

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 4141 of 2022

Sabratul @ Golam Rasul Kaderi & Ors.

Vs

The State of West Bengal & Anr.

For the Petitioners

: Mr. Musharraf Alam Sk.,
Mr. Sujoy Sarkar,
Ms. Susmita Ghorai.

For the State

: Mr. Madhusudan Sur, Ld. APP
Mr. Dipankar Paramanick.

For the Opposite Party No. 2

: None.

Hearing concluded on

: 24.04.2024

Judgment on

: 16.05.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated May 11, 2022, passed by the Learned Judicial Magistrate, 1st Court, Chanchal, Malda, in connection with G.R. Case No. 1986 of 2018, arising out of Harishchandrapur Police Station Case No. 773 of 2018, October 26, 2018, under Sections 447/323/325/354/506/34 of the Indian Penal Code, 1860, whereby the Learned Judicial Magistrate, 1st Court, Chanchal, Malda has been pleased to allow the prayer of the De-facto complainant for addition of Section 326 of the Indian Penal Code.
2. The present case has been initiated on the basis of information lodged with the Harishchandrapur Police Station, by one Anjumwara of Mahendrapur, Malda. The said information was registered as Harishchandrapur Police Station case no. 773 of 2018, dated 26.10.2018, for investigation into alleged commission of offences punishable under Sections 447/341/325/326/308/354/379/506/34 of the Indian Penal Code, 1860.
3. **In spite of due service, there is no representation on behalf of the opposite party no. 2.**
4. The allegations brought by way of the First Information Report are *inter alia* to the effect that:-

“On 26.10.2018 at about 12.30 p.m. in the afternoon accused persons came to the informant’s land to grab it

with deadly weapons. Thereafter informant and others family members went to the spot and tried to resist them. At that time accused persons assaulted the informant and her family members with such deadly weapons. Due to such informant's brother-in-law had sustained bleeding injury. Then the accused persons also snatched the informant's gold chain. After that they fled from the spot and they also threatened the informant and her family members with dire consequences."

5. The petitioners state that after completion of the Investigation, the Investigating Agency filed Charge Sheet No. 43 of 2019 dated 26.10.2019 under Sections 447/323/325/354/506/34 of the Indian Penal Code.
6. The petitioners state that on 22.04.2021, the de-facto complainant filed an application under Section 173(8) of the Code of Criminal Procedure for further investigation. On 05.08.2021 Learned Additional Chief Judicial Magistrate, Chanchal, Malda on hearing both sides and was pleased to the reject the said application.
7. On 11.05.2022 date was fixed for passing order in respect of consideration of Charge. On that day Learned Magistrate heard both sides and was pleased to direct that the prayer of de-facto complainant be allowed to the extent of addition of Section 326 of the Indian Penal Code to the said charge.
8. The petitioners/accuseds case is that as per Section 326 of the Indian Penal Code, accused must have used dangerous weapons or means for grievous hurt. But as per the injury report, one bamboo stick was used

by the petitioners and bamboo sticks cannot be said to be a dangerous weapon as stated by the petitioners.

9. The petitioners further state that, Learned Magistrate has failed to comply with the provision of Section 301(2) of the Code of Criminal Procedure, where it is clearly stated that the private pleader can assist the Public Prosecutor or Assistant Public Prosecutor.

10. The relevant part of the order under revision is as follows:-

“GR 1986/2018
J.O CODE – WB1424
Order dated 11.05.2022

..... It has been next alleged by the de-facto complainant that the I.O. has investigated this case without interrogating the de-facto complainant and without recording any statement of the witnesses u/s 161 of Cr.P.C. whose names have been enlisted in the charge sheet by the concerned I.O. and I.O. has not collected the injury report of the injured person namely Salam and such injury report clearly specifies that such injured person sustained injury on his head and in his eyes and it is clearly mentioned in the injury report that the fractured was seen in his frontal bone of scul due to the sharp cut injury which attracts Section 326/307 of IPC but the concerned I.O. has submitted the charge sheet for the offence triable by the Ld. Court of Magistrate and the I.O. has not taken any endeavour for recording the statement of the de-facto complainant u/s 164 of Cr.P.C.

Ld. Advocate namely Chinmoy Mishra for the de-facto complainant submits that it is apparent from the medical documents of the injured person that there are enough materials for filing of charge sheet by the concerned I.O. u/s 326 of IPC and in support of his submission, he has drawn the attention of this Court by referring the report of T.R.A General Hospital.

Ld. Advocate namely Ramen babu submits that there is an ample ambit before this Court for the alteration of charge u/s 216 (3) of IPC.

In this case it is apparent after perusing the medical documents of the injured person that the concerned I.O. has not collected the whole of the medical documents of the injured person and on repeated scrutiny and due consideration the whole of the materials on record, this Court has repeatedly failed to understand the reason behind of the non-collection of the whole the injury report of the injured person namely Salam.

In addition to in regard to the investigation it is more to stated that the concerned I.O. has not made the injured person as a witness of the instant case.

In regard to injury report it is too much apparent from the diagnostic report as diagnosed by the doctor Arunabha Chowdhury a consultant Radiologist, after the C.T. Scan of the brain done taking thin contiguous axial sections in MDCT, which contains the observations of the concerned doctor as follows:-

- ***Intraparenchymal***
- ***Fracture seen in frontal bone on left side with adjacent hemosinus.***

*Thus, considering the nature of such injury and the seventh instance of section 320 of IPC, which states that "**fracture or dislocation of bone or tooth**" for designating an injury as grievous hurt, it can be stated that it is apparent that there is a gross intentional negligence on the part of the concerned I.O. in conducting the investigation of the instant case and in regard to the consideration of the medical documents which has not been collected by the concerned I.O. or made a part in his case diary but brought before this Court by the de-facto complainant, is to be said that the Court is not a mere spectator and the power of this Court is not only confine for acting upon the erroneous whimsical investigation of the concerned I.O. as this Court got ample power for considering the medical documents submitted by the de-facto complainant for curing the mala-fide part of the concerned I.O. in conducting his investigation.*

That the prayer of the de-facto complainant vide her application dated 28.09.2021 is allowed to the extent of addition of section 326 of IPC considering the injury report.

Let Section 326 of IPC be added.

***Sd/-
Judicial Magistrate, 1st Court,
Chanchal, Malda”***

11. In *Dr. Nallapareddy Sridhar Reddy Vs The State of Andhra Pradesh, (Criminal Appeal No. 1934 of 2019), decided on 21.01.2020.* The Supreme Court held that:-

“14. In order to adjudicate upon the dispute, it is necessary to refer to Section 216 of CrPC:

“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.”

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.

21. The appellant has relied upon a two-judge Bench decision of this Court in **Onkar Nath Mishra v The State, (2008) 2 SCC 561**, to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established.

This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

(Emphasis supplied)

22. In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

“LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-inlaw, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant’s daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that

*A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. **When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed.”

(Emphasis supplied)

23. *The test adopted by the High Court is correct and in accordance with decisions of this Court. In the counter affidavit filed by the fourth respondent before this Court, depositions of PW 1 (LW 1), PW 5 (LW 12) and PW 6 (LW 13) and their cross-examination have been annexed. The material on record supports the possibility that in April 2006, the appellant demanded Rs 5,00,000/- from PW 1, who is the complainant, in order to secure a doctor's job for the complainant's daughter in the United Kingdom. According to PW 1, he borrowed the amount from PW 5 (brother-in-law of PW 1) and paid it to the appellant in the presence of PW 5 and PW 6 (friend of PW 1). Without pronouncing on the probative value of such evidence, there exists sufficient material on record that shows a connection or link with the ingredients of the offences under Sections 406 and 420 of the IPC, and the charges sought to be added.*

24. *The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of*

trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference.”

- 12. In *Rekha of 2 Ors. vs State of U.P. & Anr.*, AIR ONLINE 2021 ALL 369, decided on 05.02.2021, (Allahabad High Court), the Court held:-**

“19. In view of the settled legal position in case of any omission in framing of the charge if it comes to the knowledge of the court trying the offence, the power to alter the charge under Section 216 Cr.P.C. is always vested in the Court to be exercised at any time before the judgment is pronounced. The section is in the nature of an enabling provision for the Court to exercise its power under certain contingencies when the relevant facts with regard thereto are brought to its notice. In case where a situation so demands if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, the Court may do so on its own or upon an application of the parties.”

- 13. In *Sushil Vs State of U.P. & Anr.*, (Allahabad High Court), decided on 31st May, 2023, the Court held:-**

“33. As regards the submission that the learned Magistrate could not have entertained the application preferred by the informant as the same is not maintainable in the view of the provisions of Section 216 Cr.P.C. This Court feels that the learned Magistrate could have done it suo moto but the application was only a way to bring to the notice of the Court concerned about the defect in framing of the charge, therefore, the Court finds no fault in case such an application has been entertained in the present facts of the case wherein from statements of witnesses, presence of Sushil and Shubham having rifle and country made pistol in their hands, was proved at the place of incident, thus, there was ample material to entertain the application as moved by the

informant/complainant to alter the charge of Section 307 IPC against the applicant Sushil.”

14. From the materials, in the case diary placed by the State the following injuries are noted:-

- i) At page 18 is the Injury Report of Harishchandrapur II Rural Hospital. Date and time of examination is 26.10.2018 at 11.20 a.m.

A.	Admitted or not	:	Refer to Chanchal SDH/M.M.C. & Hospital.
B.	History of Injury	:	Struck by bamboo stick on Lt. frontal. Region- woozing of blood-thigh. Bandage - refer to Chanchal SDH / M.M.C. & Hospital.
C.	Size of each injury in inches, i.e., length, breadth and depth.	:	5-6 cm long, (approx). 1cm depth, (approx). 2cm breadth, (approx).
D.	On what part of the body inflicted	:	Lt. frontal region.
E.	Slight, severe or dangerous	:	Depend on further investigation.
F.	By what kind of weapon inflicted	:	Bamboo stick.
G.	Prognosis	:	Depend on further investigation.

- ii) Page 33 - Bed Head Ticket dated 26.10.2018.

Final Diagnosis or Injury:- ICH # fracture of skull.

- iii) Pg 59 – Discharge Record shows that patient was admitted for almost 10 days.

**C.T. Scan of brain has shown – Fracture of frontal
bone contusion.**

15. Several Medical papers are on record.
16. The power under Section 216 of Cr.P.C. lies exclusively with Court.
The Court can alter the charge on the basis of materials in the case diary, which was overlooked by the Investigating Officer, even on the application of the party, as even otherwise, the Court has the power to do so at any stage till the delivery of judgment.
17. A Bamboo can be a weapon of assault causing grievous hurt. It is the impact of the assault and the force with which it is used. An assault with a Bamboo can even cause death.
18. **The fracture in the skull of the victim, due to assault with a Bamboo comes under Section 320 of IPC punishable under Section 326 of IPC and the trial Court rightly added Section 326 of IPC and fixed the case for framing of charge.**
19. **Thus the order under revision being in accordance with law requires no interference by this Court and is thus affirmed.**
20. **CRR 4141 of 2022 is dismissed.**
21. All connected applications, if any, stand disposed of.
22. Interim order, if any, stands vacated.
23. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

- 24.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)