

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

CRIMINAL APPLICATION NO. 563 OF 2023

Wasim Mehmood Abrehani

..Applicant.

Versus

Union of India & Anr.

..Respondents

Mr. Ayaz Khan i/b. Zehra Charania for Applicant.

Mr. Advait M. Sethna a/w. Ruju Thakker a/w. Rangan Majumdar
for Respondent No.1.

Mr. Arfan Sait, APP for State/Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 28 JULY 2023

PC :

1. In this application, the Applicant who is the original accused No.4 in Special Case (NDPS) No.352 OF 2020 pending before the learned Special Judge (NDPS) Act, Thane, has challenged the Charge framed against him on 05/04/2023 under the various provisions of the the Narcotic Drugs and Psychotropic Substances Act, 1985. This application can be decided on a very short premise. The main grievance of Mr. Khan, learned counsel appearing for the applicant is that the procedure under sections

226, 227 and 228 of the Cr.p.c. is not followed. The main averments in the application in that behalf are in Paragraph-2(a) and 2(b), as well as, in the grounds raised in paragraph-6(a) which read thus:-

“2. The Applicant submits that the case is being tried by the Ld. Special Judge taking NDPS matters at Sessions Court at Thane, was required to follow the procedures laid down under Chapter XVIII of the Cr.P.C. The Lrd. Special Judge has not followed the following procedures. The Ld. Judge has erred

- a) In not following Sec-226 of the Cr.P.C. whereby the Prosecution ought to have opened the case by describing the charge brought against the Accused and stating by what legally admissible evidence he intends to prove the guilt of the Accused. In not giving a chance to the Accused to make out a case for moving for discharge u/s 227 of the Cr.P.C.
- b) In not considering the records of the case and the documents submitted therewith. That there is no legally admissible evidence against the Accused to frame the charge on the four counts as mentioned therein.”

“6(a). The charge in the present case is framed without following procedures established by law. That the procedure u/s.226 of the Cr.P.C. was not followed. The Roznama dated 05/04/2023 of the present case also indicates the same. Hereto annexed and marked as Exhibit ‘C’ is the copy of the said roznama as available on the website of the Court. The SPP was not present also.”

2. Mr. Khan, learned counsel invited my attention to the roznama dated 05.04.2023. The roznama simply mentions thus :

“Business : Before court
Next Purpose : Production of Accused
Next Hearing Date: 19-04-2023”

3. The roznama does not record presence of the learned PP or learned counsel for the Accused. Neither the Charge, nor the roznama records that the prosecution opened their case and the learned counsel for the accused made his submissions. There is no specific denial in the affidavit in reply submitted by the Respondent in the Court today. Thus, the grievance of the applicant made in the memo which is reproduced herein-above remains uncontroverted and unchallenged.

4. In this view of the matter, it is necessary that the learned Special Judge follows the provisions of Sections 226, 227 and 228 of the Cr.p.c. It is necessary that the prosecutor opens the case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. After that, upon consideration of the record of the case and the

documents submitted therewith, and after hearing the submissions of the accused and the prosecution, the Judge can either discharge the accused by recording the reasons or frame the Charge U/s.228 of the Cr.p.c. Sections 226, 227 and 228 of the Cr.p.c. read thus:-

“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.”

227. Discharge. - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

228. Framing of charge.- (1) 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 which-

- (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases

instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

5. In view of the provisions of these sections of the Cr.p.c., learned Special Judge is required to follow this procedure. Therefore, to that extent and in that view, the Charge framed against the accused is required to be set aside. It is made clear that the contentions and rights of both the parties can be considered by the learned Special Judge. The decision of this application shall not affect the proceedings in the Trial Court.

O R D E R

- i) The Charge framed against the applicant in Special Case (NDPS) No.352 of 2020 pending before the learned Special Judge (NDPS) Act, Thane, is set aside.
- ii) Learned Special Judge shall follow the provisions U/s.226, 227 and 228 of the Cr.p.c. and then decide the question of framing of the Charge.

- iii) All the contentions and rights of both the parties are specifically left open.
- iv) By setting aside the Charge, at this stage, will not cause prejudice to both the parties as their contentions are left open.
- v) With this direction, the Application is disposed of.

(SARANG V. KOTWAL, J.)