

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Revision Application No. 542 of 2024

Azim Abu Salim Khan	...	Applicant.
V/s.		
The State of Maharashtra	...	Respondents.

Mr. Rounak Naik a/w. Ms Lochan Chandka	Advocate for the Applicant.
Ms. Sangita E. Phad	APP for the State.

CORAM : S.M. MODAK, J

DATE : 30 September 2024.

P.C. :

Heard learned counsel for the applicant-accused No.2 and the learned APP for the State.

2. The only issue involved in this revision is about compliance of the provisions of Section 226 of the Code of Criminal Procedure (Cr.P.C.) which talks about opening of the case by the learned Public Prosecutor for prosecution. This stage is not followed and even the applicant was not represented at the time of framing of charge on 18 June 2024.

3. The copy of the Roznama of that date is produced. It records following facts:

(i) The learned Advocate for the accused No.1 was present.

(ii) The accused No.1 was brought from jail.

(iii) Accused No.2-present applicant is on bail in the present case, however, he was brought from jail as he was involved in another crime. It mentions about completing other formalities.

4. It is submitted that earlier to this date even draft charge was not submitted. Learned Advocate for the Applicant submitted that this is not an empty formality. He relied upon the observations in the case of *Manisha Gajjugiri Goswami v/s. State of Gujarat*¹ and in the case of *Pravin Bhiwa Teli v/s. The State of Maharashtra*².

5. According to learned APP when accused No.1 was represented by Advocate, he has not made any grievance about discharge. It is true that the stage of opening of a case comes first. It assists the Court in understanding what was the material collected against the accused persons. Code of Criminal Procedure does not refer to filing of discharge application. There is a provision for discharge in Section 227 of the Cr.P.C.. Once the case is opened, the Court can go through the record and then decide whether there is sufficient ground to proceed or not. It contemplates hearing of prosecution as well as the accused. Filing of a discharge application is a practice and it helps the Court as well as the prosecution to know the ground for discharge.

1 Cr. Revn. Application No.245/2021 dated 5 April 2021

2 Cr. Revn. Application No.211/2023 dated 26 July 2023

6. It is true that stage under Section 226 of the Cr.P.C. is not followed. It is also true that accused No.2-present applicant was not represented at that time. Even the Roznama never records that learned Prosecutor and learned Advocate for accused No.1 were heard. Merely marking their presence is not sufficient. So the act of framing of charge is not as per the provisions of the law. It needs to be set aside. If applicant wants, he can file the discharge application. So also applicant-accused No.2 also needs to be represented by an Advocate.

7. Hence, the following order:

ORDER

(i) The order dated 18 June 2024 thereby framing the charge against both the accused for an offence punishable under Section 8 (c) read with section 22 and 29 of N.D.P.S. Act is set aside.

(ii) The matter is remanded back to the learned Special Judge.

(iii) Prosecution to open up the case and explain what is the material collected against both the accused.

(iv) The trial Court to ensure that Accused No.2 is represented by an Advocate and if he does not appoint an Advocate within reasonable time then he can be provided with legal aid.

8. Both the accused are at liberty to file discharge application. Criminal Revision Application stands disposed of.

(S.M. MODAK, J.)