

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**
(Judicial Department)

Cr.R No. 22-P of 2019
with Cr.M No.68/2019.

JUDGEMENT

Yousaf Islam
Versus
The State .

Date of hearing. **06.05.2019.**

Petitioner by; Mr. Muhammad Riaz, advocate.

State by: Mr. Muhammad Sohail, AAG.

Complainant by: Mr. Mehboob Ali Watozai, advocate.

OAISER RASHID KHAN, J. The petitioner, Yousaf Islam, who is facing trial in case FIR No. 42 dated 15.01.2016, under section 17(4), Offences against Property (Enforcement of 'Hudood') Ordinance 1979 registered at police station Aza Khel, District Nowshera, has preferred this criminal revision against the order of the learned ASJ-III, Nowshera dated 09.02.2019 whereby his application for re-summoning of prosecution witnesses after alteration of the charge was dismissed.

2. As the record unfolds, the learned trial court on 15.03.2016 framed a formal charge under section 17(4) Offences against Property (Enforcement of 'Hudood') Ordinance, 1979 against the accused-petitioner to which he pleaded not guilty and claimed trial and after the closure of

the prosecution evidence, his statement under section 342 Cr.P.C was recorded and after hearing the arguments, the case was fixed for order. However, the learned trial court felt that the requisite standard of evidence was not forthcoming necessitating the alteration of the charge and accordingly fresh formal charge under section 17(4) Offences against Property (Enforcement of 'Hudood') Ordinance 1979 read with sections 302/382 PPC was framed against the accused and the case was fixed for arguments on the point as to whether there was any need of recording evidence afresh or the evidence already recorded was sufficient on the basis of which the case could be decided. In the meanwhile, the accused-petitioner also filed an application for re-summoning of the witnesses and after hearing the learned counsel for the parties, the learned trial court through the impugned order dated 09.02.2019 dismissed the application of the accused-petitioner by holding that there was no need to re-summon the witnesses and that the case would be decided on the basis of the evidence already recorded. Feeling aggrieved from the said order dated 09.02.2019; the accused-petitioner has preferred the present petition.

3. All that the learned counsel for the petitioner-accused vehemently contends is that the learned trial court has committed patent error and grave illegality while dismissing the application of the accused-petitioner for re-summoning of the witnesses for the purpose of cross

examination in view of the altered charge and has thus caused serious prejudice to him.

The learned counsel for the complainant on his turn defended the impugned order of the learned trial court and stated that the trial has been concluded and that through the alteration of the charge, no prejudice has been caused to the accused-petitioner.

The learned AAG also supported the arguments of the learned counsel for the complainant.

3. Arguments heard and the available record perused.

4. Before going to discuss the controversy involved in the case, it is deemed appropriate to have a brief discussion with regard to the definition, purpose and object of the charge. Chapter XIX of the Criminal Procedure Code, 1898 deals with the form of charges against an accused in a criminal case. Charge has been defined in section 4 (c) of the Cr.P.C as below:

“Charge” includes any head of charge when the charge contains more heads than one.”

The purpose of a charge is to tell and convey to an accused person as precisely and concisely as possible the criminal case in which he has to face trial and thus must communicate to him with sufficient clarity and certainty what the prosecution intends to bring home against him regarding which he would have to defend himself.

Similarly, the object of a charge is to enable an accused to concentrate his attention on the case that he has to face before the learned trial court. By the same corollary, if the charge is framed against the accused in an ambiguous manner and the necessary ingredients of the offences are not brought out in the charge and for which he may be ultimately convicted and sentenced at the conclusion of the trial, then of course such trial cannot be termed by any definition to be a fair trial.

5. It would also be more apt to refer to Section 221 Cr.P.C at this stage which deals with the framing of charge and read as:

***Charge to State Offence** (1) Every charge under this Code shall state the offence with which the accused is charged.*

(2) ***Specific name of offence sufficient description.** If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.*

(3) ***How stated where offence has no specific name** If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.*

(4) ***The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.***

(5) ***What implied in charge.** The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.*

- (6) *Language of charge.* The charge shall be written either in English or in the language of the Court.
- (7) *Previous conviction when to be set out.* If the accused having been previously convicted of any offence is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed;

Similarly, Section 227 Cr.PC is with regard to alteration or addition of the charge which runs as under:

- (1) *"Any court may alter or add to any charge at any time before judgment is pronounced and*
- (2) *Every such alteration or addition shall be read and explained to the accused."*

6. The grievance of the accused-petitioner is that after the alteration of the charge, the prosecution was bound to have re-summoned the witnesses already examined and to afford him with an opportunity of cross-examining them and by not doing so, serious prejudice has been caused to him.

Likewise, Section 231 Cr.P.C deals with recalling of witnesses after alteration of charge which reads as follows:

"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 to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the court may think to be material”.

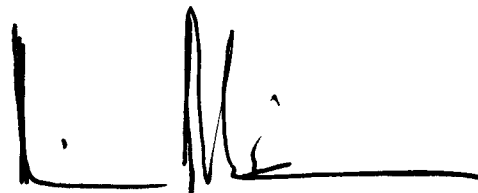
7. Undeniably, the court has wide powers to alter the charge at any time before the pronouncement of the judgment. However, the same should in no manner cause any prejudice to the accused. In this case, it is at the conclusion of the trial when the charge has been altered by the learned trial court which gives an altogether different and distinct complexion and dimension to the prosecution case and is thus was bound to cause prejudice to the accused-petitioner.

8. In this case, after the addition/alteration of the charge, the accused-petitioner has submitted a proper application for re-summoning of the witnesses to provide him with an opportunity to cross examine the PWs which has been dismissed through the impugned order. Before the alteration of the charge, the focus of the defence while cross-examining the witnesses would obviously be with reference to the offence punishable under section 17(4) Offences against Property (Enforcement of ‘Hudood’) Ordinance 1979 and not to the altered charge punishable under sections 302/382 PPC. Section 231 Cr.P.C caters to such like situation leaving the accused at liberty to recall and re-examine the prosecution witnesses, if he so desires.

Such right of an accused cannot be abridged only on the premise that the same set of PWs would be recalled and re-examined thereby prolonging the trial of the case. It is the accused who is in custody and the prolongation of his trial would only aid to his period of incarceration. Therefore, in order to advance the object of the fair trial, it was incumbent upon the prosecution to have re-summoned the witnesses and provided an opportunity to the accused-petitioner to cross-examine them as they have not been examined in the context of the altered charge. As such, the facts and circumstance of the case suggest that the learned trial court has committed illegality while dismissing the application of the petitioner-accused for re-summoning of the witnesses and providing the defence an opportunity to cross examine them and thereby causing prejudice to the petitioner-accused.

9. Accordingly, this revision petition is allowed, the impugned order dated 09.02.2019 of the learned trial court is set aside with the directions to the learned trial court to re-summon the prosecution witnesses and afford every opportunity to the petitioner-accused to cross examine them, if he so desires in order to ensure the fair trial of the case.

Announced
06.05.2019



SENIOR PUISNE JUDGE

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Justice Oaizer Rashid Khan (SB)