A ANANT PRAKASH SINHA @ ANANT SINHA

v.

STATE OF HARYANA & ANR.

(Criminal Appeal No. 131 of 2016)

B MARCH 4, 2016

[DIPAK MISRA AND SHIVA KIRTI SINGH, JJ.]

Code of Criminal Procedure, 1973: s.216 – Addition or alteration of charge – Power of court – Held: Court has authority C *to alter or add the charge if there is a defect or something is left out – It can be on the basis of complaint or FIR or accompanying documents or material brought on record during the course of trial – Also, it is obligatory on the part of court to see that no prejudice is caused to the accused and he is allowed to have a fair trial – In the instant case, informant-wife filed a case u/s.498A against* D *appellant-husband – When the matter was pending before magistrate she filed an application u/s.216 for framing an additional charge u/s.406 IPC against the appellant-husband – Magistrate allowed the application after referring to the materials and after recording his prima facie satisfaction – There was no error in the said prima facie view.*

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Dismissing the appeal, the Court

HELD: If the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle F **that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. Another aspect to be kept in mind is that it is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216** G **CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the**

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informant to add a charge under Section 406 IPC as there were allegations against the husband about the criminal breach of trust as far as her *stridhan* was concerned. It was, in a way, bringing to the notice of the Magistrate about the defect in framing of the charge. The court could have done it *suo motu*. In such a situation, there was no fault on the part of Magistrate in entertaining the said application. It may be stated that the Magistrate has referred to the materials and recorded his *prima facie* satisfaction. There is no error in the said *prima facie* view. The order of the High Court in expressing its disinclination to interfere with the order passed in revision is affirmed. The entire scrutiny is only for the purpose of framing of charge and nothing else. The Magistrate will proceed with the trial and decide the matter as per the evidence brought on record and shall not be influenced by any observations made as the same have to be restricted for the purpose of testing the legal defensibility of the impugned order. [Paras 16, 17, 20] [140-B-D; 143-C-G]

Amar Singh v. State of Haryana **(1974) 3 SCC 81 – relied on.**

Shiv Kumar v. Hukam Chand and another **(1999) 7 SCC 467: 1999 (2) Suppl. SCR 81 – Distinguished.**

CBI v. Karimullah Osan Khan **(2014) 11 SCC 538: 2014 (3) SCR 588;** *Hasanbhai Valibhai Qureshi v. State of Gujarat and others* **(2004) 5 SCC 347: 2004 (3) SCR 762;** *Jasvinder Saini and others v. State (Government of NCT of Delhi)* **(2013) 7 SCC 256: 2013 (7) SCR 340;** *Harihar Chakravarty v. State of West Bengal* **AIR 1954 SC 266;** *Umesh Kumar v. State of Andhra Pradesh and Anr.* **(2013) 10 SCC 591: 2013 (14) SCR 213** *Poonam and anr. v. State of Punjab* **CRR 657 of 2015** [High Court of Punjab and Haryana]; *Kantilal Chandulal Mehta v. State of Maharashtra* **(1969) 3 SCC 166: 1970 (2) SCR 742;** *Rajbir alias Raju and anr. v. State of Haryana* **(2010) 15 SCC 116: 2010 (13) SCR 886;** *Thakur Shah v. King Emperor* **AIR 1943 PC 192;** *Bhimanna v. State of Karnataka* **(2012) 9 SCC 650: 2012 (7) SCR 909 – referred to.**

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Case Law Reference

2014 (3) SCR 588	**referred to.**	**Para 4**
2004 (3) SCR 762	**referred to.**	**Para 4**
2013 (7) SCR 340	**referred to.**	**Para 4**
B **2013 (14) SCR 213**	**referred to.**	**Para 6**
AIR 1954 SC 266	**referred to.**	**Para 6**
1970 (2) SCR 742	**referred to.**	**Para 10**
2010 (13) SCR 886	**referred to.**	**Para 11**
C **AIR 1943 PC 192**	**referred to.**	**Para 13**
(1974) 3 SCC 81	**relied on.**	**Para 17**
2012 (7) SCR 909	**referred to.**	**Para 17**
1999 (2) Suppl. SCR 81	**Distinguished**	**Para 19**

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CRIMINAL APPEALATE JURISDICTION: Criminal Appeal No. 131 of 2016.

From the Judgment and Order dated 29.09.2015 of the High Court of Punjab and Haryana at Chandigarh in CRM-M No. 24510 of 2015.

E Amarendra Sharan, Sr. Adv., Amit Anand Tiwari, Abhinandan Banerjee, Advs. for the Appellant.

Sanjay Kumar Visen, Adv. for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Despite completion of a decade from F the date of solemnisation of the marriage and in spite of two off springs in the wedlock, neither the time nor the expansion of family nor the concern for the children could cement the bond or weld the affinity between the appellant-husband and the wife, the 2nd respondent herein, as a consequence of which she was compelled to set the criminal law in motion by lodging FIR No. 376 dated 23.11.2013 which was registered G for the offences punishable under Section 498A/323/34 of the Indian Penal Code (IPC) against the husband and the mother-in-law alleging that the husband was insistent upon getting mutual divorce and on her resistance, he had physically assaulted her and deprived her of basic facilities of life. All these allegations had the foundation in demand of H dowry and non-meeting of the same by the family members of wife.

After due investigation, the prosecuting agency placed the charge-sheet against the husband alone for the offences punishable under Section 498A and 323 IPC before the learned Judicial Magistrate 1st Class, Gurgaon who eventually vide order dated 04.04.2009 framed charges against the husband for commission of the said offences.

2. When the matter was pending before the learned Magistrate, an application dated 31.07.2014 under Section 216 of the Code of Criminal Procedure (CrPC) was filed by the informant-wife for framing an additional charge under Section 406 IPC against the husband and mother-in-law, Renuka Sinha. It was stated in the said application that there was an express complaint with regard to misappropriation of the entire *stridhan* and other articles and hence, the accused persons had committed breach of trust, but no charge-sheet was filed in respect of the said offence. It was contended that in her statement recorded under Section 161 CrPC, she had categorically stated about misappropriation of the *stridhan* by the family members of her husband. The learned Magistrate took note of the materials, namely, *stridhan* list, complaint addressed to D.C.P. (East), Gurgaon, statements recorded under Section 161 CrPC and letter dated 16.11.2013 from Women Cell, D.C.P. (East), Gurgaon and came to hold that in view of the specific allegations regarding misappropriation of her entire *stridhan* by the husband and the other statements recorded during investigation, a *prima facie* case for criminal breach of trust was made out and, accordingly, allowed the application under Section 216 CrPC against the husband and the mother-in-law. Be it noted, a prayer had been made to add the charge for the offence under Section 120B IPC also but the same was not accepted by the learned Magistrate.

3. The order passed by the learned Magistrate came to be assailed in Criminal Revision No. 5 of 2015 before the learned Additional Sessions Judge, Gurgaon and it was contended in the revision that the mother-in-law was not charge-sheeted by the police but the trial court had directed to frame the charge against her and, therefore, the whole approach was erroneous. It was also urged that there was no material to make out a *prima facie* case under Section 406 IPC against the husband. The stand put forth by the revisionist was combatted by the prosecution as well as by the informant on the ground that the trial court has power to add or alter any charge under Section 216 CrPC and, therefore, no exception could be taken to the order passed by the learned Magistrate. The

A revisional court dwelt upon the law pertaining to alteration and addition of charges and came to hold that the framing of the charge against mother-in-law was unsustainable but the framing of additional charge under Section 406 IPC against the husband, the appellant herein, could not be faulted. Being of this view, the revisional court partly allowed the
B revision petition by setting aside the order of framing of charge against the mother-in-law.

4. The defensibility of the aforesaid order was called in question by the husband by preferring a petition under Section 482 CrPC in the High Court of Punjab and Haryana forming the subject matter of CRL.M. No. 24510 of 2015. The soundness of the order was attacked by placing
C reliance on the principles as elucidated in ***CBI v. Karimullah Osan Khan***[1] and ***Hasanbhai Valibhai Qureshi v. State of Gujarat and others***[2]. As is demonstrable from the impugned order, the learned single Judge appreciating the ratio of the aforesaid decisions has opined that the court can exercise power of addition or modification of charge under
D Section 216 CrPC on the basis of material before the court. The High Court has also observed that the trial court has spelt out the reasons that have necessitated for addition of the charge and hence, the impugned order did not warrant any interference. To buttress the view, the High Court has drawn support from the authority in ***Jasvinder Saini and others v. State (Government of NCT of Delhi)***[3].
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5. We have heard Mr. Amarendra Sharan, learned senior counsel appearing for the appellant and Mr. Sanjay Kumar Visen, learned counsel for the respondent-State.

6. It is submitted by Mr. Sharan, learned senior counsel for the
F appellant that the High Court would have been well within the domain of its jurisdiction in exercise of power under Section 482 CrPC in setting aside the orders passed by the courts below, for the Magistrate has no power under Section 216 CrPC to alter or modify the charge on the basis of an application filed by the informant. It is his further submission that the trial court could have altered the charge if some evidence had
G come on record but not on the basis of the material that was already on record. Additionally, it is urged by Mr. Sharan that materials on record do not remotely attract any of the ingredients of the offence under Section 406 CrPC and, therefore, addition of charge in respect of the said offence

[1] (2014) 11 SCC 538
H [2] (2004) 5 SCC 347 : (2004) 2 RCR (Criminal) 463
[3] (2013) 7 SCC 256

is wholly unsound and faulty. It has also been argued by Mr. Sharan that the charges could not have been added on the basis of an application filed by the informant, for such an application as required in law is to be filed only by the Public Prosecutor. In support of the aforesaid submissions, he has drawn inspiration from the authorities in ***Harihar Chakravarty v. State of West Bengal***[4], ***Hasanbhai Valibhai Qureshi*** (supra), ***Jasvinder Saini and others*** (supra), ***Umesh Kumar v. State of Andhra Pradesh and another***[5], ***Karimullah Osan Khan*** (supra) and orders passed by the High Court of Punjab and Haryana in ***Poonam and anr. V. State of Punjab***[6] and ***Anant Sinha v. State of Haryana and ors.***[7].

7. Mr. Visen, learned counsel for the respondent-State, has supported the order passed by the High Court and submitted that there is no prohibition under Section 216 CrPC to alter or add a charge prior to the recording of evidence if the court is moved for the said purpose and it is satisfied that charge framed by it deserves to be altered or an additional charge is required to be added. According to him, the order passed by the High Court being totally correct and impenetrable, there is no reason to interfere with the same in exercise of jurisdiction under Article 136 of the Constitution of India. Learned counsel would further contend that when the Magistrate has jurisdiction to rectify the mistake by adding or altering the charge, he can hear the counsel for the parties and do it *suo motu* and an application either filed by the Public Prosecutor or by the informant is only to bring the said facts to his notice and in any case, that would not invalidate the order.

8. The controversy as raised rests on two aspects. The first aspect that has emanated for consideration is whether without evidence being adduced another charge could be added. In this context, we may usefully refer to Section 216 CrPC which reads as follows:-

"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.

[4] AIR 1954 SC 266

[5] (2013) 10 SCC 591

[6] CRR 657 of 2015 [High Court of Punjab and Haryana]

[7] Criminal Misc. No. M-1044 of 2014 (O&M) Order dated 07.03.2014

A (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.

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(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.

C (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."

D 9. The aforesaid provision has been interpreted in ***Hasanbhai Valibhai Qureshi*** (supra) wherein the Court has observed:-

"Section 228 of the Code in Chapter XVII and Section 240 in Chapter XIX deal with framing of the charge during trial before a Court of Session and trial of warrant cases by Magistrates

E respectively. There is a scope of alteration of the charge during trial on the basis of materials brought on record. Section 216 of the Code appearing in Chapter XVII clearly stipulates that any court may alter or add to any charge at any time before judgment is pronounced. Whenever such alteration or addition is made, the same is to be read out and informed to the accused."

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10. In the said case, reference was made to ***Kantilal Chandulal Mehta v. State of Maharashtra***[8] wherein it has been ruled that Code gives ample power to the courts to alter or amend a charge 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 the charge or in not

G giving him full opportunity of meeting it and putting forward any defence open to him on the charge finally preferred against him. Placing reliance on the said decision, it has been opined that if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any

H [8] (1969) 3 SCC 166

addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate.

11. In ***Jasvinder Saini and others*** (supra), the charge- sheet was filed before the jurisdictional Magistrate alleging commission of offences under Sections 498-A, 304-B, 406 and 34 IPC against the appellant Nos. 1 to 4 therein. A supplementary charge-sheet was filed in which the appellant Nos. 5 to 8 therein were implicated for the case to which Section 302 IPC was also added by the investigating officer. After the matter was committed to the Court of Session, the trial court came to the conclusion that there was no evidence or material on record to justify framing of a charge under Section 302 IPC, as a result of which charges were framed only under Sections 498-A, 304-B read with Section 34 IPC. When the trial court was proceeding with the matter, this Court delivered the judgment in ***Rajbir alias Raju and anr. v. State of Haryana***[9] and directed that all the trial courts in India to ordinarily add Section 302 to the charge on Section 304-B IPC so that death sentences could be imposed in heinous and barbaric crimes against women. The trial court noted the direction in ***Rajbir*** (supra) and being duty-bound, added the charge under Section 302 IPC to the one already framed against the appellant therein and further for doing so, it placed reliance on Section 216 CrPC. The said order was assailed before the High Court which opined that the appearance of evidence at the trial was not essential for framing of an additional charge or altering a charge already framed, though it may be one of the grounds to do so. That apart, the High Court referred to the autopsy surgeon which, according to the High Court, provided *prima facie* evidence for framing the charge under Section 302 IPC. Being of this view, it declined to interfere with the order impugned. This Court adverting to the facts held thus:-

> "It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of

[9] (2010) 15 SCC 116

A murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The B ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case C and simply on the basis of the direction issued in *Rajbir case*. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in *Rajbir case* (supra), but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court." D

12. It is appropriate to note here, the Court further observed that the annulment of the order passed by the court would not prevent the trial court from re-examining the question of framing a charge under Section 302 IPC against the appellant therein and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, E the trial court comes to the conclusion that there is any room for doing so. In that context, reference was made to ***Hasanbhai Valibhai Qureshi*** (supra).

13. In ***Karimullah Osan Khan*** (supra), the Court was concerned with the legality of the order passed by the Designated Court under the F Terrorist and Disruptive Activities (Prevention) Act, 1987 for Bomb Blast Case, Greater Bombay rejecting the application filed by the Central Bureau of Investigation (for short "CBI") under Section 216 CrPC for addition of the charges punishable under Section 302 and other charges under the IPC and the Explosives Act read with Section 120-B IPC and G also under Section 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987. The Designated Court framed charges in respect of certain offences and when the CBI filed an application for addition of the charge under Section 302 IPC and other offences, the Designated Court rejected the application as has been indicated earlier. In the said context, the Court proceeded to interpret the scope of Section 216 CrPC. H

Reference was made to the decisions in ***Jasvinder Saini*** (supra) and ***Thakur Shah v. King Emperor***[10]. Proceeding further, it has been ruled thus:-

> "17. Section 216 CrPC 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.
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> 18. 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 W.B.* (supra) 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 CrPC and other related provisions."

14. At this juncture, we have to appropriately recapitulate the principles stated in ***Harihar Chakravarty*** (supra). In the said case, a complaint was filed charging the appellant and another for the offences punishable under Sections 409, 406, 477 and 114 of the IPC. The complainant and his witnesses were examined and on the basis of said evidence, the learned Magistrate had framed a charge under Section 409 IPC against the appellant. The appellant entered upon his defence and after the trial, the Magistrate acquitted the appellant and the other accused under Section 409 IPC. The complainant filed a criminal revision

[10] (1942-43) 70 IA 196 : (1943) 56 LW 706 : AIR 1943 PC 192

A before the High Court which set aside the order of acquittal and remanded the matter to the Magistrate for decision for amendment of the charge by examining appropriate evidence. The said order was the subject matter of assail before this Court. This Court, addressing to the merits of the case opined thus:-

B "8. This was a private prosecution in which the complainant came forward with a story that the never ordered the appellant to purchase these shares and that therefore the shares did not belong to him, and he had no interest in them or title to them. In fact his case was that the shares were never purchased by the appellant under his instructions. All that was found to be false and it was C found that he did order them to be purchased and that therefore the shares were his. The order which was made by the learned Judge in effect meant that the complainant should abandon his original story to lay claim to the shares and prosecute the Appellant for another and distinct offence which could only arise on a different D set of facts coming into existence after the purchase of the shares. The appellant might or might not be guilty of this other offence, but he is certainly innocent of the offence with which he was charged and for which he was fully tried and therefore he is entitled to an acquittal and the learned Judge had no power to set aside that order so long as he agreed, as he did, that the appellant was E not guilty of the offence with which he was charged. Once a charge is framed and the accused is found not guilty of that charge an acquittal must be recorded under Section 258(1) of the Criminal Procedure Code. There is no option in the matter and we are of the opinion therefore that the order setting aside the acquittal was F in any event bad.

9. Next as regards the direction to alter the charge so as to include an offence for which the appellant was not originally charged, that could only be done if the trial court itself had taken action under Section 227 of the Criminal Procedure Code before it G pronounced judgment. It could only have done so if there were materials before it either in the complaint or in the evidence to justify such action.

10. The complaint affords no material for any such case because it is based on the allegation that the shares did not belong to the complainant and that in fact they were never purchased. The H learned Judge observed that the contention was that the shares

belonged to the complainant and were dishonestly pledged by the appellant with the Nath Bank. We do not find even a word about this either in the complaint or in the examination of the complainant."

[emphasis is added]

15. After so stating, the Court opined that there was no material on which the trial court could have amended the charge under Section 227 CrPC and the learned Judge therefore had no power to direct an amendment and a continuation of the same trial as he purported to do. The purpose of laying stress on the said authority is that the trial court could issue a direction for alteration of the charge if there were materials before it in the complaint or any evidence to justify such action. On the aforesaid three-Judge Bench decision, it is quite vivid that if there are allegations in the complaint petition or for that matter in FIR or accompanying material, the court can alter the charge. In ***Thakur Shah v. King Emperor*** (supra), what the Court has held is that 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. It does not necessarily mean that the alteration can be done only in a case where evidence is adduced. We may hasten to clarify that there has been a reference to the decision rendered in ***Harihar Chakravarty*** (supra) but the said reference has to be understood in the context. Section 216 CrPC, as is evincible, does not lay down that the court cannot alter the charge solely because it has framed the charge. In ***Hasanbhai Valibhai Qureshi*** (supra), it has been stated there is scope for alteration of the charge during trial on the basis of material brought on record. In ***Jasvinder Saini and others*** (supra), it has been held that circumstances in which addition or alteration of charge can be made have been stipulated in Section 216 CrPC and sub-sections (2) to (5) of Section 216 CrPC deal with the procedure to be followed once the court decides to alter or add any charge. It has been laid down therein that the question of any such addition or alteration 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. If the said decision is appositely understood, it clear lays down the principle which is in consonance with ***Harihar Chakravarty*** (supra).

16. From the aforesaid, it is graphic that the court can change or alter the charge if there is defect or something is left out. The test is, it

must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC.

17. In addition to what we have stated hereinabove, another aspect also has to be kept in mind. It is obligatory on the part of the court to see that no prejudice is caused to the accused and he is allowed to have a fair trial. There are in-built safeguards in Section 216 CrPC. It is the duty of the trial court to bear in mind that no prejudice is caused to the accused as that has the potentiality to affect a fair trial. It has been held in ***Amar Singh v. State of Haryana***[11] that the accused must always be made aware of the case against them so as to enable him to understand the defence that he can lead. An accused can be convicted for an offence which is minor than the one he has been charged with, unless the accused satisfies the court that there has been a failure of justice by the non-framing of a charge under a particular penal provision, and some prejudice has been caused to the accused. While so stating, we may reproduce the following two passages from ***Bhimanna v. State of Karnataka***[12]:-

> "25. Further, the defect must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the charges has led to a failure of justice, this Court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in

[11] (1974) 3 SCC 81
[12] (2012) 9 SCC 650

mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

26. This Court in *Sanichar Sahni* v. *State of Bihar*[13], while considering the issue placed reliance upon various judgments of this Court particularly on *Topandas* v. *State of Bombay*[14], *Willie (William) Slaney* v. *State of M.P.*[15], *Fakhruddin* v. *State of M.P.*[16], *State of A.P.* v. *Thakkidiram Reddy*[17], *Ramji Singh* v. *State of Bihar*[18] and *Gurpreet Singh* v. *State of Punjab*[19] and came to the following conclusion: (*Sanichar Sahni case (supra)*, SCC p. 204, para 27)

> "27. Therefore ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."

A similar view has been reiterated in *Abdul Sayeed* v. *State of M.P.*[20]"

18. We have reproduced the aforesaid passages by abundant caution so that while adding or altering a charge under Section 216 CrPC, the trial court must keep both the aforestated principles in view. The test of prejudice, as has been stated in the aforesaid judgment, has to be borne in mind.

19. Presently to the second aspect. Submission of Mr. Sharan is that the learned Magistrate could not have entertained the application preferred by the informant, for such an application is incompetent because it has to be filed by the public prosecutor. In this regard, he has laid

[13] (2009) 7 SCC 198
[14] AIR 1956 SC 33
[15] AIR 1956 SC 116
[16] AIR 1967 SC 1326
[17] (1998) 6 SCC 554
[18] (2001) 9 SCC 528
[19] (2005) 12 SCC 615
[20] (2010) 10 SCC 259

A stress on the decision in ***Shiv Kumar v. Hukam Chand and another***[21]. In the said case, the grievance of the appellant was that counsel engaged by him was not allowed by the High Court to conduct the prosecution in spite of obtaining a consent from the concerned Public Prosecutor. The trial court had passed an order to the extent that the advocate engaged by the informant shall conduct the case under the supervision, guidance and control of the Public Prosecutor. He had further directed that the Public Prosecutor shall retain with himself the control over the proceedings. The said order was challenged before the High Court and the learned single Judge allowing the revision had directed that the lawyer appointed by the complainant or private person shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed and the Public Prosecutor in-charge of the case shall conduct the prosecution. This Court referred to Sections 301, 302(2), 225 CrPC and various other provisions and came to hold as follows:-

> "13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.
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> 14. It is not merely an overall supervision which the Public

H [21] (1999) 7 SCC 467

Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

20. Being of this view, this Court upheld the order passed by the High Court. The said decision is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge under Section 406 IPC as there were allegations against the husband about the criminal breach of trust as far as her *stridhan* is concerned. It was, in a way, bringing to the notice of the learned Magistrate about the defect in framing of the charge. The court could have done it *suo motu*. In such a situation, we do not find any fault on the part of learned Magistrate in entertaining the said application. It may be stated that the learned Magistrate has referred to the materials and recorded his *prima facie* satisfaction. There is no error in the said *prima facie* view. We also do not perceive any error in the revisional order by which it has set aside the charge framed against the mother-in-law. Accordingly, we affirm the order of the High Court in expressing its disinclination to interfere with the order passed in revision. We may clarify that the entire scrutiny is only for the purpose of framing of charge and nothing else. The learned Magistrate will proceed with the trial and decide the matter as per the evidence brought on record and shall not be influenced by any observations made as the same have to be restricted for the purpose of testing the legal defensibility of the impugned order.

21. Consequently, the appeal, being devoid of merit, stands dismissed.

Devika Gujral

Appeal dismissed.