

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 734 of 2019

Hrishikesh Sarkar

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Achin Jana,
Mr. Suman Chakraborty,
Mr. Prosenjit Ghosh.

For the Opposite Party/State : Ms. Puspita Saha.

Heard on : 13.06.2023

Judgment on : 30.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 15.02.2019 passed by the Learned Additional Sessions Judge, 2nd Court-cum-Special Judge under POCSO Act, Darjeeling, whereby additional charge under Section 6 of the POCSO Act, 2002 was framed against the present petitioner with the original charges framed on 30.10.2017 under Sections 493/376 of the Indian Penal Code in connection with the Spl.(C) No. 113 of 2015 arising out of Naxalbari P.S. Case No. 237/2013 dated 11.11.2013.

2. The petitioner's case is that on the basis of a written complaint dated 11.11.2013 lodged by one Debasri Roy, Naxalbari Police Station Case No. 237/2013 under Sections 493/376 of the Indian Penal Code has been commenced against the petitioner, alleging inter alia that –

“Since last one year, there was a love relationship between the de facto complainant and the petitioner and they had engaged in sexual intercourse on several occasions upon false promise of marriage by the petitioner. After that the de facto complainant conceived and intimated the same to the petitioner. But the petitioner told her not to disclose the aforesaid matter to anyone and threatened her. After some days she came to know that the petitioner fled away with another girl of her village namely Sapna Roy”.

3. On the basis of the aforesaid written complaint a FIR was drawn up against the present petitioner and investigation conducted. After completion of investigation, the police submitted charge sheet being no. 55/2014 dated 31.03.2014 under Sections 376/493 of the Indian Penal Code, 1860 against the present petitioner.
4. After taking cognizance of the alleged offences the case record was committed to the Court of Sessions at Darjeeling and then transferred to the Court of Learned Additional Sessions Judge, 2nd Court-cum-Special Judge under POCSO Act, Darjeeling for disposal and was registered as Spl.(C) No. 113/2015 on 14.12.2015.
5. On 30.10.2017 which was the date fixed for framing of charge, the prosecution after careful consideration and deliberation of all the alleged materials, evidences proposed to frame charges under Sections 493/376 of the Indian Penal Code against the present petitioner/accused person

and the Learned Trial Judge also after perusing the alleged materials, evidences contained in the case diary, was pleased to frame charges under Sections 493/376 of the Indian Penal Code against the present petitioner and was further pleased to fix 06.02.2018 for appearance and evidence of the prosecution witnesses.

6. Subsequently the Learned Presiding Judge was transferred and in his place the present Presiding Judge was appointed and on 27.11.2018, when the alleged victim lady (C.S.W.-1) was supposed to be examined, one application was filed by the Learned Public Prosecutor with a prayer for framing additional charge under Section 6 of the POCSO Act along with the original charges framed under Sections 376/493 of the Indian Penal Code against the present accused person/petitioner.
7. On 15.02.2019, the Learned Trial Judge upon hearing both sides was pleased to frame additional charge under Section 6 of the POCSO Act, 2012 along with the original charges under Sections 376/493 of the Indian Penal Code against the present petitioner and since the petitioner pleaded 'not guilty' hence the Learned Judge was further pleased to fix 12.03.2019 as the date for recording evidence of the alleged victim girl.
8. The petitioner states that according to Section 226 of the Code of Criminal Procedure when an accused is brought before the Court of Sessions after commitment, it is the prosecutor who upon making careful scrutiny of the charge sheet and other materials collected during investigation proposes to prove the guilt of the accused against particular criminal charges.

9. That the legislature has cast an incumbent duty upon the Learned Trial Court to consider the record of the case and the documents submitted therewith, along with the submissions made by both the contesting parties, before passing the order of discharge or framing charge(s) against the accused accordingly.
10. It is also a legislative mandate that if the accused pleads 'not guilty' to the charges as framed by the Learned Judge, then the Learned Trial Judge on the next date fixed, shall record the evidence of the prosecution witness(s) and any departure from such procedure is uncalled for and bad in law.
11. In the present case the Investigating Authority upon completion of the perfunctory investigation had filed a charge sheet being Charge Sheet No. 55/2014 dated 31.03.2014 against the petitioner/accused under Sections 493/376 of the Indian Penal Code.
12. The petitioner states that the charge sheet was submitted on 31.03.2014 and subsequently on the basis of the charge sheet, the Learned Trial Court on 30.10.2017 had been pleased to frame charge against the present petitioner for committing the offences punishable under Sections 493/376 of the Indian Penal Code.
13. The petitioner submits that the investigation conducted by the police was completely tainted and vindictive against the present petitioner and the charge sheet did not reveal any allegation that the petitioner has ever by deceit caused the alleged victim to believe that she was lawfully married to him, which is the rudimentary ingredient necessary to substantiate the charge under Section 493 of the Indian Penal Code

against the petitioner and yet the charge sheet was filed under Sections 376/493 of the Indian Penal Code.

14. That since the charge sheet has miserably failed to bring forth even the very elementary ingredients necessary to substantiate allegation under Section 493 of the Indian Penal Code hence framing of charge under Section 493 of the Indian Penal Code by the Learned Trial Judge vide impugned order dated 30.10.2017 was totally misconceived, bad in law and therefore should be set aside.
15. That in the instant case the Learned Trial Judge has been pleased to frame additional charge under Section 6 of the POCSO Act, 2012, on the basis of the very same materials that he had already considered while framing the original charges under Sections 376/493 of the Indian Penal Code and neither any supplementary charge sheet was filed nor any evidence was recorded by way of examination of witness or by way of exhibiting some documents/materials.
16. **Mr. Achin Jana, learned counsel for the petitioner** has submitted that once the predecessor court had already considered the available materials and framed charges preferred by the prosecution, in view of clear bar under Section 362 of the Code of Criminal Procedure, the successor court was precluded from revising the earlier order passed by the predecessor court on the basis of the same materials.
17. That the impugned orders dated 30.10.2017 as well as 15.02.2019 have caused immense prejudice to the bona fide interest of the petitioner by violating the principles of fair trial and natural justice.

18. Thus, the orders under revision are liable to be set aside and quashed.
19. **In spite of due service there is no representation on behalf of the opposite party no. 2.**
20. **Ms. Puspita Saha, learned counsel for the State** has placed the case diary. Page 53 of the case diary is the **school certificate** in support of the victim's age, stating her date of birth as per the admission register. **The date of birth of the victim is 14.01.2000. The FIR has been registered on 11.11.2013. The alleged victim was then aged about 13 years,** though she had stated she is aged about sixteen years.
21. The allegations in the complaint is to the effect that for about a year the parties were in love and on the assurance of marriage had sexual relationship. **The victim (13 years) at the time of medical examination on 27.11.2013 was 28 weeks pregnant.**
22. Mr. Jana, learned counsel for the petitioner has relied upon paragraph 11 of the judgment in **Jasvinder Saini & Ors. vs. State (Government of NCT of Delhi)** reported in **(2013) 7 Supreme Court Cases 256** which 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 alternation may be made are not, however, stipulated in

Section 216. It is all the same trite that the question of any such addition or alteration 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.”

23. Section 216 of the Code of Criminal Procedure, lays down:-

“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 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 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.”

24. In *Dr. Nallapareddy Sridhar Reddy vs The State of Andhra Pradesh & Ors., Criminal Appeal No. 1934 of 2019 (arising out of SLP (Crl.) No. 3884 of 2019), on January 21, 2020, held:-*

“15. Section 216 appears in Chapter XVII of the CrPC. Under the provisions of Section 216, *the court is authorised to alter or add to the charge at any time before the judgment is pronounced.* Whenever such an alteration or addition is made, it is to be read out and

explained to the accused. The phrase “add to any charge” in Sub-Section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done “at any time before judgment is pronounced”. SubSection (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the persecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-Section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 of the CrPC deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial.

16. The decision of a two-judge Bench of this Court in **P Kartikalakshmi v Sri Ganesh, (2017) 3 SCC 347**, dealt with a case where during the course of a trial for an offence under Section 376 of the IPC, an application under Section 216 was filed to frame an additional charge for an offence under Section 417 of the IPC. Justice F M Ibrahim Kalifulla, while dealing with the power of the court to alter or add any charge, held:

“6. ... Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. 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 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so**

on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.”

(Emphasis supplied)

17. In *Anant Prakash Sinha v State of Haryana* (2016) 6 SCC 105, a two judge Bench of this Court dealt with a situation where for commission of offences under Sections 498A and 323 of the IPC, an application was filed for framing an additional charge under Section 406 of the IPC against the husband and the mother-in law. After referring to various decisions of this Court that dealt with the power of the court to alter a charge, Justice Dipak Misra (as the learned Chief Justice then was), held:

“18. ... 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 CrPC.

19. 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...”

(Emphasis supplied)

18. In *CBI v Karimullah Osan Khan (2014) 11 SCC 538*, this Court dealt with a case where an application was filed under Section 216 of CrPC during the course of trial for addition of charges against the appellant under various provisions of the IPC, the Explosives Act 1884 and the Terrorist and Disruptive Activities (Prevention) Act 1987. Justice K S P Radhakrishnan, speaking for the Court, held thus:

“17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to 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.”

(Emphasis supplied)

19. In *Jasvinder Saini v State (Govt of NCT of Delhi) (2013) 7 SCC 256*, this Court dealt with the question whether the Trial Court was justified in adding a charge under Section 302 of the IPC against the accused persons who were charged under Section 304B of the IPC. Justice T S Thakur (as he then was) speaking for the Court, held thus:

“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.”**

(Emphasis supplied)

20. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words “at any time before judgment is pronounced” in Sub-Section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon *prima facie* examination of the material brought on record, it leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court’s power is the prejudice likely to be caused to the accused by the addition or

alteration of charges. Sub-Section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused.”

25. **In the present case**, it is submitted, that the court added Section 6 of the POCSO Act without the finding that the previous charge is defective. The said argument has no substance. The Court vide the order under revision added to the charge framed earlier as per Section 216 Cr.P.C. Section 362 Cr.P.C. as relied upon by the petitioner is not applicable at this stage.
26. **Thus, considering the materials on record, this Court find that the orders under challenge being an order dated 15.02.2019 passed by the Learned Additional Sessions Judge, 2nd Court-cum-Special Judge under POCSO Act, Darjeeling, whereby additional charge under Section 6 of the POCSO Act, 2002 was framed against the present petitioner with the original charges framed on 30.10.2017 under Sections 493/376 of the Indian Penal Code in connection with the Spl.(C) No. 113 of 2015 arising out of Naxalbari P.S. Case No. 237/2013 dated 11.11.2013 are in accordance with law and needs no interference by this Court.**
27. **The revisional application being CRR 734 of 2019 is accordingly dismissed.**
28. The order dated 15.02.2019 passed by the Learned Additional Sessions Judge, 2nd Court-cum-Special Judge under POCSO Act, Darjeeling, whereby additional charge under Section 6 of the POCSO Act, 2002 was framed against the present petitioner with the original

charges framed, vide order dated 30.10.2017 under Sections 493/376 of the Indian Penal Code in connection with the Spl.(C) No. 113 of 2015 arising out of Naxalbari P.S. Case No. 237/2013 dated 11.11.2013, **are affirmed.**

29. **Learned Sessions Court to proceed with the trial expeditiously.**
30. No order as to costs.
31. All connected applications, if any, stands disposed of.
32. Interim order, if any, stands vacated.
33. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
34. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)