Kantilal Chandulal Mehta vs State Of Maharashtra And Anr on 10 October, 1969

Equivalent citations: 1970 AIR 359, 1970 SCR (2) 742, AIR 1970 SUPREME COURT 359, 1969 SCD 1020, 1970 SC CRI R 303, 1970 2 SCJ 317, 1970 MADLW (CRI) 175, 1970 MADLJ(CRI) 610, 1970 CRI. L. J. 510, (1970) 2 S C R 742 73 BOM L R 36, 73 BOM L R 36

Author: P. Jaganmohan Reddy

Bench: P. Jaganmohan Reddy, S.M. Sikri

PETITIONER:
KANTILAL CHANDULAL MEHTA

Vs.

RESPONDENT:
STATE OF MAHARASHTRA AND ANR.

DATE OF JUDGMENT:
10/10/1969

BENCH:
REDDY, P. JAGANMOHAN
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REDDY, P. JAGANMOHAN
SIKRI, S.M.

CITATION:
1970 AIR 359 1970 SCR (2) 742
1970 SCC (3) 166

ACT:
Criminal trial-Charge, amendment of-High Court allowing plea for alternate charge and remanding case keeping appeal pending-Code of Criminal Procedure 1898, ss. 423, 535.

HEADNOTE:
The second respondent Bank filed a complaint against the appellant alleging against him misappropriation of moneys and goods contrary to the Packing Credit Agreement entered into between the appellant's firm and the Bank. The Magistrate framed only one charge against the appellant, viz., 'for misappropriation of moneys, under s. 406, Penal Code. Against his conviction the appellant appealed to the

High Court and when the case had been argued for a considerable length the learned Judge allowed an oral application for amendment of the charge to include one of misappropriation of goods. Allowing the application the learned Judge directed that the case be sent back "for a new trial on the amended charge so as to enable the appellant to have full opportunity to meet the case till which time the appeal is kept pending." In appeal to this Court against this order.

HELD : Dismissing the appeal,

The Code of Criminal Procedure gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate Court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. Especially, cl. (d) of sub-s. (1) of s. 423 empowers the appellate court even to make any amendment or any consequential or incidental order that may be just or proper. Further, s. 535 provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be 'framed and direct that the 'trial be recommended from the point immediately after the 'framing of the charge. [748 A-E]

Thakar Sahab v. Emperor, [1943] P.C. 192, referred to.

In the present case the learned Judge of the High Court did not intend nor did he direct a new trial; only an opportunity was given to the accused to safeguard himself against any prejudice by giving him a opportunity to recall any witness and adduce any evidence on this behalf. [749 C]

The offence with which the appellant was charged alternatively was the same, namely, under s. 406; but as the entire transaction was one and indivisible he was not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant Bank contended became their's as soon as the accused purchased them with the moneys it advanced. Therefore no prejudice was

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caused, nor was likely to be caused to the accused by the amendment of the charge as directed by the High Court. [749 E-F]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 260 of 1968.

Appeal by special leave from the judgment and order dated October 18, 1968 of the Bombay High Court in Criminal Appeal No. 1161 of 1966.

A. S. R. Chari, S. S. Khanduja and Maya Rao, for the appellant.

M. C. Bhandare and S. P. Nayar, for respondent No. 1. V. M. Tarkunde, Janendra Lal and B. R. Agarwala, for respondent No. 2.

The Judgment of the Court was delivered by P. Jaganmohan Reddy, J. This appeal is by special leave against the order of the High Court of Bombay dated the 18th October 1968 allowing the oral application of the learned advocate for the respondent for the amendment of the charge of terms of the draft submitted by him and directing the Chief Presidency Magistrate to assign the case to some court for holding a new trial in respect of the amended charge. This order was made in the following circumstances The appellant was one of the partners of a firm Chandulal Kanji & Co. along with his brother Chandulal K. Mehta. By and under an agreement called the Packing Credit Agreement entered into between the firm and the second respondent, the Union Bank of India, the appellant obtained 75 per cent of the value of groundnut extraction to be purchased by the firm and exported to the United kingdom and other European countries from the Bank on the condition that immediately after the purchase of the goods and its export the shipping documents would be sent to it. This arrangement required the firm while sending a letter requesting the credit to be given to it, to enclose the contract of sale of groundnut extraction entered into between it and the foreign firm. On receipt of this letter and the agreement. the bank would advance 75 per cent of the money required to purchase the groundnut extraction. After the amount was received, goods had to be purchased from the mills and shipped for export and the shipping documents sent to the Bank within a month from the date of such advance. It appears that under this arrangement the second respondent Bank had advanced under the Cash Credit Agreement and the Packing Credit Agreement nearly rupees 4 lacs on several dates the first of which was March 27, 1965 which was for the purchase of 200 tons of groundnut extraction and with which we are now concerned. The Cash Credit Agreement, the Packing Credit Agreement and the letter requesting the advance of Rs. 60,000/- were all signed on the same date. The advance, as requested, was also made on the 27th March 1965. Goods were purchased but could not be shipped within a month from the date of the advance because, as stated in the letter of the appellant dated the 27th April, due to change in the schedule of departure of the ships it was not possible to export the goods on the 24th or 25th March as originally planned as such he undertook to ship the goods a week thereafter. On the same day, the appellant further sent a declaration that the firm had purchased 300 tons from the advance made to it and is holding the stock. On the 6th May the Bank requested the firm to forward the shipping documents in respect of the seven agreements of which one related to the agreement of 27th March. When the shipping documents were not sent to it in conformity with the several documents the bank made certain enquiries from its branch in Veraval, a port in Kathiawar and received certain information as to the dates on which the various quantities were exported and the ships in which they were sent. As the shipping documents were not sent to the second respondent as required under the agreements entered into with it, it again called on the firm on the 24th May to hand over

the documents to it in respect of the groundnut exported. When this request was not complied with, it filed a complaint against the appellant who alone was the active partner of the firm, in the court of the Presidency Magistrate on the 26th May alleging against him misappropriation of moneys and goods contrary to the agreement. In support of this complaint the manager of the Bank gave evidence and at the stage of framing the charge the Magistrate heard the lawyers for both sides. He framed only one charge against the accused for misappropriation of the moneys under S. 406 I.P.C. advanced by the Bank in respect of which the Magistrate ultimately convicted him on 31st August 1966 and sentenced him to 18 months' R.I. Against this conviction the appellant appealed to the High Court and when the case came up for hearing and had been argued for a considerable length, the advocate for the complainant, the second respondent, appears to have made an oral application for amending the charge framed by the Magistrate as per the draft handed over to the learned Judge which was to be added as an alternative charge to the charge already framed. It was contended that the Magistrate had framed a charge merely in respect of the entrustment of the moneys that were advanced by the Bank to the appellant but even so the evidence had been led on behalf of the complainant at the trial to show that apart from the money with which the appellant was said to have been entrusted with, even the goods that were purchased by the appellant with the moneys so advanced had also been entrusted to him and which he had agreed to hold on account of the Bank. This prayer was opposed by the learned advocate for the appellant who contended that it was open to the complainant to have urged the Magistrate at the time when the charge was being framed to have an alternate charge similar to the one now required to be added. In fact it was stated by the learned advocate that the charge was actually framed by the Magistrate after substantial evidence of the complainant had been recorded by him and after the complainant's advocate in the lower court had discussions on the question of the framing of charge, but in spite of it only one charge was framed against the appellant for breach of trust in respect of moneys said to have been entrusted to the appellant by the Bank. The charge relating to goods was omitted and not framed. It was also pointed out that the altering or amending of charge at this stage would really amount to the framing of a totally new charge in regard to altogether a new subject matter, namely, alleged entrustment of goods, which if permitted would prejudice the accused in his defence. The learned Judge, however, after hearing these arguments thought that a charge which would include entrustment of moneys as well as entrustment of goods ought to have been framed by the Magistrate but having regard to the materials which have already been brought on record by the complainant at the trial he thought that it was desirable in the interest of justice to allow the amendment. The following directions given by the learned Judge are relevant for the determination of the contention urged before us :

> "I direct that the charge as framed by the learned Magistrate be altered and amended in terms of the draft amendment submitted and send the case back for a new trial on this amended charge so as to enable the appellant to have full opportunity to meet this case, till which time this appeal is kept pending. I direct that the papers be sent to the learned Chief Presidency Magistrate forthwith and the learned Chief Presidency Magistrate is further directed to assign the case to some Court for holding the new trial. I further direct that the new trial should be expeditiously completed and preferably within two months from the receipt of the papers by the Court to which the case would be assigned by the learned Chief Presidency Magistrate. The other two appeals being Criminal Appeals Nos. 1162 and 1163 of 1966 should also be

adjourned as part-heard matters and to be put up along with Cri-

minal Appeal No. 1161 of 1966 after the record and the proceedings of the new trial is received by this Court."

Mr. Chari on behalf of the appellant construing the above order as a direction for a new trial without disposing of the appeal contends that it is unwarranted, unfair, inequitable and unsupported 'by any of the provisions of the Code of Criminal Procedure. The learned advocate further submits that it is grossly prejudicial to the accused, for the prosecution to wait till the end of the trial and then say that the charge should be amended. It could have easily insisted at the stage of framing the charge itself that an additional charge should be framed and if the prayer was not accepted it could have come in revision. The, prosecution having let the trial proceed to the end without insisting on any additional charge cannot now before an appellate court ask for its amendment nor should the said amendment be permitted. Secondly, he submits that the learned Judge did not consider the question whether there was or was not a prima facie case of entrustment of goods. In fact it is the contention that the cumulative effect of the agreement and the transaction between the appellant and the second respon- dent Bank does not disclose entrustment of moneys to sustain the charge for which the appellant was convicted and if there can be no question of any entrustment of moneys there can be no entrustment of goods. The learned Judge, it is stated, should have adverted his mind to this aspect of the case before he permitted the framing of additional charge and directed the Magistrate to hold a new trial. In fact the learned advocate urged that before the Magistrate the second respondent's advocate had specifically stated that the trial should proceed only on one charge relating to entrustment of moneys as a test case and having taken up this position no prayer for the addition of another charge can be made or ought to have been granted. But Shri Tarkunde appearing on behalf of the second respondent denies that there was any such submission and contends that in fact Tulzapurkar J. did not direct a new trial as suggested by the advocate on behalf of the appellant though the use of the words "new trial" has unhappily given rise to such a contention. What in fact the learned Judge did was to send the case back to the Magistrate to enable the appellant to have full opportunity to meet the case and return the record to the court to enable it to dispose of the appeal on both the charges. The learned advocate submits that there is no illegality in the order of the learned Judge because what the appellate court could have done itself it is directing the Magistrate to do, namely, to give an opportunity to the accused to call the prosecution witnesses if he so desires, obtain his statement under S. 342 in respect of the additional charge and to allow him to record any evidence on his behalf if he is so desirous. It appears to us that the contention of Shri Tarkunde is amply justified by the following observations of the learned Judge allowing the application for amendment made by Mr. Patel on behalf of the second respondent:

"I have therefore asked Mr. Khambata as to whether the appellant would like to have an opportunity of a new trial where he could meet this case and Mr. Khambata has stated that the proper course for the court, after allowing amendment of the charge in the manner sought by the complainant, would be to order a new trial. Mr. Patel for the complainant, however, has stated before me that even during such new trial that would be ordered by the court, no fresh evidence would be led on behalf of the complainant and the complainant would be relying upon the self same material that

> has already been brought on record by the complainant at the trial, which is already concluded.
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> Mr. Khambata also urged before me that if I were inclined to allow the application of Mr. Patel, I should dispose of the appeal which deals with the alleged entrustment of the monies and either accept the findings or set aside the findings and thereafter order a new trial in regard to the alleged entrustment of the goods. I feel that it would be desirable and proper to keep this pending till the opportunity that is being given to the appellant-accused No. 2 to meet this new case is fully availed of by him and the record of such new trial is received by this court. I accordingly allow the application of Mr. Patel for amendment of the charge in terms of the draft submitted by him."

From the above observations it would be clear that the learned Judge did not intend that the trial should be a new trial in the sense that the Magistrate would record the evidence afresh, see whether there, was a prima facie case for framing a charge and if there was, to frame a charge then permit the complainant to lead evidence, record the statement of the accused under s. 342 and adduce evidence on his behalf after which he would pronounce judgment of conviction or acquittal. If he had so intended and had directed a totally new trial as is alleged, he could not have rejected the contention of Shri Khambata for the appellant that he should dispose of the appeal and order a new trial on the additional charge nor would he have directed that the appeal should be kept pending till the record of the new trial is received back in his court which could only be after giving the accused appellant an opportunity to meet the case on the additional charge.

On this interpretation of the order the question is whether what has been directed by the learned Judge is in conformity with the provisions of the Code of Criminal Procedure. In our view the Criminal Procedure Code gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him. The power of the appellate court is set out in section 423 Cr. P. C. and invests, it with very wide powers. A particular reference may be made to clause (d) of sub-section (1) as empowering it even to make any amendment or any consequential or incidental order that may be just or proper. Apart from this power of the appellate Court to alter or amend a charge, section 535 Cr. P. C. further provides that no finding or sentence pronounced or passed shall be deemed to be invalid merely on the ground that no charge has been framed unless the Court of appeal or revision thinks that the omission to do so has occasioned failure of justice and if in the opinion of any of these courts a failure of justice has been occasioned by an omission to frame a charge, it shall order a charge to be framed and direct that the trial be recommenced from the point immediately after the framing of the charge. The wide and extensive power which an appellate or revisional court can exercise in this regard has also the support of the Privy Council. Lord Porter who delivered the opinion of the Judicial Committee in Thakar Sahab v. Emperor(1) had occasion to point out that while the history of the growth of Criminal Law in England its line of development and the technicalities consequent thereon would have made it more difficult and may be impossible to justify a variation of the charge, Indian Law was subject to no such limitation but is governed solely

by the Penal Code and Criminal Procedure Code. In that case the Privy Council was called on to decide whether the alteration of the charge and the conviction from one of abetment of forgery by known person or persons to abetment of forgery by an unknown person or persons vitiated the conviction. It was held that it did not, because an Appellate Court had wide powers conferred upon it by section 423 and in particular by sub- section (1)(a) of that section, which is "always of course subject to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he (1) [1943] P.C.192.

is not fully aware of the charge made or is not given full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred." In this case Shri Chari contends that : (1) what the High Court should have done if it found that interest of justice required it either to have recorded the evidence itself or to have asked the trial court to record it and send it back, but it cannot refuse to give a finding on the charge for which he was convicted and (2) that the prosecution having proceeded with the trial on the charge framed and not having asked for an amendment at that stage cannot ask the appellate court to amend or add to the charge. It appears to us that both these contentions are based on a misreading of the order of the High Court. As already pointed out the learned Judge of the High Court did not intend nor did he direct a new trial in the sense that it is contended he had done. There was in fact no retrial directed, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The appellant has also understood the order not as a retrial is clear from ground (f) of the Special Leave Petition filed before us. It is therefore not necessary for us to examine the scope and extent of the power or circumstances in which a retrial should be ordered. The complainant's Advocate Shri Tarkunde in fact said and even now submits before is that he does not want to lead any evidence and would be satisfied on the same evidence to sustain a conviction on the amended charge, nor does the alternative charge now framed requires him to answer a charge against him of a new offence which would cause prejudice. The offence 'With which he is now charged alternatively is the same namely under Section 406 but as the entire transaction was one and indivisible he is not only required to answer the charge of misappropriation of money but in the alternative misappropriation of goods which the complainant Bank contends became their's as soon as the accused purchased them with the moneys it advanced. In our view no prejudice is caused or is likely to be caused to the accused by the amendment of the charge as directed by the High Court. It was again contended that the High Court ought to have considered whether there was a prima facie case against the accused to justify the framing of the amended charge particularly when it took the view that the first charge could not be sustained. We do not think the learned Judge expressed any view as to the maintainability or otherwise of the conviction, but thought there should have also been framed an alternate charge in respect of the goods. It is true that the court did not give any reasons as to why it thinks there was a prima facie case, but being an appellate court perhaps it was anxious to avoid giving an impression that it has taken any particular view on the evi- dence. The accused raised no ground on this account in the Special Leave Petition, nor do we think on this account we should interfere with the judicial exercise of discretion of the learned Judge in framing the charge and in giving the accused an opportunity to recall any witnesses or adduce fresh evidence on his behalf. If no objection could be taken to the trial Court in framing the original charge it is difficult to see how an objection can be taken at this stage to the framing of an alternate charge on the same allegation in the complaint.

The appeal is accordingly dismissed.

Y.P. Appeal dismissed.