Sikkim High Court Rocky Benediek And Anr. vs State Of Sikkim on 30 June, 2003 Equivalent citations: 2003 CriLJ 3309 Author: N Singh Bench: N Singh ORDER N.S. Singh, Actg. C.J. 1. The order dated 5th June, 2003 passed by the learned Sessions Judge (E and N), Gangtok in Criminal Case No. 11 of 2002 is the subject-matter under challenge in this revision petition. 2. Pacts of the case, in a short compass, are as follows :– The present accused-petitioners, namely, Shri Rocky Benediek and Smt. Jiji Rocky and one Shri Biju Henry have been facing the trial before the learned trial Judge in respect of the charges under Sections 302 and 201, I.P.C. as against the petitioner No. 2, Smt. Jiji Rocky and charges under Section 201/34, I.P.C. as against the present petitioner No. 1, Shri Rocky Benediek and one Shri Biju Henry vide Criminal Case No. 11 of 2002 and when the trial is/was at the stage of argument, the prosecution filed the application under Section 216, Cr.P.C. for adding the charge under Section 302/34, I.P.C. as against the accused-petitioner No. 1. Shri Rocky Benediek and to add the charge under Section 34, I.P.C. against the accused-petitioner No. 2, Smt. Jiji Rocky and the trial Court allowed the petition with the observations that the accused Rocky Benediek will not be prejudiced if additional charge under Section 302 read with Section 341, I.P.C. is framed against him in addition to the charges already framed and similarly, by addition of charge under Section 34, I.P.C. to the charges already framed against the accused-petitioner No. 2, Smt. Jiji Rocky, under the impugned order dated 5th June, 2003. Being dissatisfied with the impugned order, the present accused-petitioners filed this revision petition. 3. Supporting the case of the accused-petitioners, Mr. N. Rai, learned counsel submitted that there is no material on record for altering or adding of charges as against the petitioners inasmuch as petitioner No. 1's involvement for an offence under Section 302, I.P.C. by virtue of the impugned order does not bear out by the record placed before the learned Court below and apart from that the learned trial Court went one step ahead to frame a fresh charge exceeding his jurisdiction vested upon him by law when the prosecution only sought for addition of charge and, moreover, the learned trial Court has reviewed its previous order pertaining to framing of charges against the accused persons. According to Mr. N. Rai, learned counsel, the learned trial Court has no power to frame fresh charges under Section 216, Cr.P.C., but it can only alter or add to any charge and as such, the impugned order pertaining to the framing of fresh charges is an order passed without jurisdiction. It is also argued by the learned counsel that the facts for which the fresh charges were framed, were in existence at the time of framing of the first charge on 15th May, 2002 and no new facts or materials have come into light for framing of fresh charge and more so, the petition was filed at a belated stage. Mr. N. Rai, learned counsel went on to contend that the learned trial Court ought to have rejected the petition of the prosecution as there is/was no change in the circumstances of the case from the date of framing of the original charge to the present date to warrant addition of any charge. Mr. N. Rai, learned counsel had also relied upon a decision of the Apex Court rendered in Harihar Chakravarty v. The State of West Bengal reported in AIR 1954 SC 266 : (1954 Cri LJ 724) and decisions of Bombay High Court and Kerala High Court rendered in State

of Maharashtra v. Ramdas Shankar Kurlekar reported in 1999 Cri LJ 196 and in a case between T.J. Edward v. C. A. Victor Immanuel reported in 2002 Cri LJ 1670 and contended that if a prejudice is caused to the accused by altering the charges then it is not permissible for the trial Court to change the charge. It is also argued by the learned counsel for the petitioners that no cogent reason has been assigned in the impugned order by the trial Court while allowing the prayer of the prosecution for addition of charges and apart from that the trial proceeded with and the evidences of both the sides were closed and the case was fixed for argument and at such stage framing of fresh charges by the trial Court is perverse and illegal and accordingly, it should be interfered With by this Court. 4. At the hearing, Mr. N.B. Khatiwada, learned Public Prosecutor assisted by Mr. J.B. Pradhan, Additional Public Prosecutor contended that the scope of the provision of Section 216, Cr.P.C. is very wide and any Court may alter or add to any charge at any time before the judgment is pronounced. According to Mr. Khatiwada, learned Public Prosecutor, the learned trial Court altered and added to the charges as against the petitioners under the impugned order on the basis of the available materials on record and the learned trial Court exercised its jurisdiction vested upon him by law under Section 216, Cr.P.C. in accordance with law and as such, there is no infirmity in it. 5. Now, this Court is to see and examine as to whether the present petitioners could make out a case to Justify the interference with the impugned order and whether the impugned order is tenable in the eye of law or not. 6. I have perused the impugned order and available materials on record including the case records of Criminal Case No. 11 of 2002. It is not disputed that the evidence of the parties were closed and the related case being Criminal Case No. 11 of 2002 was fixed for argument and at the relevant stage, the prosecution filed the said petition under Section 216, Cr.P.C. In the said petition, it was specifically stated that the evidence on record shows that the accused-petitioner No. 1 Rocky Benediek is an accomplice of the accused-petitioner No. 2 Jiji Rocky in the murder of victim girl Bina Pradhan and as such it is felt necessary to add charges under Section 302 read with 341, I.P.C. against the accused Rocky Benediek and add the charge under Section 34, I.P.C. against the accused-petitioner No. 2 Smt. Jiji Rocky. It was also stated that the victim girl was last seen in the custody of the accused-petitioners and the victim girl was found dead on 18th February, 2002 in the residence of the accused-petitioners and apart from that cause of death of the victim girl as per the medical evidence is anti-mortem head injury and as contrary to such medical evidence, the two accused persons/petitioners gave the cause of death of the victim girl as vomiting and diarrhoea and also tried to hush up the death of the victim girl as due to vomiting and diarrhoea by carrying her dead body to Kumrek by covering in quilt and the rubber slippers and the crime weapon polythene pipe which was used by the accused-persons in beating the victim girl to death was recovered from the house of these two accused persons/petitioners on the basis of the statement of the accused Rocky Benediek under Section 27 of the Indian Evidence Act. Keeping in view of these materials on record and upon hearing the learned counsel for the parties, the trial Judge passed the impugned order with the observations that the accused

Rocky Benediek will not be prejudiced if additional charge under Section 302, I.P.C. read with Section 34, I.P.C. is framed against him in addition to the charges already framed and similarly, by adding charge under Section 34, I.P.C. to the charges already framed as against the accused Jiji Rocky, she will not be prejudiced. The impugned order was passed before rendering any judgment of the case in hand. It is true that the learned trial Court used the words, namely, "fresh charges to be framed" in the impugned order for which Mr. N. Rai, learned counsel submitted that the trial Court has no jurisdiction to frame fresh charges, but the Court may alter or add to any charge by invoking the provisions of law laid down under Section 216, Cr.P.C., which according to me, this submission of the learned counsel has no legal substance as the trial Court opined that the accused will not be prejudiced after additional charges are framed. 7. So far the case laws cited and relied upon by Mr. N. Rai, learned counsel, do not support the case of the accused-petitioners inasmuch as in the case between Harihar Chakravarty v. The State of West Bengal (supra), the accused-appellant Harihar Chakravarty was acquitted by the Presidency Magistrate, Calcutta, but the order of acquittal was set aside by the High Court of Judicature at Calcutta and on appeal the Apex Court held that in a revision petition, a direction to alter the charge so as to include an offence for which the accused was not originally charged, that could only be done if the trial Court itself had taken action before it pronounced judgment and it could only have done so if there were materials before it either in the complaint or in the evidence to justify such action. In other words, in that case, direction to alter charge was made at the revisional stage not at the trial stage of the case, but in the case in hand, the impugned order of addition of charges were made at the trial stage and before the judgment. Therefore, this decision of the Apex Court rendered in Harihar Chakravarty v. The State of West Bengal (supra), does not help the case of the present petitioners. Similarly, in the case between State of Maharashtra v. Ramdas Shankar Kurlekar (supra), one of the accused was only charged for abetment and the other accused was acquitted and in such situation this charge against the said accused for abetment is not maintainable. In that case also the issue of addition or alteration of charges came up after the pronouncement of judgment at appellate stage before the Bombay High Court. In my considered view, the learned counsel appearing for the petitioner had lost the sight of the decision of the Apex Court rendered in CBI v. V.C. Shukla reported in AIR 1998 SC 1406 : (1998 Cri LJ 1905), Be that as it may, the another decision of Kerala High Court rendered in T.J. Edward v. C.A. Victor Immanuel (supra) relates to alteration of charge and in that case, the Kerala High Court was of the view that when there is no material on record for showing a prima facie case against the accused so as to frame charge against him for commission of offence punishable under Section 420, I.P.C., the Court refusing to alter charge is just and proper. This decision also does not help the case of the petitioner inasmuch as in the case in hand, there is material on record for altering, or adding to the charges as against the present petitioners. 8. For just determination of the real points in controversy between the parties, the provision of Section 216, Cr.P.C. is relevant and accordingly, it is quoted

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 alternation 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 alternation 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." 9. The object of the Section 216, Cr.P.C. is to ensure a fair trial and the Court is to see as to whether alteration or addition to any charge at any time before the judgment is pronounced is called for or not and if it is called for, such alteration or addition to any charge, must be on the basis of some evidence on record. It is made clear that the words "add to" means addition of a new charge and not addition of a few words or corrections and that an erroneous or improper charge may be corrected by refraining it properly or by adding to it or altering it for an offence provable by the evidence taken by the trial Court. According to me, a prima facie case has been made out by the prosecution for altering or adding the said charges and the basic ingredients are present in the prosecution case and as such, the accused-petitioners are not prejudiced or handicapped in their defence. However, it is made clear that after such addition of charges under the impugned order, the prayer or request to recall or re-summon witnesses for examination in respect of those newly added charges must come either from the accused-persons or prosecution for which further liberty should be granted by the trial Court to the parties in the matter. 10. For the reasons, observations and discussions made above, I am of the view that there is no infirmity, illegality or impropriety in the impugned order. In the result, the petition is devoid of merit and accordingly, it is dismissed, thus affirming the impugned order dated 5th June, 2003 passed by learned Sessions Judge (E. and N) in Criminal Case No. 11 of 2002 with a direction to learned trial Court to entertain any request or prayer to recall or re-summon witnesses and to adduce further evidence in respect of the newly added charges from the end of the accused-petitioners or prosecution, if any and if so made by either of them. 11. No order as to costs. 12. The registry is directed to transmit the related case record to the trial Court immediately.