

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
Criminal Revisional Jurisdiction
Appellate Side**

**Present:
The Hon'ble Justice Rai Chattopadhyay**

**CRR 325 of 2023
with
CRAN 6 of 2024**

**Anil Chhetri
Vs.
The State of West Bengal & Anr.**

For the Petitioner : Mr. Amalesh Ray,
: Mr. Pratap Khati,
: Mr. N. Mittal.

For the State : Mr. Aditi Sankar Chakraborty,
Ld. APP.
: Mr. Subhasish Misra.

**Heard on : 09/09/2024
Judgment on: 11/09/2024**

Rai Chattopadhyay, J.

1. The petitioner is aggrieved by the order of alteration of charge in case No. SC 50 of 2022, pending in the Court of the Sessions Judge Kalimpong, corresponding to Gorubathan Police Station Case No. 13 of 2022 dated 22.05.2022 under section 498A and 302 of the IPC, that is, order dated November 17, 2023 of the Court.

2. Fact remains that pursuant to the FIR lodged on May 22, 2012, a case was registered under sections 498A and 302 of the IPC. After completion of investigation, a charge-sheet was submitted under sections 498A and 304 of the Code. Charge has also been framed under sections 498A and 304 thereof and the trial proceeded by examining the witnesses. That, after the prosecution evidence was closed and the Court upon being satisfied that the charge may be altered to incorporate that of an offence under section 302 of the IPC, has delivered the impugned order dated November 17, 2023, thereby altering the charge to that under section 302 IPC along with section 498A of the Code, after giving opportunity of hearing to the prosecution as well as the defence. Being aggrieved thereby the petitioner/accused person is before this Court, in this case, to seek setting aside of the order as impugned.

3. Mr. Ray is representing the petitioner. He, having accepted that, the Court is equipped with ample power, under section 216 of the Code of Criminal Procedure, to alter the charge framed in the case, has submitted further that such power is, however, not unfettered, but subject to a sound decision making process on the basis of the materials available and application of sound judicious mind to the same to ascertain the genuine requirement of alteration of charge. He would say about the grievance of

the petitioner that the impugned order has been made without due consideration of the materials on record. Mr. Roy in candid to say that the charge-sheet which is the culmination of investigation process and upon consideration of the materials collected in the process, would show an alleged offence under section 304 of the IPC, along with section 498A thereof. He says that the Court's decision for alteration of the said charge against the accused person, must have been based on some more material, which are sufficient and directly relatable to the offence sought to be charged against the accused person, in order to support the finding of the Court regarding alteration of charge. According to Mr. Roy, unless the decision of the Court is based on of such nature of additional evidence which was not available to the Court before, a decision to alter the charge, in exercise of the power under section 216 of the Code, would not be sustainable in the eye of law. In this regard a judgment of the Supreme Court has been relied on, that is reported in ***(2020) 12 SCC 467 [Dr. Nallappareddy Sridhar Reddy vs. State of Andhra Pradesh and Others]***. According to the petitioner, the impugned order suffers with such impropriety and illegality. That, for the said reason it would not be maintainable and would be liable to be quashed.

4. The State has been represented. Mr. Misra for the State has raised strong objections as to the contentions and prayer of the petitioner. He has made two fold submissions. Firstly that, the statute has provided wide power to the Court to alter the charge at any time, during the trial. He has stated that such wide discretionary power ought to have been utilised by the Court at an appropriate place for the purpose of fair trial and the Court in this case has done exactly like that. According to the State, the order of the Court dated November 17, 2023, is based on sound reasoning and proper materials and is therefore, not warranted to be interfered into. The second limb of argument by Mr. Misra is about due statutory protection of the accused person, in terms of section 217 of the Code, to defend his case, even in case of alteration of charge in the trial. He has stated that the law has protected prejudice of the accused person in any way, in case of alteration of the charge. He also says that the Court has been fully conscious about the same and directed accordingly. He would suggest that the present case may not be maintainable and insist that the same may be dismissed.

5. Sections 216 and 217 of the Code has dealt with alteration of charge in a trial. Addition or alteration to any charge has been permitted by the law at any stage before pronouncement of judgment. The same has to be read

over and explained to the accused. Also that the witnesses have to be recalled or re-summoned and their examinations have to be made with reference to the alteration or addition. The statute has provided further that with respect to the altered charge, further material witnesses may also be called for and examined.

6. The provision of the statute as above aims to the fair trial and proper adjudication of the case. The legislative intention is evidently to invest the Court with all comprehensive power for remedy the defect in a charge whether they arose while framing the charge or due to non-framing of charge; whether the defects were discovered at the inception of trial or at any subsequent stage of it. An erroneous and improper charge may be corrected under Section 216 Cr. P. by re-framing it properly or by adding or altering it for an offence provable by the evidence.

7. This power to add or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or non-framing of charge and whether they are discovered at the inception of the trial or at subsequent stage of the trial but prior to the pronouncement of the Judgment. Court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the Judgment is

pronounced. It is discretionary power but the discretion should be exercised judicially and not arbitrarily.

8. The power of such alteration of charge is also considered by the Supreme Court in the case of **Anant Prakash Sinha vs. State of Haryana & Anr.** reported in **(2016) 6 SCC 105**, wherein, the Apex Court held that the charge can be altered at any time during the proceedings, which would mean even after the case is reserved for its Judgment. But, what has to be seen is, whether there is material and what is the prejudice that would be caused to the accused by such act.

9. The Supreme Court in the said Judgment held as follows:

“18. From the aforesaid, it is graphic that 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 Cr. P. C.

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 Cr. P. C. 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.”

10. The petitioner’s case is based on the ground that no such new or further material is available on record, on the basis and for reason of which, the Court could have altered the charge of the case from that of section 304 of the IPC, to 302 of the Code. By referring to **Dr. Nallappareddy’s case (supra)** it has been submitted that in this case, before the Court neither there was any omission in framing of charge nor any new material would be available post framing of charge, to suggest factual ingredient to constitute an offence under section 302 of the IPC. The same having been held by the Supreme Court, in that case, as imperative for alteration of charge, the impugned order would not be maintainable as per law.

11. The Court’s reasons in the impugned order dated November 17, 2023, may be quoted as herein below :

“Evidence on record shows that the autopsy surgeon, P.W-15 has stated during his cross-examination that “injuries could have been inflicted from outside”. The report of Dr. Vivek Kumar the Associate Professor, department of FSL, North Bengal Medical College and Hospital (Ext-25) shows that the professor has opined that, “possibility of homicide can not be ruled out”. Both the P.M. reports (Ext-14) and the report of the professor Dr. Vivek Kumar (Ext-25) show that death was due to effect of multiple head injuries ante-mortem in nature. The victim was found with different injuries on her body like injuries on different sides of scalp, broken upper central incisional teeth, injuries on her left elbow joint, right elbow joint, right forearm below right elbow, anterior aspect of left knee, posterior aspect of right shoulder sub-scalp hematoma, contusion of dark blue and brown colour present on different

parts of body and as per post-mortem report death was due to effect of injuries which were found to be ante-mortem in nature. P.W-33 Dr. Anup Chakraborty of Neuro Surgery Department, Anandaloke Hospital, Siliguri proved his report and deposed that this was not a case of bleeding caused by cerebral stroke and that, "I firmly believe that it was a case of head injury and not of C.V.A. In case of a stroke there is deep seated blood that will never get a subdural hemorrhage. So it was not a case of C.V.A., rather it was a case of head injury".

Prima-facie case is made out u/s 498A/302 of IPC against the accused person. Substance of acquisition is read over and explained to the accused person in his native language to which he pleaded innocence by saying 'Kasoor Chaina' (I am innocent). Formal charge is prepared in separate sheet and kept with record."

12. It appears that the Court has taken into consideration the evidence of the witnesses, more precisely, that of P.W.s 15, 29 and 33 and documentary evidences like Exhibit-14 and Exhibit-25, to come to the finding of alteration of charge. Obviously evidence of the witness was never there for prima facie consideration of the Court at the time of framing of charge, in the case. The Supreme Court judgment may be beneficially quoted at this juncture to elucidate the aspect, that is in the case of **Jasvinder Saini vs State (NCT of Delhi) (2013) 7 SCC 256 :**

"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.”

13. It would also be beneficial to note as to the portion of evidence which have inspired the Court to alter the charge. That is like, P.W.15 says in cross-examination that *“injuries could have been inflicted from outside”*. Also that P.W. 33 says *“I firmly believe that it was a case of head injury and not of C.V.A. In case of stroke there is deep seated blood that will never get a subdural hemorrhage. So it was not a case of CVA, rather it was a case of head injury”*. These ocular evidences are very vital when matched with the facts which revealed from documentary evidences as mentioned above to comprehend a direct link or nexus with the ingredients of offence under section 302 of the IPC. In such view of the fact, the Court finds that the ratio of the judgments of the Supreme Court in ***Dr. Nallappareddy’s case (supra)*** as well as ***Jasvinder Saini’s case (supra)***, would be squarely applicable in the present case. This Court has little or no doubt at all as regards any infirmity, as alleged, as to the exercise of discretion by the Sessions Judge in considering it necessary to alter the charge, having regard to the evidence on record.

14. The petitioner's submission that no new material than those which were available earlier before the Court, was present to rely on, in order to alter the charge, is not acceptable, in so far as, after the ocular evidence of the witnesses having been brought on record, the same should be considered as the materials which were not there before the Court at the time of framing of the charge. Any other interpretation would render the statutory provision as nugatory, which allows the Court to alter charge at any stage, till the time before pronouncement of the judgment.

15. On the said premise, the present case would not be maintainable.

16. Hence, CRR 325 of 2023 is dismissed. Connected application being CRAN 6 of 2024 is disposed of.

17. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

RAI
CHATTOPA
DHYAY

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(Rai Chattopadhyay, J.)