

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO.889 OF 2022

1. Sachin S/o. Chandrashekhar Bharti,

Aged : 60 Yrs., Occ.: Business,

2. Raju @ Rajesh Narayanrao Lohana,

Aged : 59 Yrs., Occ.: Business

3. Ganesh S/o. Mohansing Thakur

Aged : 51 Yrs., Occ.: Service,

All R/o. Yavatmal, Tal. & Distt

Yavatmal

.... **PETITIONERS**

// VERSUS //

State of Maharashtra,

Through PSO of PS Wadgaon Road,

Taluka & District Yavatmal

.... **RESPONDENT**

Shri P. W. Mirza, Advocate for the petitioners

Ms M. H. Deshmukh, APP for the State/respondent

CORAM : G. A. SANAP, J.

DATED : 16 MARCH, 2023

ORAL JUDGMENT :

1. Heard.

2. Rule. Rule made returnable forthwith. Heard finally with the consent of learned Advocates for the parties.

3. In this writ petition, the petitioners who are the accused Nos. 3, 4 and 5 respectively, in Sessions Trial No. 77 of 2013 pending on the file on the learned Sessions Judge, Yavatmal, have challenged the order dated 18.11.2022 passed by the learned Sessions Judge, Yavatmal whereby the learned Sessions Judge has altered the 5th head of the charge.

4. The facts giving rise to this petition may be stated in brief:

The accused persons are facing trial with two more accused for the offences punishable under Sections 302, 120-B, 143, 147, 148, 149 of the Indian Penal Code and Section 4 read with Section 25 of the Arms Act, 1959 and Section 135 of the Maharashtra Police Act, 1951. The chargesheet in the crime was filed on 01.11.2012. On 25.07.2016, the charge was framed against the three accused vide Exh. 133. After arrest of the remaining two accused, the composite charge was framed against five accused on 04.11.2017 vide Exh. 175. The prosecution has examined the witnesses to prove the charge. After recording statement of the accused persons under Section 313 of the Code of Criminal Procedure, 1973 (For short 'the Cr.P.C.), the matter was fixed for argument on 27.07.2022. The argument of both sides was over on 13.09.2022 and the matter was adjourned for judgment.

5. It appears that after studying the matter, the learned Sessions Judge found slight error in the 5th head of the charge. The learned Judge found that the word 'prior to' preceding the date 03.08.2012 remained to be stated in the charge. Learned Sessions Judge found that this 5th head of the charge was not in consonance with the case of the prosecution. Learned Sessions Judge, therefore, proposed to alter the charge in the manner set out in the order below Exh. 1 dated 06.10.2022. The learned Sessions Judge granted an opportunity to the accused persons to file their say to the proposed alternation of charge.

6. The accused persons accordingly filed their say to the proposed alteration in the charge. They opposed the proposed alteration of charge on the ground that alternation of charge, at that stage, would cause grave prejudice to them and ultimately result into miscarriage of justice. They further contended that this exercise is initiated at the behest of the prosecution to fill up the lacuna in the case of the prosecution.

7. Learned Sessions Judge granted an opportunity of hearing to the prosecution and to the accused persons before making the alteration in the charge, as proposed by him. Learned Sessions Judge found that 5th

head of the charge was not in consonance with the case of the prosecution. Learned Sessions Judge observed that from the date of lodging of First Information Report it is the case of the prosecution that the accused persons committed murder of Umesh Khandwe pursuant to the criminal conspiracy hatched by them prior to the date of the incident i.e. 03.08.2022. Learned Sessions Judge in order to take care of the grievance, with regard to the prejudice or likely prejudice, to the parties granted liberty to the accused persons to recall or re-summon the witnesses already examined by the prosecution for further cross examination with reference to the altered charge.

8. Being aggrieved by this order passed by the learned Sessions Judge, the accused Nos. 3, 4 and 5 have challenged this order of alteration of charge. I have heard Mr P. W. Mirza, learned Advocate for the petitioners/accused and Ms M. H. Deshmukh, learned APP for the State. Perused the record and proceedings.

9. Learned Advocate Mr Mirza for the petitioners submitted that there was inordinate delay in making alteration in the charge. Learned Advocate submitted that after framing the initial charge, recording of the evidence commenced on 17.01.2018. Learned Advocate

pointed out that the accused persons have disclosed their defence during the course of cross examination of the witnesses. Learned Advocate submitted that after closing the trial for judgment the learned Judge *suo motu* proposed to alter the charge. Learned Advocate submitted that on the ground of delay, the order altering the charge cannot be sustained because the same has resulted in prejudice to the accused persons in their defence. Learned Advocate further submitted that the delayed alteration in the charge has denied the right of fair trial to the accused. Learned Advocate further submitted that the alteration made in 5th head of the charge has changed the complexion of the case of the prosecution and directly prejudiced the accused persons in their defence. Learned Advocate in order to substantiate his submission, on the point of right of a speedy trial and consequences of denial of speedy trial, relied upon decision in the case of ***Vakil Prasad Singh .v/s. State of Bihar***¹. Learned Advocate in support of his submission on the point that delayed alternation of charge was not consistent with the mandate of law and against the rule of propriety, relied upon the decisions of this Court in the case of ***Ravishankar Jagannath Prasad Tiwari .v/s. State of Maharashtra***² and ***Arif Ali .v/s. State of Maharashtra***³.

1 (2009) 3 SCC 355

2 2007 (1) ABR (NOC) 161 (BOM).

3 2013 Cri.L.J.(NOC) 373 (BOM.)

10. Learned APP Ms M. H. Deshmukh for the State submitted that the Court has power under Section 216 of the Cr.P.C. to alter or add to any charge at any time before judgment is pronounced. Learned APP submitted that after considering the matter from all possible angles, the learned Judge before pronouncement of judgment found that the alteration in the charge, as made by him, was necessary to ensure the fair trial to the accused persons as well as to the victim and prosecution. Learned APP submitted that in the FIR it has been stated that the murder was committed pursuant to the conspiracy hatched by the accused persons. Learned APP, therefore, submitted that alteration in the charge, made consistent with the case of the prosecution, could not be said to be an act to take the accused persons by surprise. Learned APP submitted that in order to ensure the fair trial and take care of the likely prejudice to the accused, learned Judge has granted them liberty to recall the witnesses for further cross examination, in view of the alteration made in the charge. Learned APP submitted that the learned Sessions Judge has, therefore, balanced the scale of fair trial appropriately.

11. In order to appreciate the rival submissions, I have gone through the record and proceedings. At the outset, it is necessary to state that the trial is pending before the Court of Sessions. The procedure for

the sessions trial has been laid down in Chapter XVIII of the Cr.P.C. Section 226 provides for opening of the case for prosecution by the prosecutor after committal of case to the Sessions Court. The prosecutor is supposed to describe the charge brought against the accused and point out the evidence he proposes to prove the guilt of the accused. Section 227 provides for the discharge of the accused in case the Judge considers that there is no sufficient ground for proceeding against the accused. Section 228 provides for framing of charge. It provides that if, after consideration of the material and hearing, as contemplated under Section 226, if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence then he shall frame, in writing, a charge against the accused. It is to be noted that when the Judge proceeds to frame the charge he has to revert back to the provisions of Chapter XVII under the heading ‘The Charge’. Perusal of Sections 226 and 227 of the Cr.P.C. would show that the learned Judge has to grant an opportunity of hearing to the prosecution as well as to the accused. Learned Judge after hearing the accused and the prosecution is required to frame the charge. It, therefore, goes without saying that the exercise of framing of charge is a very important stage in the criminal trial. The object of framing the charge on the basis of the material compiled in the chargesheet and on hearing the prosecution and the accused persons is to

put the accused persons to the notice of the case of the prosecution against them, so as to enable them to effectively and meaningfully meet the said case of the prosecution. It is to be noted that if there is error or mistake in framing the charge then the same can cause prejudice either to the prosecution in the conduct of the case and to the accused persons in their defence. The Court has to discharge this primary duty with great care and caution. The Judge, while framing the charge, apart from keeping the broad facts of the case of the prosecution in mind, in my view, has to strictly comply the provisions of Sections 211 to 214 of the Cr.P.C. Section 211 deals with the contents of charge. Section 212 provides for the particulars as to time, place and person to be specifically incorporated in the charge. Section 213 provides for the cases when manner of committing offence is required to be stated in the charge. Section 214 provides that in every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

12. The Judge is, therefore, under a legal obligation to frame the charge consistent with the case of the prosecution by complying the provisions of Sections 211 to 214 of the Cr.P.C. It is to be noted that the legislature in its wisdom has provided a window to take care of situation

when there is an error or mistake in framing the charge. Section 216 empowers the Court to alter or add to any charge at any time before judgment is pronounced. Sub Sections (3) and (4) of Section 216 of Cr.P.C. are very relevant for the purpose of deciding this petition. For the purpose of ready reference sub Sections (3) and (4) of Section 216 needs to be reproduced. The same reads thus:

“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.”

13. It is seen that if after alteration or addition of charge the Court is of the opinion that it is not likely 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 having been made, proceed with the trial as if the altered or added charge had been the original charge. Sub section 4 provides that if such alteration or addition is such that the proceeding immediately with the trial is likely, to prejudice the accused or the prosecution, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

14. Learned Advocate by giving emphasis on sub section (4) of section 216 submitted that since the alteration of a charge, in this case, is likely to prejudice the accused in their defence, learned Judge ought to have directed a new trial. In my opinion, this submission made by relying on sub section 4 of section 216 cannot be accepted in this case, in view of the minor alteration made in the charge. The alteration made in 5th head of the charge is consistent with the case of the prosecution. It is the case of the prosecution that the murder was committed by the accused persons pursuant to the conspiracy hatched by them. The necessary documents have been compiled in the chargesheet. The prosecution has adduced the evidence. The witnesses have been cross examined by the accused persons. It is pertinent to note that the accused persons did not raise any objection for framing of independent charge for the offence of criminal conspiracy punishable under Section 120-B of the

IPC. They did not apply either for deletion, alteration or modification of the charge under Section 120-B of the IPC. It is, therefore, apparent that the accused persons cannot make a grievance that simply because of alteration in that head of the charge they have been taken completely by surprise. The accused would have justified in making such grievance provided the prosecution had applied for framing of the charge of a criminal conspiracy for the first time after completion of recording of evidence. It, therefore, goes without saying that the accused persons by the initial charge, before its alteration, were put to notice that the murder was committed by them pursuant to the criminal conspiracy hatched by them.

15. Perusal of 5th head of the charge before its alteration would show that by mistake the Judge has stated in the charge that on the same day, time and place i.e. on 03.08.2012, pursuant to the criminal conspiracy hatched by them, they committed the murder of Umesh Khandwe. The only alteration sought in this head of the charge was with regard to the addition of word “prior to 03.08.2012”. Perusal of the altered charge would show that it has not changed the tenor and substance of the case of the prosecution. The altered charge has not in

any manner made the accused persons to face a totally new, distinct and different case.

16. Learned Advocate, as far as the charge of criminal conspiracy is concerned, submitted that there is hardly any evidence about hatching of the criminal conspiracy to commit the murder. In my view, this submission cannot be entertained at the stage of alteration of charge or hearing the challenge to the altered charge. It is to be noted that whether the evidence adduced by the prosecution is sufficient to bring home the said charge or not cannot be gone into, at this stage. It is further pertinent to mention that the offence of criminal conspiracy is a substantive offence. It is common knowledge that secrecy is the hallmark of the offence of criminal conspiracy. Ordinarily, it is very difficult to get direct evidence of criminal conspiracy. Direct evidence of criminal conspiracy is possible if one of the accused becomes an approver or one of the accused have made a confession of commission of crime by him as well as by his partners in the crime. Such is not the case here. In my view, therefore, this argument of prejudice or likely prejudice cannot be given undue weightage.

17. In this case, learned Judge after considering the matter from all angles and particularly keeping in mind the genesis of the case of the prosecution found that unintentional error committed by the Court needs to be corrected by altering the 5th head of the charge. The Court can *suo motu* alter or add the charge before pronouncement of judgment. Similarly, the Court can alter or add the charge on the application of the accused as well as the application by the prosecutor. The Court is not supposed to be a mute spectator. It is the duty of the Court to ensure a fair trial to the accused as well as to the victim of the crime and to the society at large. The Court is, therefore, required to act in a neutral manner while discharging its duty in the matter of framing of charge or alteration or addition of charge. It is to be noted that the failure on the part of the Court to frame the charge consistent with the case of the prosecution can prejudice the accused as well as the prosecution. The Court has to obviate the prejudice to the accused and to the prosecution and as such, frame the proper charge and give an appropriate notice to the accused of the case of the prosecution they are required to meet. Similarly, the Court has to ensure that the prosecution is not denied the fruits of the material compiled in the chargesheet on account of error or mistake in the charge. It is not out of place to mention that the accused has right to assert the prejudice cause to them on account of error or

mistake in the charge in the subsequent proceeding adopted by them, if any, after the judgment. In my view, therefore, the order passed by the learned Judge cannot be said to be contrary to the law.

18. Section 217 provides for recall of witnesses when charge is altered. The mandate of section 217 provides that whenever a 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 with reference to such alteration or addition, any witness, who may have been examined. Similarly, it provides that the prosecution and accused shall be allowed also to call any further witness whom the Court may think to be material. It is true that this exercise of alteration of charge was made after completion of the argument and before pronouncement of judgment. It is true that this exercise may cause delay in trial if the right provided under Section 217 is exercised or proposed to be exercised by the prosecution and by the accused. In my view, only on the ground of delay, if the exercise of alteration of charge is otherwise well within the parameters of law, the same cannot be thwarted. The Court has to balance the scale by ensuring the fair trial to the accused and to the victim and society at large. In this process, either the accused or the victim or society shall not feel that any inadvertent mistake or error on

the part of the Court, has resulted in injustice. In this case, learned Judge has granted liberty to the accused persons to exercise their right under section 217 of the Cr.P.C. In my view, the grant of liberty to the accused persons to exercise their right under section 217 of the Cr.P.C. would take care of their grievance.

19. It is seen on perusal of the record that this exercise of alteration of charge by the Court *suo motu* could not be said to have been undertaken to fill up the lacuna in the case of the prosecution. On examining the record, it is seen that this exercise was necessary and warranted to sub-serve the cause of justice. In view of this, the accused cannot make grievance that this exercise is nothing short of their persecution and not the prosecution. In my view, if the law laid down in the judgments, relied upon by the learned Advocate for the accused is considered and applied, I am of the opinion that the same is not applicable to the facts of the case of the accused. Therefore, I conclude that the order passed by the learned Sessions Judge to alter the 5th head of the charge is fully in accordance with law. No interference is warranted.

20. In the facts and circumstances, the petition stands dismissed.

21. Learned Judge is requested to dispose of the matter expeditiously and in any case, within four months from the date of the receipt of the writ. Pending applications, if any, stands disposed of.

22. Rule stands discharged.

(G. A. SANAP, J.)

Namrata