

C.B.I vs Karimullah Osan Khan on 4 March, 2014

Author: K. S. Radhakrishnan

Bench: Vikramajit Sen, K. S. Radhakrishnan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1127 OF 2009

C.B.I.	.. Appellant
	Versus
Karimullah Osan Khan	.. Respondent

J U D G M E N T

K. S. Radhakrishnan, J.

1. We are, in this case, concerned with the legality of the order passed by the Designated Court under TADA (P) Act, 1987 for Bomb Blast Case, Greater Bombay, rejecting the application filed by the Central Bureau of Investigation (for short 'CBI') under Section 216 of the Code of Criminal Procedure (for short 'CrPC') for addition of the charges punishable under Section 302 and other charges under the Indian Penal Code (for short 'IPC') and the Explosives Act read with Section 120-B IPC and also under Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA Act').

2. The city of Mumbai and its surrounding areas witnessed a series of bomb blasts on 12.3.1993, whereby 257 persons were killed, 713 persons got injured and extensive damage to properties worth approximately Rs.27 crores was caused. The State Police registered 27 criminal cases. On 4.11.1993, a single charge-sheet was filed in the Designated Court against 189 accused persons, of which 44 were shown as absconding. Investigation from the State Police was transferred to CBI on 19.11.1993 and the CBI registered Case Crime No. RC 1 (S)/93/STF/BB. CBI, later, submitted supplementary reports before the Designated Court under Section 173(8) CrPC and the case was registered as Court Case No. BBC-1 of 1993. Permission for further investigation was obtained by the CBI from the Designated Court on 25.11.1993. During the course of investigation, the involvement of the respondent accused, by name Karimullah Osan Khan, was disclosed and efforts were made to arrest him. The Designated Court issued proclamation against him and, on 5.8.1994, he was declared as a proclaimed offender. Later, the Designated Court, on 8.9.1994, issued warrant of arrest against him.

3. The Designated Court framed a common charge of criminal conspiracy on 10.4.1995 against all the accused persons present before the Court and also against the absconding accused persons, including the respondent - accused No. 193 and all other unknown persons, under the following

Sections:

- “1. Section 3(3) of TADA (P) Act, 1987 and Section 120(B) of IPC r/w section 3(2) (i) (ii), 3(3), 3(4), 5 and 6 of TADA (P) Act, 1987 and r/w Section 302, 307, 326, 324, 427, 435, 436, 201 and 212 of IPC.
2. Section 3 and 7 r/w Section 25(1A), [1B(a)] of the Arms Act, 1959.
3. Section 9-B (1),(a),(b),(c) of the Explosives Act 1884.
4. Section 3, 4(a), (b), 5 and 6 of the Explosives Substances Act, 1908.
5. Section 4 of Prevention of Damage to Public Property Act, 1984.

The Designated Court then issued an order dated 19.6.1995 for examination of the witnesses, including the absconding accused no.193, in accordance with the provisions contained in Section 299 CrPC.

4. Respondent accused No. 193, who was absconding was, later, arrested in Mumbai on 22.8.2008, and was remanded to the police custody and further investigation was carried on. During further investigation, the respondent accused made a confession which was recorded under Section 15 of the TADA Act, wherein he had admitted his role in the criminal conspiracy, for which the above mentioned common charges had been framed. On completion of investigation, a supplementary charge-sheet dated 17.11.2008 was filed against the respondent accused for offence of criminal conspiracy as well as the offence punishable under Section 3(3) of TADA Act and lists of additional witnesses and additional documents were enclosed along with the supplementary charge-sheet. On 1.1.2009, the Designated Court framed charge of conspiracy against the respondent accused under Section 120-B IPC read with Section 3(3) of TADA Act but, it is the statement of CBI, that inadvertently the original charge of criminal conspiracy under Section 3(2) of TADA Act read with Section 120-B IPC and other offences applicable were not mentioned. On 3.2.2009, the evidence was closed by the CBI and on 6.2.2009, the statement of the respondent accused was recorded. CBI, as already indicated, filed an application on 26.2.2009 under Section 216 CrPC for alteration of charge by addition of the charges punishable under Section 302 IPC and other charges under the IPC and the Explosives Act read with Section 120-B IPC and Section 3(2) of the TADA Act. The Designated Court, on 28.4.2009, rejected the application filed by the CBI, against which this appeal has been preferred.

5. The Designated Court framed the following points while examining the application preferred by the CBI:

- A) Is there any evidence existing on record to add further charges against the accused for agreeing to commit the terrorist acts by use of explosive substances at various places in Mumbai and for that purpose bringing the arms to Indian shore in furtherance of the implementation of the criminal conspiracy? B) Is there any

evidence on record to add charges of causing death and attempt to cause death, injuries to human bodies and loss to properties during commission of terrorist acts by use of explosive substances?

C) Whether the charges as alleged deserve to be altered and added as prayed?

6. In support of the application, CBI highlighted the following grounds:

- 1) Conspiracy was hatched to cause communal disturbance and destabilizing the Government. Huge quantity of arms and ammunitions was smuggled into India by the accused persons and used at different places in Mumbai. 27 cases were registered and single charge-sheet came to be filed against 189 accused persons in the Designated Court, out of which 44 accused were shown as absconding in the said case No. BBC 1/1993.
 - 2) The Designated Court framed charges for conspiracy on 10.4.1995 against the accused persons who were present before it at that time, as well as against the respondent accused whose involvement was disclosed and charge was also framed against him, being absconding accused.
 - 3) The prosecution moved an application M.A. 139/94 under Section 299 CrPC and the Court granted the liberty to join the absconding accused in the trial whenever he is arrested and the said evidence was also recorded under Section 299 CrPC against the respondent accused vide order dated 19.6.1995.
 - 4) The prosecution adduced evidence to show that the respondent was deeply involved in the criminal conspiracy which was hatched by the accused persons to commit various terrorist activities and the respondent accused actively participated in the said criminal conspiracy.
 - 5) Mohd. Usman, who was an approver, was examined for charge punishable under Section 120-B IPC and the said witness identified the respondent and also narrated his role in landing of arms by other co-accused for the prime accused Tiger Memon. Further, it was pointed out that the accused had participated in the conspiratorial meeting held by Memon before proceeding for landing work.
 - 6) The accused also aided the main accused twice in the landing operations and also in smuggling of various arms and ammunitions in Mumbai. Further, the respondent had also confessed about his participation in landing arms and also about his fleeing to Pakistan to escape from clutches of law.
 - 7) The confession made by him was proved by witnesses SP Mr. Sujit Pandey and Dy. S.P. Mr. Tyagi and that the confession was voluntary and is admissible in evidence, when read along with the confession of others.
7. Defence opposed the prayer for alteration of charges stating that the same would prejudice the accused and the intention is to delay the trial proceedings and to see that the accused languishes in

jail. Further, it was pointed out that the abscondance is not a ground for alteration of charges. Further, it was also stated that the prosecution is trying to compel the court to appreciate the entire evidence at the fag end of the trial and pointed out that even the evidence already adduced required corroboration. The evidence already recorded, it was pointed out, would not show that the respondent was a party to the criminal conspiracy and that he had committed any act described by Section 3(2) of TADA Act. Further, it was also pointed out that the order passed by the Court on 6.2.2009 in respect of other accused persons has no bearing when an application under Section 216 CrPC is being examined, which has to be examined independently, on the basis of the materials available in that case.

8. We heard Shri Sidharth Luthra, learned Additional Solicitor General, appearing for the appellant and Shri Satbir Pillania, learned counsel appearing for the respondent, at length. Learned counsel highlighted their respective stand placing reliance on the materials already on record as well as on the interpretation of Section 216 CrPC.

9. We are, in this case, primarily concerned with the scope of Section 216 CrPC and the power of the Court to alter or add to the charge at any time before judgment is pronounced. We may point out that the following are the reasons given by the Designated Court in rejecting the application:

- a) The application is moved after closure of evidence and there is delay in the matter.
- b) The charge could not be framed against absconding Respondent.
- c) The order dated 06.2.2009 in SLP (Crl.) No. 569/2009 titled CBI V. Abu Salem Ansari & Anr. and order dated 02.12.2008 of the Designated Court is final, and charges against the Respondent were distinct.
- d) The voluntariness of the confession of the Respondent has to be tested in law at Trial Court.
- e) The evidence of Mohd. Usman Ahmed Jan Khan is not adequate.
- f) There is no sufficient material on record to indicate that the accused can be charged for being member of the criminal conspiracy and it is not the case of prosecution that the accused himself took any active part in commission of any terrorist act as were done by other accused who are already charged and convicted for individual acts in earlier Trial BBC 1/93.
- g) The delay in pursuing proper remedies at appropriate time has become the order of the day on the part of the prosecution which cannot be appreciated.
- h) Still there is no material to indicate that the accused was member of any such assembly which had agreed to commit terrorist acts in Mumbai or anywhere else. Even no shred of any earlier piece of evidence or witness is cited in the charge sheet

nor is the statement of any witnesses annexed therewith.

10. We may have to examine whether the reasons stated above would be sufficient enough to reject the application filed by CBI under Section 216 CrPC. As already pointed out, initially, the investigation was started by the State Police and, later, it was entrusted to CBI and it was during the investigation by CBI that the involvement of the respondent accused was disclosed on 5.8.1994 and a warrant of arrest and proclamation was issued against him. On 19.6.1995, the Designated Court permitted examination of witnesses, in which the respondent's name was also recorded but, since he was absconding, he could not be examined. 7 accused persons, including the respondent, who were absconding, were later arrested on various days and as against 6 absconding accused persons trials proceeded based on the charges framed by the Designated Court, as originally contemplated. However, only against the respondent, with same materials in hand, charges were framed distinctly without invoking Section 3(2) of TADA Act read with Section 120- B IPC and other provisions of IPC. The Designated Court failed to appreciate that the supplementary charge-sheet dated 17.11.2008 filed against the respondent accused was in continuation of the original charge- sheet filed on 4.11.1993 and the list of witnesses annexed to the supplementary charge-sheet was shown as list of additional witnesses. Further, the entire material available at that time, which led to the framing of charges during abscondance of the respondent accused and other accused persons, is available to the prosecution to be used against the respondent at the stage of charge or at the stage of modification of the charge.

11. Apart from the above factual situation, it should be remembered that it is a case where the respondent accused was absconding for about 15 years and, therefore, the delay cannot be attributed to that of the prosecution alone and, it is in the above circumstances, we have to examine whether the application filed under Section 216 CrPC, could be rejected. Section 216 CrPC reads as follows :

“216. (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.”

12. This Court in *Jasvinder Saini and others v. State (Government of NCT of Delhi)* (2013) 7 SCC 256, had an occasion to examine the scope of Section 216 CrPC and held as follows:

“11.. 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 [pic]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.

12. In the case at hand the evidence assembled in the course of the investigation and presented to the trial court was not found sufficient to call for framing a charge under Section 302 IPC.”

13. The Privy Council, as early as in *Thakur Shah v. Emperor* AIR 1943 PC 192, spoke on alteration or addition of charges as follows :

“The alteration or addition 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 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.”

14. Section 216 CrPC gives considerable powers to the Trial Court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add 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.

15. 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. (See Harihar Chakravarty v. State of West Bengal AIR 1954 SC 266. Merely because the charges are altered after conclusion of the trial, that itself will not lead to the conclusion that it has resulted in prejudice to the accused because sufficient safeguards have been built in in Section 216 CrPC and other related provisions.

16. We may point out, so far as the present case is concerned, with regard to the incident occurred on 12.3.1993 (Bombay blast), trial in respect of 123 accused persons had been concluded, out of which 100 persons were convicted by the Designated Court and this Court vide its judgment recorded on 21.3.2013 confirmed the conviction of 98 accused persons in the following cases:

- i. Essa @ Anjum Abdul Razak Memon vs. State of Maharashtra cited as 2013 (4) SCALE 1;
- ii. Ibrahim Musa Chauhan @ Baba Chauhan vs. State of Maharashtra cited as 2013 (4) SCALE 207;
- iii. Ahmed Shah Khan Durrani @ A.S. Mubarak S. vs. State of Maharashtra cited as 2013 (4) SCALE 272;
- iv. State of Maharashtra vs. Fazal Rehman Abdul cited as 2013 (4) SCALE 401; and v. Sanjay Dutt (A-117) vs. The State of Maharashtra through CBI (STF), Bombay cited as 2013 (4) SCALE 462.”

17. Taking note of all those aspects and the fact that the respondent was declared as a proclaimed offender and was absconding for more than 15 years and sufficient materials are already on record and all elements of the crime are interconnected and interrelated, the Court cannot simply discard the confession made by him on 27.8.2008 during investigation, which was recorded under Section 15 of TADA Act, wherein he had admitted his role in the criminal conspiracy, of course, that has to be dealt with in accordance with law. Following that, the supplementary charge-sheet was filed against the respondent accused for offence of criminal conspiracy as well as for offences punishable under Section 3(3) of TADA Act and a list of additional witnesses and documents was enclosed with that. The Designated Court framed charge of criminal conspiracy against the respondent under Section 120-B IPC read with Section 3(3) of TADA Act but, inadvertently, the original charge of criminal conspiracy under Section 3(2) of TADA Act read with Section 120-B and other offences, was not mentioned.

18. Looking into all those aspects, in our view, this is a fit case where the Court ought to have exercised its powers under Section 216 CrPC and allowed the application dated 26.12.2009 filed by CBI for alteration of charge. Consequently, the impugned order is set aside. The application preferred by CBI under Section 216 CrPC would stand allowed and the Designated Court is directed to further proceed with the case in accordance with law. Ordered accordingly.

19. The Appeal is, accordingly, allowed.

Read Hear.....J. (K. S. Radhakrishnan)J. (Vikramajit Sen) New
Delhi, March 4, 2014.