

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 407 OF 2018

Mrs.Manisha Pokharkar & Ors.

...Applicants

Versus

The State of Maharashtra

...Respondent

.....

Mr.Vaibhav C. Bagade for the Applicants.

Mrs.Rutuja Ambekar, APP for the Respondent – State

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CORAM: MRS.MRIDULA BHATKAR, J.

DATED : OCTOBER 22, 2018

P.C.:

1. Rule. Rule made returnable forthwith. By consent of the parties, this Criminal Revision Application is heard finally and disposed of at the stage of admission, as the issue involved is short and the notes of evidence and other documents are produced before the Court.

2. This Criminal Revision Application is filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C.”).

3. This Criminal Revision Application is directed against the order dated 19th June, 2018 passed by the learned Additional Sessions Judge, Gr. Mumbai in Sessions Case No. 604 of 2017. The challenge is

given only on the ground that no opportunity was given to the defence of audience under Section 226 of the Cr.P.C. i.e., before framing of charge.

4. The learned counsel for the applicants has submitted that on 19th June 2018, the applicants had moved an application below Exhibit 20 before framing of charge informing that their advocate was unable to remain present due to personal difficulty and the matter be kept for hearing before charge and hence, the matter be adjourned. The said application was rejected by the learned Judge of the trial Court vide order dated 19th June, 2018 i.e., on the same day. The learned counsel has further submitted that he was not present when charge was framed and, therefore, he was not heard at the time of opening of the case by the prosecution. The learned counsel has further submitted that the learned Judge of the trial Court has gone wrong in holding that since the discharge application has already been heard and rejected, it is not necessary to take hearing on charge. Therefore, prejudice caused to the applicants as the defence was not heard before framing of charge. The learned counsel has further submitted that the defence has right of audience under Section 226 of the Cr.P.C. In support of his submission, he has relied on the following judgments:

(i) *Ambadas Kashirao Kharad Versus State of Maharashtra* reported in 2007 (1) Bom. C.R. (Cri.) 881;

(ii) *Vikrant Rajkumar Gupta Versus The State of Maharashtra* (High Court of Judicature at Bombay, Nagpur Bench, Nagpur -Criminal Revision No. 7 of 2015 dated 22nd January, 2015);

(iii) *Akshay Manoj Jaisinghani Versus The State of Maharashtra* (Bombay High Court - Criminal Writ Petition No. 3599 of 2017 dated 15th December, 2017).

5. The learned APP while opposing this Revision Application, has supported the order passed by the learned Additional Sessions Judge, Gr. Mumbai.

6. Heard submissions. Perused record. Charge is framed under Section 228 of the Cr.P.C. in sessions trial before a Court of Sessions. Before that, under Section 225 of the Cr.P.C., trial to be conducted by public prosecutor. The prosecutor is supposed to open the case of the prosecution before the Judge thereby describing the charge against the accused and has to state what evidence he proposes to prove the guilt of the accused.

7. Section 227 of the Cr.P.C. is the provision for discharge. If there is no sufficient ground to proceed against the accused, he can make an application for discharge.

8. The Code of Criminal Procedure lays down two stages before framing of charge, which is as follows :

The prosecutor has to open the case of the prosecution i.e., under Section 226 of the Cr.P.C. and thereafter, under Section 227 of the Cr.P.C., the defence can make an application for discharge.

9. For better understanding, Section 226 of the Cr.P.C. is reproduced as under:

“226. Opening case for prosecution.- When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused”.

10. Section 226 of the Cr.P.C. specifically states that the prosecutor has to open the case of the prosecution and points out any evidence, he wants to tender before the Court. Section does not state about opportunity of audience to be given to the accused to defence. It does not state whether the Judge has to take into account any evidence at the time of considering charge under Section 226 of the Cr.P.C.

11. Under Section 227 of the Cr.P.C., the Judge has to take into account the evidence against the accused and on hearing the accused, the Judge has to consider whether such evidence is sufficient to frame charge under the relevant section; thereafter, the Judge to frame charge under Section 228 of the Cr.P.C.

12. While rejecting the said application on 19th June 2018, the learned Judge of the trial Court has recorded detailed Roznama wherein it is mentioned that the accused were produced from judicial custody. In the first sitting, at the request of accused No.1, the matter was kept back at 2.45 p.m. In the second sitting, when the matter was called out, advocate for accused No.6 was present. The learned Judge has mentioned that the discharge application under Section 227 of the Cr.P.C. was filed on behalf of all the accused and it was rejected by order dated 3rd April, 2018. Thereafter, the matter is fixed for framing of charge. The learned Judge has further mentioned that as such hearing on charge is not required since the discharge application is already heard and rejected.

13. I have gone through the judgments relied upon by the learned counsel for the applicants. The ratio laid down in all the three judgments can be culled out as the compliance of Sections 226 and 227

of the Cr.P.C. is not an empty formality and the Sessions Court while dealing with the sessions cases is bound to comply with the provisions of these sections in literal and spirit. This position of law cannot be disputed. The point raised by the learned counsel for the applicants is not directly covered in either of the cases.

14. Section 228 of the Cr.P.C. specifically states that if, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence, then charge to be framed.

Thus, at the time of framing of charge, the Judge has to take into account the case of the prosecution so also if the submissions are advanced on the point of discharge by the accused, the Judge to proceed for framing of charge.

15. Section 228 of the Cr.P.C. reads as “hearing as aforesaid”. The word “aforesaid” indicates hearing on the point of discharge. Thus, after opening of the case by the public prosecutor under Section 226 of the Cr.P.C., the defence may move oral submissions or written application before the Court praying for discharge. After considering the aforesaid submissions, the Judge has to pass an order either discharging accused or rejecting it and may proceed to frame charge.

16. In the present case, the learned Judge of the trial Court has already been heard the submissions on the point of discharge and rejected the same. Thus, the Judge has crossed the stage of Sections 226 and 227 of the Cr.P.C. and hence, fully justified in framing charge in the absence of the advocate for the accused when the advocate for the accused have already been advanced the submissions on behalf of all the accused. Nothing can be faulted with the order passed by the learned Additional Sessions Judge, Gr. Mumbai. There is no substance in this Criminal Revision Application and hence, rejected.

(MRIDULA BHATKAR, J.)