. This falls specifically under Sec. 28 of the Arms Act, 1959, and the learned Sessions Judge has recorded in his Order while a charge under Sec.27 (1) has been framed for possession of a firearm without licence, Sec.28 provides for resisting arrest by using a firearm. However, in the operating portion of the Order, the Court only reiterates its own power to alter the Charge, and does not state that it is altering the charge because the prosecution has required it. In other words, it has only used the opportunity provided by the petition to alert itself, and no more.

10.Therefore, this Court does not find in error in the approach of the Court below. What however, requires to be recorded is that the learned Sessions Judge has held that he is allowing the petition, which gives an impression that his decision to alter the Charge is a direct consequence of the Order. Since the decision to alter the Charge is substantial, no matter that it was done pursuant to the petition filed by the prosecution, this Court does not consider it necessary to interfere with the charges that now stand altered. Here, this Court also takes into account Sec.464 Cr.P.C. which provides that *"a finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid or on the ground of any error, omission or irregularity in the charge.."*

11.Turning to the second that the alteration of charge at this stage might require a de novo trial is concerned, Sec.216(3) read with Sec.216(4) of the Code has entrusted the Court with the power to apply its mind as to if the alteration of charge requires a new trial or if it can proceed with the trial, both depending on its assessment if any prejudice will be caused. This is left to the discretion of the trial Court.



12. In the end, this Court does not find any merit in the petition and accordingly, the same is dismissed.

Sd/-

Assistant Registrar (Writs)

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Sub Assistant Registrar (CS)

To

1. The Inspector of Police,
Papanasam Police Station,
Thanjavur District.

2. The II Additional District and Sessions Judge,
Thanjavur.

+1 CC to MR.C.ARUL VADIVEL@SEKAR, Advocate SR-55211.

**Pre-delivery order made in
Crl.O.P. [MD] No.2635 of 2019
19.03.2019**

CS: (17/06/2019) 4P 4C