

**IN THE HIGH COURT OF TRIPURA**  
**AGARTALA**

**CRL. REV. P. NO. 13 OF 2015**

Sri Nayan Deb,  
son of Sri Prithis Deb,  
resident of Village-Jamirghat,  
P.O & P.S. Lefunga, Sub-Division- Mohanpur,  
District : West Tripura, Pin : 799210

..... Petitioner

– Vs –

The State of Tripura

.....Respondent

**B E F O R E**  
**THE HON'BLE MR. JUSTICE S. TALAPATRA**

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|---|---|---|
| For the petitioner                      | : | Mr. A. Pal, Advocate                              |
| For the respondent                      | : | Mr. A. Ghosh, P.P.<br>Mr. John Debbarma, Advocate |
| Date of hearing                         | : | 23.11.2016  |
| Date of delivery of<br>judgment & order | : | 16.12.2016  |
| Whether fit for reporting               | : | YES   |

**JUDGMENT & ORDER**

By means of this petition under Section 397 read with Section 401 of the CPC, the petitioner has challenged the judgment and order dated 07.02.2015 delivered in Criminal Appeal No. 62 of 2014 whereby the judgment and order of conviction and sentence dated 16.10.2014 delivered in PRC 1011 of 2010 by the Judicial Magistrate, 1<sup>st</sup> Class, Agartala, West Tripura has been affirmed. The trial court convicted the petitioner under Section 323 of the IPC for causing hurt and



sentenced him to suffer rigorous imprisonment for 1 (one) month and to pay a fine of Rs.1000/- with default imprisonment.

2. In a nutshell, the prosecution case is that on 18.03.2007, the petitioner married one Rinku Sarkar as per Hindu rite and customs. After one year of their marriage, Rinku Sarkar, hereinafter the victim, was subjected to mental torture both physical and mental by her husband. On 14.09.2010 at mid night at about 02.00 hours, the petitioner assaulted her by thrashing against a concrete structure and resultantly the victim received injury on her head and was shifted to Mohanpur Community Health Centre [CHC in short] for her treatment. Based on the complaint filed by the victim to the Officer-in-Charge, Lefunga Police Station, Lefunga P/S Case No. 46/2010 under Section 498-A of the IPC was registered and taken up for investigation. Having completed the investigation, the investigating officer filed the final police report charge-sheeting the petitioner. On taking cognizance, the charge was framed under Section 498A of the IPC. For ensuring the attendance of the petitioner proclamation and attachment procedure were also resorted.

3. To substantiate the charge, the prosecution adduced as many as 6 (six) witnesses including the victim (PW-1) and one of the investigating officers, namely Satikanta Bardhan (PW-6) was examined. After examination of the petitioner under



Section 313 of the Cr.P.C. and evaluating the evidence on record, the trial court has observed as under :

**"Therefore, from the evidence on record, the prosecution could not bring home the guilt to the accused person under Section 498A IPC. However, from the material evidence on record it is amply proved beyond any doubt that on 14.09.2010, the accused person had assaulted the victim causing her simple hurt and accordingly the prosecution had been successful in bringing home the guilt of the accused person under Section 323 IPC. Accordingly, I find and hold that the accused person committed the offence under Section 323 IPC."**

4. The trial court passed the judgment of conviction on 16.10.2014 and on that very day i.e. 16.10.2014 a separate order was passed in PRC 1011 of 2010 where the following has been observed by the trial court:

**"However, having heard arguments of both sides as well as on perusal of the evidence on record it appears to me that for fair ends of justice the charge so framed against the accused person is required to be altered. Accordingly, Section 323 IPC has been added in addition to section 498A IPC so framed against the accused in compliance with section 216 Cr.P.C read with section 221(2) Cr.P.C."**

On that premises the petitioner has been convicted under Section 323 of the IPC.

5. Mr. A. Pal, learned counsel appearing for the petitioner has submitted that the charge can be altered by the court under Section 216 of the Cr.P.C. Section 216 of the Cr.P.C. provides as under :

**"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."

6. It is to be noticed that Section 216(2) of the Cr.P.C. has clearly mandated that every such alteration or addition shall be read and explained to the accused person so as to enable him to project and pursue his defence. In **Sabbi Mallesu and Others versus State of A.P.** reported in **2006 10 SCC 543** the apex court by reiterating the statutory provision has interpreted as under :

"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 resummon, 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, also to call any further witness whom the court may think to be material."

7. Section 221 of the Cr.P.C. provides an extra tool in the hand of the trial court. Section 221 of Cr.P.C. provides that :

"221. (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of



**such offences, and any number of such charges may be tried at one; or he may be charged in the alternative with having committed some one of the said offences.**

Sub-section 2 of Section 221 of the Cr.P.C. further provides that :

**(2) If, in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1) , he may be convicted of the offence which he is shown to have committed, although he was not charged with it."**

Sub-section 2 of Section 221 of the IPC has been invoked by the trial court for the reason that the accused was charged with one offence, and it appeared from the evidence that he committed different offence for which, against him the charge could have been framed under sub-section (1) of the IPC and he might have been convicted of the offence which he is shown to have committed, but he was not charged with it.

Section 222 of the Cr.P.C. provides that :

**"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted, of the minor offence, though he was not charged with it.**

**(2) When a person is charged with an offence and facts are proved which reduced it to a minor offence he may be convicted of the minor offence, although he is not charged with it.**

**(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.**

**(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."**

8. Mr. A. Pal, learned counsel has submitted that even though the jurisdiction to frame the alternative charge under



Section 216 and Section 221(2) of the Cr.P.C. had been exercised by the trial court but the said charge was not required to read out to the petitioner or get it explained. As a result, the petitioner has been deprived of the defence in respect of the new charge under Section 323 of the IPC. Mr. Pal, learned counsel has referred to a decision of the apex court in **Central Bureau of Investigation versus Karimullah Osan Khan** reported in **(2014) 11 SCC 538** where the apex court having referred to **Jasvinder Saini versus State (Govt. of NCT of Delhi)** had occasion to examine the scope of Section 216 of the Cr.P.C. 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 alteration would generally arise either because the court finds the charge already framed to be defective for any 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.**

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**16. The Privy Council, as early as in *Thakur Shah v. King Emperor*, 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 a full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred'**

**17. Section 216 Cr.P.C. gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to 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.**

**18. Section 216 Cr.P.C. 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 Cr.P.C., 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. 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 Section 216 Cr.P.C. and other related provisions."**

Mr. Pal, learned counsel has further submitted that for not affording due opportunity for defence against the altered charge, the petitioner has become seriously prejudiced and the proceeding has become non-est in the eye of law.

9. From the other side, Mr. J. Debbarma, learned counsel on instruction of Mr. A. Ghosh, learned PP has submitted that for wrong citation of the provision, the trial would not vitiate. The trial court has convicted the petitioner under Section 323 of the IPC without framing any charge in exercise of power conferred by Section 222 of the Cr.P.C. The offence of causing simple hurt is punishable under Section 323



of the IPC, which is a minor offence in comparison to the offence under which the petitioner was charged i.e. Section 498-A of the IPC for causing cruelty to the victim. A keen reading of the provisions of Section 323 of the IPC and Section 498-A of the IPC would show that "simple hurt" can be read within illustration (a) provided below Section 498-A of the IPC. The offence for committing simple hurt is no doubt an offence cognate to the offence punishable under Section 498-A. As such, the judgment of conviction as returned is deemed to have been passed under Section 222 of the Cr.P.C. Mr. Debbarma, learned counsel has further submitted that on survey it would be apparent that the cognate relation exists between the offence punishable under Section 323 of the Cr.P.C. and the offence punishable under Section 498-A of the IPC. In **Shamnsaheb M. Multtani versus State of Karnataka** reported in **(2001) 2 SCC 577**, the apex court having revisited the law has observed as under:

"24. One of the cardinal principles of natural justice is that no man should be condemned without being heard, (audi alteram partem). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice."

[Emphasis added]

But the exception has been curved out in **Sangaraboina Sreenu versus State of A.P.** reported in **1997 5 SCC 348**, where the apex court has held that :



"It is true that Section 222 Cr.P.C. entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr.P.C. for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

10. Having regard to the said observation, this court may recall the observation as made in **Shamnsaheb M. Multtani** (*supra*) which runs as under :

"14. Sections 221 and 222 of the Code are the two provisions dealing with the power of a criminal court to convict the accused of an offence which is not included in the charge. The primary condition for application of Section 221 of the Code is that the court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case the section permits to convict the accused of the offence which he is shown to have committed though he was not charged with it. But in the nature of the acts alleged by the prosecution in this case there was absolutely no scope for any doubt regarding the offence under Section 302 IPC, at least at the time of framing the charge.

15. Section 222(1) of the Code deals with a case 'when a person is charged with an offence consisting of several particulars.' The section permits the court to convict the accused "of the minor offence, though he was not charged with it". Sub-section (2) deals with a similar, but slightly different situation.

'222.(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.'

16. What is meant by 'a minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence."



11. As Mr. Pal, learned counsel has submitted that affording no opportunity to defend the altered charge and to pass on the very day the judgment is prejudicial to the accused. Such proposition has been strongly contested by Mr. J. Debbarma, learned counsel appearing for the respondents holding that the intent and purport of the said order dated 16.10.2014 is amply clear. The trial court had returned the judgment of conviction on considering 'simple hurt' as cognate and minor in comparison and relation to the cruelty. According to the trial court, 'cruelty' and 'simple hurt' are cognately related. This court as a measure of abundant caution has considered the entire evidence and finds that the appellate court committed no fault by affirming the judgment of the trial court. From the testimonies of the witnesses, it has been established beyond reasonable doubt that the petitioner committed an offence punishable under Section 323 of the IPC. What is a 'minor offence' is not defined in the code. It can only be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.



Now, the question that falls for consideration is that whether the ingredients of Section 498-A and Section 323 of the IPC are common or not. From the explanation (A) it may so appear that the main ingredients of that illustration (A) below the 498-A of the IPC and ingredients of Section 223 of the IPC are common. Let us examine further what is the main ingredient of Section 323 of the IPC. The main ingredient of both is voluntarily causing hurt. Section 319 of the IPC defines hurt as whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Whereas the voluntary causing hurt has been defined in Section 321 as whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt.". Section 498-A IPC, however, provides as under:

**"498A. Husband or relative of husband of a woman subjecting her to cruelty- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.**

**Explanation.- For the purposes of this section, 'cruelty' means-**

**(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or**

**(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet demand.]"**

**Explanation (a) or (b) accommodates the following ingredients of the offence:**



**1. An woman was married and she was subjected to cruelty. The cruelty has been illustrated as under :**

**(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman or**

**(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet demand.**

**(c) The owner was subjected to such cruelty by her husband.**

**Explanation (a) and (b) are disjunctive to each other. If the prosecution succeed in proving the Explanation (a) and (b) for purpose of establishing the cruelty the court may convict the accused. The harm or voluntarily causing harm can be read within explanation and as such without much stretch it can be held that the main ingredients of Section 323 and Section 498-A particularly in view of explanation (a) thereunder are cognate to each other and definitely in the context Section 323 of the IPC is a minor offence.**

Even though the trial court has referred to Sections 216 and 221(2) of the Cr.P.C. to convict the petitioner under Section 323 of the IPC without framing the charge, but in effect, the trial court had invoked its jurisdiction under Section 222 of Cr.P.C. for convicting the petitioner under Section 323 of the IPC without framing charge. Thus, this court is of the considered view that the impugned judgment whereby the said finding of conviction has been confirmed, does not suffer from any defect.

Having held so, this petition stands dismissed.

Send down the LCRs forthwith.

**JUDGE**

Sabyasachi B.