

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

CRIMINAL APPLICATION NO. 354 OF 2022

Mohd. Mahir Ashraf Qalbe Hussain Siddiqui ...Applicant
Versus
The State of Maharashtra ...Respondent

Mr. Mithilesh Mishra for the Applicant

Ms. Anamika Malhotra, A.P.P for the Respondent–State

CORAM : REVATI MOHITE DERE, J.
FRIDAY, 1st APRIL 2022

P.C. :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith, with the consent of the parties and is taken up for final disposal. Learned A.P.P waives notice on behalf of the Respondent–State.

3 By this application, the applicant seeks quashing and setting aside of the impugned order dated 15th March 2022 passed by the learned Special Judge, MCOC Court below Exhibit 39 in MCOC Special Case No.

17/2019, by which, the learned Judge rejected the applicant's application seeking recall of witnesses PW 1 to PW 4.

4 Learned counsel for the applicant states that the FIR was lodged in 1999, after which, some of the accused who were arrested, were put up for trial after filing of the charge-sheet *qua* them. He submits that the applicant-accused came to be arrested on 29th May 2019 and that after investigation *qua* the applicant, supplementary charge-sheet was filed as against the applicant in August 2019. He submits that the applicant was not provided with the statements recorded earlier nor the main charge-sheet filed by the police in 2000. According to the learned counsel for the applicant, the applicant realized that the main charge-sheet was not supplied, only during the cross-examination of PW 5, hence, the applicant filed an application and sought copies of the main charge-sheet filed in the year 2000. Pursuant thereto, a copy of the previous charge-sheet was supplied to the applicant on 26th October 2021. After receipt of the said charge-sheet, the applicant filed an application under Section 311 of the Code of Criminal Procedure, and sought recall of PW 1 to PW 4. According to the learned counsel, the learned Judge ought not to have

rejected the said application, as the fault i.e. non-supply of first charge-sheet, lay with the prosecution, which would seriously prejudice the applicant's case.

5 Learned A.P.P opposed the application. She, however, does not dispute the fact, that the report of the Assistant Police Commissioner dated 30th November 2021, which is on page 429 of the application (Exhibit G) shows that the first charge-sheet was supplied to the applicant's advocate on 26th October 2021. She also does not dispute the fact, that prior to the said date i.e. 26th October 2021, four witnesses were examined by the prosecution i.e. PW 1 to PW 4.

6 Perused the papers. On 23rd July 1999, an FIR i.e. CR No. 251/2019 came to be registered with the MRA Marg Police Station alleging offences punishable under Sections 302, 120(B), 201 and 34 of the Indian Penal Code; under Sections 3, 25, 27 and 35 of the Indian Arms Act. The said investigation was transferred to DCB CID, Unit-I, Mumbai on 26th July 1999. Subsequently, Sections 3(1)(i), 3(2), 3(4) of the Maharashtra Control of Organised Crimes Act, came to be applied. After investigation,

charge-sheet came to be filed as against some of the arrested accused. Some of the accused (including the applicant) were shown absconding. Two of the earlier arrested accused i.e. Shaikh Ayub Shaikh Ahmed and Mohd. Isaq Attar Siddiqui were tried by the learned Sessions Judge and were acquitted of all the charges vide judgment dated 7th July 2001. Thereafter, the applicant was arrested in the said case on 29th May 2019 and supplementary charge-sheet was filed as against him. It appears that thereafter, the applicant's trial commenced and the prosecution examined four witnesses in the said case. It appears that when the 5th prosecution witness stepped into the witness box, the advocate for the applicant learnt that the prosecution had not been given a copy of the first charge-sheet. It appears that the prosecution provided the applicant a copy of the previous charge-sheet on 12th February 2021, however, *sans* the statements. It appears that thereafter on 26th October 2021, the prosecution provided the applicant with a copy of the previous charge-sheet with statements, by which time, the prosecution had examined four eye-witnesses i.e. PW 1 to PW 4. The fact that the said charge-sheet was provided on 26th October 2021 is evident from the document at page 429 i.e. Exhibit G. On receipt of the said statements in the main charge-sheet, the applicant preferred an

application under Section 311 of the Code of Criminal Procedure and sought recall of PW 1 to PW 4, as PW 1 to PW 4 were cross-examined only on the basis of the supplementary statements, which formed part of the supplementary charge-sheet. The learned Special Judge after hearing the parties rejected the said application.

7 It is pertinent to note that the first statements of all the four witnesses i.e PW 1 to PW 4 were recorded in July 1999 and were part of the first charge-sheet, however, the same were not provided to the applicant till 26th October 2021 and hence, obviously, the advocate for the applicant could not cross-examine the said four witnesses on the basis of the said statements. The cross-examination of PW 1 to PW 4, was thus conducted only on the basis of the supplementary statements of the said witnesses, which were part of the supplementary charge-sheet.

8 It was the bounden duty of the prosecution to serve the first charge-sheet and all the material relied upon by the prosecution, as against the applicant, on the applicant, so as to enable him to answer the charges as against him. It was also the duty of the learned Special Judge to ensure

that the entire charge-sheet was made available to the applicant, so as to give him a fair opportunity of putting his case/defence. In the absence of the earlier statements recorded in July 1999 of the said four witnesses, the advocate for the applicant cross-examined the said four witnesses i.e. PW 1 to PW 4 only on the basis of the statements of these witnesses recorded in June 2019 i.e. the statements which formed part of the supplementary charge-sheet filed against the applicant.

9 Considering the aforesaid, the impugned order dated 15th March 2022 passed by the learned Special Judge below Exhibit 39 in MCOC Case No. 17/2019, is quashed and set-aside.

10 Accordingly, all the four witnesses i.e. PW 1 to PW 4 need to be recalled. It is made clear, that the applicant is permitted to cross-examine the said four witnesses only on the basis of the contents of the statements recorded in July 1999, the contradiction, if any, between the said statements and the supplementary statement.

11 The learned Judge to issue witness summons to the said four

witnesses. Needless to state, that till then i.e. till the witnesses appear, it is open for the learned Judge to proceed with the trial and examine other witnesses, except the Investigating Officer. All parties to co-operate in the expeditious disposal of the case.

12 Rule is made absolute in the aforesaid terms. Writ petition is accordingly disposed of.

13 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.