

Reserved on 28.11.2019

Delivered on 04.02.2020

A. F. R.

1. **Case :-** APPLICATION U/S 482 No. - 43580 of 2019

Applicant :- Smt. Rekha

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Mohd. Rashid Siddiqui, Abhinav Gaur, Anoop Trivedi (Senior Adv.)

Counsel for Opposite Party :- G.A.

With

2. **Case :-** APPLICATION U/S 482 No. - 43493 of 2019

Applicant :- Manoj

Opposite Party :- State Of U.P. And Anr

Counsel for Applicant :- Shailendra Singh

Counsel for Opposite Party :- G.A.

Hon'ble Ajit Singh, J.

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Mohd. Rashid Siddiqui and Abhinav Gaur, learned counsel for the applicant and Sri Swetashwa Agarwal, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. The present 482 Cr.P.C. Application No.43580 of 2019 has been filed to quash the orders dated 18.11.2019, 19.11.2019 and 20.11.2019 passed by learned Additional Sessions Judge, Baghpat in S.T. No. 26 of 2017 and S.T. 149 of 2017 (State Vs. Rekha and others), under Sections 147, 148, 149, 302, 307 and 120B IPC, arising out of Case Crime No.271 of 2016, Police Station Binauli, District Baghpat.

3. So far as the Application under Section 482 Cr.P.C. bearing No. 43493 of 2019 is concerned, has also been filed to quash the order dated 19.11.2019 passed by Additional Sessions Judge, IVth, Baghpat in Session Trial No.26 of 2017 (State Vs. Satendra and others), arising out of Case Crime No. 271 of 2016, under Sections 147, 148, 149, 302, 307, 120B IPC, Police Station Binauli, District Baghpat.

4. Both these applications mentioned above are being decided by a common judgment and order as the controversy involved in these two applications is same and identical.

5. The police investigated the matter and submitted the charge sheet against the accused persons, namely, Satendra, Smt. Rekha, Manoj, Nirbhay, Anil, Subodh along with Arjun and the trial commenced. The accused Rekha was charged under Section 120B read with Section 302 IPC and she was further charged under Section 120B read with Section 307 IPC and the accused Manoj was also charged under Section 120B read with Section 302 and 307 IPC and all other accused persons were charged under Sections 302, 147, 148, 149, 307 and 120B IPC and session trial commenced and evidence of prosecution witnesses were recorded. After recording the evidence of the prosecution witnesses, an application was given, copy whereof has been annexed on page 25 onwards under Section 216 Cr.P.C. with the prayer to amend the charges against the accused persons, namely, Rekha and Manoj, charged under Sections 147, 148, 149, 302, 307, 120B IPC. This application was moved on 31.7.2019 and the Court allowed this application vide order dated 18.11.2019, the order has been annexed on page 36 of the paper book and directed that the charge be amended and thereafter the charges against the accused persons, namely, Smt. Rekha and Manoj were amended on 19.11.2019. After the amendment of the charge against the accused Smt. Rekha and Manoj, an application was moved by the prosecution, which is annexed on page 53; which states that the witnesses were present in the Court and they were also ready for cross-examination, but no order was passed by the learned trial Court on the application dated 19.11.2019, moved by the prosecution. Then, again, an application was moved by accused namely Smt. Rekha praying therein that the accused persons may be given an opportunity to cross-examine the prosecution witnesses and the same was rejected. In that application the order was passed on 19.11.2019 by the learned trial Court, which is annexed on page 40 onwards and the operative portion reads as follows:-

“41 वादी के विद्वान अधिवक्ता द्वारा प्रार्थना पत्र प्रस्तुत किया गया है कि अभियुक्ता रेखा व मनोज पर चार्ज में धारा 302 भा०दं०सं० की बढ़ोत्तरी की गयी है। इस स्तर पर अभियोजन अपने साक्षीगण से अभियुक्तगण द्वारा जिरह कराने को तैयार है। अभियुक्तगण के विद्वान अधिवक्ता द्वारा कोई आपत्ति नहीं है और वे जिरह हेतु तैयार हैं। पत्रावली के अवलोकन से पूर्व में ही यह स्पष्ट हो चुका है कि अभियुक्तगण द्वारा अभियोजन पक्ष के साक्षीगण से सम्पूर्ण जिरह की जा चुकी है और धारा 261 दं०प्र०सं० के उपबन्ध-3 के अनुसार अभियुक्तगण को आरोप परिवर्धित किये जाने से कोई भी प्रतिकूल प्रभाव पड़ने की सम्भावना भी प्रतीत नहीं होती है तथा परिवर्धन के पश्चात अभियोजन द्वारा किसी अभियोजन साक्षी का मुख्य परीक्षण नहीं कराया जाना है तथा पूर्व में अभियुक्तगण द्वारा अभियोजन साक्षीगण से प्रतिपरीक्षण विस्तृत रूप से की जा चुकी है। माननीय उच्च न्यायालय के आदेशानुसार पत्रावली का निस्तारण करने के उपरान्त दिनांक 02.12.2019 तक सूचना माननीय उच्च न्यायालय को प्रेषित की जानी है। माननीय उच्च न्यायालय द्वारा भविष्य में भी समयवृद्धि न किये जाने का निर्देश भी दिया गया है। अतः उपरोक्त तथ्यों एवं परिस्थितियों में वादी का प्रार्थना पत्र स्वीकार किये जाने योग्य नहीं है। तद्विषय प्रार्थना पत्र निरस्त किया जाता है।”

6. The order passed on the application of the accused persons is annexed to the supplementary affidavit oat page 8 dated 20.11.2019, filed in this application. The learned trial Court rejected the application moved by the accused persons for re-crossexamination of the witnesses as fresh and the learned trial Court has opined that if the trial is being proceeded without affording an opportunity to cross-examine the prosecution witnesses to the accused persons, there will be no adverse effect on the accused persons and thereafter rejected the right of cross-examination of the accused persons.

7. Learned counsel for the applicants has submitted that the trial Court by not affording the opportunity to cross-examine the prosecution witnesses has committed manifest error and has totally bypassed the settled principles of law and by not permitting the accused to cross-examine the prosecution witnesses after amendment of the charge which has been specifically provided by the Sections 216 and 217 Cr.P.C.

8. He further submitted that initially both the accused persons were charged under Section 120-B read with Section 302 IPC and again charged under Section 120B and 302 IPC and they were not charged with the offence under Sections 147, 148, 149, 302 IPC. He further submits that initially the charges were confined only to the conspiracy and now by way of amendment of the charge, substantial change in the charges levelled earlier has been made and a new role has been assigned and attributed to the accused persons by amending charge and the accused persons were not able to defend themselves legally and they have not been provided and afforded an opportunity to cross-examine the prosecution witnesses in light of amended charges and their legal rights have been curtailed and slashed by the learned trial Judge.

9. Sri Swetashwa Agarwal, learned counsel for the opposite party no.2 has not disputed the fact that the charge was amended and he has accepted that the charges were already amended; and in the proper interest of justice the accused should have been provided the right to cross-examine which has never been catered.

10. The provisions of Sections 216 and 217 of Code of Criminal Procedure, which are relevant and necessary for just and proper decision of the controversy, are reproduced below:-

“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.

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. B.- Joinder of charges The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and 4 of Section 216 of the Code. Sub-section(3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section(4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.

11. When this Court applies the aforesaid principles to the facts of this application it emerges out that initially the accused persons were charged for an offence under Section 120B read with Section 302 IPC and later on charges were amended to Sections 147, 148, 149, 302 IPC and initially the accused persons were considering that they had to defend themselves against the charge with which they were charged that is criminal conspiracy, later on they were charged with offence of murder they were charged under Sections 147, 148, 149, 302 IPC now they have to defend themselves under the amended charge

and the amended charges are bound to create prejudice to the applicants. In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses, examine them in the context of the charge under Section 302 IPC and other relevant sections and allowed the accused persons to cross-examine the prosecution witnesses in the light of amended charge.

12. In the present case, with the framing of alternative charge, testimony of those witnesses recorded prior to that date could even be taken into consideration and this Court is of the opinion that the provisions of Sections 216 and 217 are mandatory in nature as they not only sub-serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity of cross-examination of the witnesses.

13. The credibility of any witness can be established only after the said witness is put to cross-examination by the accused persons in connection with the charged offence. In the instant case, no cross-examination of the prosecution witnesses has taken place insofar as concerned charge under Sections 147, 148, 149 and 302 IPC and if the accused persons are not provided an opportunity to cross-examine the prosecution witnesses then the trial will be vitiated.

14. It is principle of natural law that nobody will be condemned unheard and proper and due hearing should be provided to the accused and the cross-examination is one of the facet of due hearing which ought to be provided to every accused to defend himself of the charge being levelled against him.

15. In **Bhimanna Vs. State of Karnataka** reported in(2012) 9 SCC 650, it has been held:-

"19. It is a matter of great regret that the trial court did not proceed with the case in the correct manner. If the trial Court was of the view that there was sufficient evidence on record against Yenappa (A- 1) and Suganna (A-3), which would make them liable for conviction and punishment for offences,

other than those under Section 447 and 504/34 IPC, the court was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial. Section 216 of the Code of Criminal Procedure, 1973 (hereinafter called "Cr.P.C.") empowers the trial Court to alter/add charge(s), at any stage before the conclusion of the trial. However, law requires that, in case such alteration/addition of charges causes any prejudice, in any way to the accused, there must be a fresh trial on the said altered/new charges, and for this purpose, the prosecution may also be given an opportunity to recall witnesses as required under Section 217 Cr.P.C."

16. After considering the rival submissions and considering the facts and circumstances of this case, this Court deems it proper to direct that the learned trial Court will provide an opportunity to the applicants for cross-examination of the prosecution witnesses in the interest of justice and will protect the constitutional rights of due hearing and fair trial of the accused. It is further directed that the learned trial Court will call the prosecution witness day by day and will provide an opportunity to the accused persons to cross-examine the witnesses and it is also being directed that the prosecution witnesses will present as and when required by the trial Court and the accused persons will not take any unnecessary adjournment, if the witnesses are present in the Court. After providing opportunity to the accused persons for cross-examination of the prosecution witnesses and after recording the statements of the accused persons under Section 313 Cr.P.C., the learned trial Court will pass the judgment.

17. The learned trial Court will not act in haste in deciding this session trial and the trial Court will follow and adhere to the mandatory provisions of law.

18. With the above observations, both the applications are finally **disposed of**.

Order Date :- 04.02.2020

Mini/LBY