

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

CRIMINAL WRIT PETITION NO.3748 OF 2023

Jayanti Waghji Heliya

.... Petitioner

versus

State of Maharashtra

.... Respondent

.....

- Mr. Akash Kavade, Advocate for Petitioner.
- Mr. Arfan Sait, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 11th DECEMBER, 2023

P.C. :

1. The Petitioner is the original accused No.1 in Sessions Case No.722 of 2021 pending before the Principal Judge, Sessions Court, Greater Mumbai. Originally, there were two accused. The Accused No.2 Hitesh Waghji Heliya is already discharged from the case vide order dated 20/01/2023 passed below Ex.5 in the said case. The present Petition is preferred to challenge the order of framing of the charges dated 29/04/2022. Learned Judge has framed the charge u/s 302 of the Indian Penal Code against the present Petitioner. As of today, the present Petitioner is the sole accused in the said trial.

2. Heard Mr. Akash Kavade, learned counsel for the Petitioner and Mr. Arfan Sait, learned APP for the State.
3. The trial arose out of the investigation in C.R.No.393/2021 dated 03/06/2021 registered at Tardeo Police Station. The FIR is lodged by PSI Jagtap about the incident dated 03/06/2021 which had occurred in the early hours of the morning. The incident is described in the statement of the eyewitness Sanjay Jadhav. He has described that on 03/06/2021, at 03.30 a.m. he saw the Petitioner's brother Hitesh in injured condition. His intestine had come out. There was a stab injury. The present Petitioner brought one person at the spot. The Petitioner had caught that person. The Petitioner saw the condition of his brother Hitesh. He got angry. He abused the person who was caught by him. The Petitioner assaulted that person on his thighs and other parts below the waist with a knife. The investigation revealed that the name of that person was Dharmesh Bariya. The eyewitness Sanjay, the Petitioner and

others took the injured to hospital and got him admitted. In the meantime, the police reached the spot. Dharmesh was taken to hospital, but he succumbed to his injuries. The investigation was carried out and finally the Petitioner and his brother Hitesh faced the trial.

4. The record shows that the present Petitioner had also lodged his own FIR vide C.R. No.394/2021 at Tardeo Police Station u/s 307 of the I.P.C. against Dharmesh Bariya for causing injuries to Hitesh Heliya.
5. Learned APP states that since Dharmesh had succumbed to his injuries, there was no further progress in the investigation as the matter stood abated against Dharmesh.
6. The grievance of the learned counsel for the Petitioner is that the procedure u/s 226, 227 and 228 of the Cr.P.C. was not followed. The charge was framed in the absence of the Advocate of the Petitioner. The Roznama mentions that the Petitioner was

produced through video conferencing. He was not even physically produced. Learned APP appearing in the case did not open the case as required u/s 226, 227 and 228 of Cr.P.C. No opportunity was given to the learned counsel for the Petitioner to make his submissions. Therefore, the charges are framed without following the due procedure under those sections.

7. Learned counsel for the Petitioner submitted that discharge of the co-accused Hitesh is an important consideration, which the learned Judge should have taken into account while deciding whether the charge was to be framed against the Petitioner. The record shows that the deceased was the aggressor and had caused life threatening injury to Hitesh.

8. Learned APP produced a certified copy of the Roznama. It is taken on record and marked 'X' for identification. Learned APP fairly submits that the submissions raised by the learned counsel for the Petitioner are supported by the notings in the Roznama. There is nothing to show that the learned APP

made submissions pointing out the charge and the proposed evidence against the Petitioner and that the Advocate for the Petitioner was heard before charges were framed. The Roznama shows that the Advocate was absent.

9. I have considered these submissions. The Roznama dated 29/04/2023 reads thus:

Sr. No.3 29.04.2023 SC 722/21	<u>CORAM – HIS HONOUR THE SESSIONS JUDGE,</u> <u>SHRI A. SUBRAMANIAM (C.R. NO.19)</u> APP Mr. S. E. Soshte for the Stat is present. HC 031218 attached to Tardeo Police Station present. Accused No.1 is in JC produced through VC. Accused No.2 is already discharged. Advocate for accused absent. Accused not produced physically. Produced on VC. Charge is explained to him on VC. Copy of plea be forwarded to him in Jail Authorities for signature. Accused pleaded not guilty. <u>Exh. C-8</u> – Charge framed. <u>Exh. C-9</u> – Plea of accused. Adjourned on 11.05.2023 for compliance u/s.294 Cr.PC. Sessions Judge, Gr. Mumbai.
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10. The provision of section 226, 227 and 228 of Cr.P.C. are as follows :

“Section 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.

Section 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.

Section 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.”

11. Section 228 of Cr.P.C. refers to such consideration and hearing as is mentioned u/s 226 and 227 of Cr.P.C. In the present case, there is nothing to show that the Prosecutor had

opened the prosecution case by describing charge brought against the Petitioner/accused and stating by what evidence he proposed to prove the guilt of the accused/Petitioner.

12. Section 227 of Cr.P.C. refers to the submissions on behalf of the accused as well as the prosecution. Section 228 of Cr.P.C. refers to the 'hearing' as mentioned in the earlier sections. Therefore, it was necessary to hear the prosecution as well as the learned counsel for the accused before framing of the charge. In this case, it was not done and therefore, the learned counsel for the Petitioner is justified in raising his grievance about non-compliance of these provisions. Therefore, the Petition deserves to be allowed to that extent.

13. Hence, the following order :

ORDER

- (i) The charge framed against the Petitioner on 29/04/2023 in Sessions Case No.722 of 2021

before the Principal Judge, Sessions Court, Greater Mumbai, is set aside.

- (ii) The learned Judge shall follow the procedure u/s 226, 227 and 228 of Cr.P.C. by giving opportunity to both the sides and then consider the question of framing of charge.
- (iii) With these observations, the Petition is disposed of.

(SARANG V. KOTWAL, J.)