

(a) This Hon'ble Court be pleased to set aside the impugned order dated 05/01/2021 passed by learned Sessions Judge at Dadar Nagar Haveli, Silvassa below Exhibit No.95 in Session Case No. 17/2018 refusing application u/s. 217 of Cr.P.C. arising in Session Case No.17/2018;

(b) This Hon'ble Court be pleased to direct the learned Session Judge at Dadar Nagar Haveli, Silvassa to set aside the altered charges dated 26/11/2020 and to reframe the charges as per the order dated 06/11/2020 passed below Exhibit No.89 by the learned Session Judge at Dadar Nagar Haveli, Silvassa.

4. Learned Counsel for the applicant submits that, after the applicant/accused's 313 statement was recorded and when the matter was posted for final arguments, the prosecution preferred an application (Exhibit 89) seeking alteration/addition of charge as against the applicant/accused. He submits that what was prayed in the application by the prosecution was addition of the words "thrown from the gallery of the room of deceased". He submits that the said application was allowed by the learned Judge vide order dated 6th November, 2020 and accordingly, the charge was altered by adding the words "thrown from the gallery of the deceased". Learned Counsel submits that whilst adding the said words "thrown from the gallery", the learned Judge deleted the words "under the influence of alcohol assaulted" on his own volition, although there was no prayer for the same. Learned Counsel for the applicant submits that he had no objection to the addition of the words "thrown from the gallery of the deceased" as prayed for by the prosecution, however, he has serious

objection to the deletion of the words “under the influence of alcohol assaulted” by the learned Judge on his own volition.

5. Learned Counsel further submits that after the charge was altered, the applicant/accused filed an application seeking recall of some of the witnesses, under Section 217 of the Criminal Procedure Code, as permissible in law. He submits that it was incumbent on the learned Judge to permit either the prosecution or the defence to re-examine the witnesses, as the charge was altered. He submits that since the prosecution did not want to recall any of its witnesses, the defence i.e. the applicant preferred an application under Section 217 of the Criminal Procedure Code and sought recall of some of the witnesses. He submits that the learned Judge, without considering the provisions of Section 217 of the Criminal Procedure Code, rejected the said application (Exhibit 95) vide order dated 5th January, 2021, only on the ground that the trial would be delayed and some of the witnesses had been examined on the said aspect i.e. “thrown from the gallery of the deceased” and as such, further cross-examination was not warranted.

6. Learned APP does not dispute the fact that what was prayed by the prosecution seeking alteration/addition of the charge was only “thrown

from the gallery of the room of the deceased”. He does not dispute the position of law in cases where charges are altered, in particular, the provision under Section 217 of the Criminal Procedure Code.

7. Perused the papers. The applicant/accused is facing prosecution in connection with C.R.No. 91 of 2018 registered with the Silvassa Police Station for the alleged offence punishable under Section 302 of the Indian Penal Code. The applicant was arrested on 30th March, 2018 and is in custody since then. After investigation, chargesheet was filed as against the applicant. On 14th August, 2018, the learned Sessions Judge framed charge as against the applicant. The said charge which is at Exhibit-B, reads as under:

“CHARGE

.....

That on 29.03.2018, at about 14:45 hours, in room no. 35 of Chetanbhai Prabhatsinh Rathod chawl at Village Athal, you under the influence of alcohol assaulted with bottle on the head of Shri.Mahendra Bhaskarbhai Naik with knowingly and intentionally and caused homicidal death of Shri.Mahendra Bhaskarbhai Naik, and thereby you have committed an offence punishable under Section 302 of the Indian Penal Code and within the cognizance of this Session Court.”

8. He submits that thereafter, the prosecution examined eight witnesses in support of its case, after which, the statement of the applicant was recorded under Section 313 of the Criminal Procedure Code on 3rd

September, 2020. It appears that thereafter, the matter was posted for final arguments on 10th September, 2020, when the parties were told to give a gist of the evidence and the matter was adjourned to 4th November, 2020. It appears that on 4th November, 2020, the prosecution filed an application (Exhibit-89) seeking alteration/addition of certain words in the charge. The said application which is on page 18 (Exhibit-C) reads as under:

“That in the above matter, the charge has been framed about the assault with glass bottle on the head of the deceased Mahendra, prosecution on the face of the case prays to add “and thrown from the gallery of the room of deceased Mahendra”.

9. The said application was opposed by the learned Counsel for the applicant, however, the learned Sessions Judge vide order dated 6th November, 2020 altered/added the said words as prayed for by the prosecution. It appears that whilst altering the said charge by adding the words “thrown from the gallery of the deceased” the learned Judge, on his own volition deleted the words “under the influence of alcohol assaulted”, from the original charge. Admittedly, the deletion was not sought for by the prosecution. The entire case had proceeded on the basis of the charge that was framed by the trial Court on 14th August, 2018.

10. Learned Counsel for the applicant today has no objection if the

altered charge i.e. the addition of the words “thrown from the gallery of the deceased” is maintained, however has serious objection to the deletion of the words “under the influence of the alcohol assaulted”. Considering that the application was only for addition/alteration of the charge as prayed for by the prosecution for the addition of the words “thrown from the gallery of the deceased”, the deletion of the words which were there in the original charge framed on 14th August, 2018, by the learned Judge, was clearly unwarranted. The operative part of the order dated 16th November, 2020 passed by the learned Sessions Judge below Exhibit-89 reads as under:

- “1. The application at Exh.89 is allowed.*
- 2. The charge is accordingly altered by adding the words “thrown from the gallery of the deceased”.*

11. Considering the aforesaid order, the learned Judge could not have deleted the words from the original charge which existed, on his own volition, when the same was not even sought for by the prosecution. Whether the deletion is an inadvertent mistake or has been consciously deleted by the learned Judge, is not clear, however, be that as it may, the said deletion cannot be sustained. Hence, the words “under the influence of alcohol assaulted” would have to be restored, as it originally stood in the charge.

12. As far as the order dated 5th January, 2021 is concerned, by which, the learned Sessions Judge rejected the applicant's application (Exhibit-95) seeking recall of certain witnesses is concerned, the same also cannot be sustained. It is pertinent to note that after the charge was altered, the applicant filed an application seeking recall of the witnesses under Section 217 of the Criminal Procedure Code. The name of the witnesses sought to be recalled are as under :

“(a) PW-1 Banwarilal S/o. Jawarilal Moyal Mob. No.9610160821.

Age 24 years, Occu. Agriculturist R/o. Village Taparwada, Tehsil. Parwatsar, Dist. Nagor (Rajasthan).

(b) PW-2 Nitin Rajendra Jadhav Mob. No. 9104358303

Age 28 Years, Occu. Private Service R/o. Baldevi, Rammandir, Sayli Road, DNH, Silvassa.

(c) PW-3 Kuldeepsinh Mansing Rajawat Mob. No. 9714677370
Age – 30 Years, Occu. Private Service R/o. Naroli, DNH, Silvassa.

(d) Mayur Chauhan Mobile No. 7016736214, 9978613123
Occupation : Branch Manager CPF.

(e) PW-4 Dr. Sunil S/o. Rameshbhai Patel Mobile No. 9924331659

Age 43 years, Occupation Medical Officer at Shri.V.B.C.H.Silvassa District Silvassa.

(f) PW-8 PSI Anil Kumar T.K. Mobile No. 9824476884,
Age 43 years, Occupation PSI Naroli Outpost, R/o.Police Line Silvassa.”

13. As far as witness - Mayur Chavan at clause (d) is concerned, learned Counsel for the applicant does not seek his recall, however, learned Counsel insists that the witnesses at (a) (b) (c) (e) and (f) be permitted to re-examine on the point “thrown him from the gallery of the deceased”. Section 217 of the Criminal Procedure Code reads as under:

Section 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.

14. From a perusal of the aforesaid provision, it is evident that whenever charge is altered or added by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine the said witnesses with reference to the said alteration or addition, unless the Court is of the opinion that such examination/recall is for the purpose of vexation or delay or for defeating the ends of justice. In the facts of the present case, considering the original charge and the subsequent alteration/addition of charge, it would be necessary for the applicant to recall and re-examine the aforesaid witnesses

except witness at clause (d) only on the point on which, the charge was altered.

15. The applicant is facing a serious charge/prosecution under Section 302 of the Indian Penal Code. If the applicant is not permitted to examine the said witnesses as stated aforesaid except the witness at clause (d), serious prejudice would be caused to him. Infact, the question of delay in the conduct of the trial given as one of the reasons for rejecting the application of the applicant seeking recall of witnesses, cannot be accepted, considering the fact, that the applicant himself is in custody since 2018, and has nothing to gain by filing such an application.

16. Considering the aforesaid, the impugned order dated 5th January, 2021 passed by the learned Sessions Judge below Exhibit-95 is quashed and set aside to the extent that the applicant is now permitted to examine witnesses at clauses (a) to (f), except the witness-Mayur Chavan whose name is at clause (d) of the application.

17. Considering that the applicant is in custody since 2018, The learned Sessions Judge to conclude the trial as expeditiously as possible and preferably within 6 months from the date of receipt of this order.

18. Application is allowed and disposed of accordingly.
19. Rule is made absolute on the aforesaid terms.
20. All parties to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.