

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 220 OF 2022

Mubin Kadar Shaikh .. Appellant
Versus
The State of Maharashtra .. Respondent

WITH
CRIMINAL APPEAL NO. 221 OF 2022

1. Ansar Ahmad Basdshah Shaikh
2. Mubin Kadar Shaikh
3. Farooque Sharfoddin Tarkash
4. Yasir Anis Sayyed .. Appellants
Versus
The State of Maharashtra .. Respondent

WITH
CRIMINAL APPEAL (ST) NO. 4762 OF 2022
WITH
CRIMINAL INTERIM APPLICATION NO. 987 OF 2022
AND
CRIMINAL INTERIM APPLICATION NO. 989 OF 2022

Mubin Kadar Shaikh .. Appellant
Versus
The State of Maharashtra .. Respondent

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- Mr. Mubin Solkar a/w Mr. Aamir Sopariwala i/by Ms. Tahera Qureshi for the Appellants
 - Mr. A.M. Chimalkar, a/w Mr. Siddharth Jagusthe, Special P.P. for the State
 - Ms. M.M. Deshmukh, APP for the State
 - Mr. Prashant Sawant, API for CIU
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**CORAM : SMT SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

Reserved on : APRIL 22, 2022
Pronounced on : MAY 04, 2022

P.C. : [PER MILIND N,JADHAV, J.]

1. Criminal Appeal No. 220 of 2022 has been filed by the Appellant - Mubin Kadar Shaikh to quash and set aside the order dated 24.04.2019 whereby the Appellant's application under Exhibit 396 has been rejected by the Trial court in Sessions Case No. 4 of 2015 (previously numbered as MCOCA Special Case No. 4 of 2009).

2. Appellant is accused No. 8 in Sessions Case No. 4 of 2015 pending with the Special Court constituted under the NIA Act, 2008 arising out of C.R. Nos. 152/2008 and 162/2008 of DCB-CID, Mumbai. On 26.02.2013, the Appellant and one another co-accused filed an application vide Exhibit '623' before the then Special MCOCA Court challenging quashing of the invocation of the provisions of Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act, 1999 in Sessions Case No. 4 of 2015 on the ground that there was no *prima facie* material to frame charges against the applicants under the said provisions.

3. During pendency of the aforesaid application under Exhibit '623', on 10.12.2013 charges were framed against the accused thereby making the application filed vide Exhibit '623' redundant.

4. On 15.04.2014, the learned Special Judge called upon the prosecution to explain as to why the charges under the MCOC Act

should not be dropped in view of the judgment of the Supreme Court in Civil Appeal No. 1975 of 2008 in the case of Zameer Ahmed Latifur Rehman Shaikh Vs. State of Maharashtra & Ors. However, on 01.09.2014, the said Exhibit '623' was disposed of as 'not survived'.

5. The prosecution has filed a reply under Exhibit 402 to the application of the appellant under Exhibit 396 claiming that the Appellant was well aware that he has not only been prosecuted under the provisions of the MCOC Act but also under the provisions of the UAP Act, 1967 which is triable by the Special Court constituted under Section 22 of the NIA Act, 2008. Hence, the prosecution asserted that the application filed by the Appellant was not maintainable. On 15.05.2015, the learned Sessions Court has framed a question as to why the charges under MCOC Act should not be dropped.

6. The prosecution has asserted that due process of law as laid down under the provisions of Sections 226 and 227 of the Cr.P.C. was followed and the learned Sessions Court proceeded to frame the charges on 10.12.2013. It is further stated that the Appellant and other accused gave their no-objection to framing of the charges when the charges were framed by the Sessions Court. Therefore, it was not open for the Appellant (accused No. 8) to file a fresh application under Exhibit '396' to re-agitate the same issue which was the subject matter of the earlier application under Exhibit '623' which

was disposed of. The prosecution has relied upon the decision of the Supreme Court in the case of **Radial Bhanji Vs. Stae of Maharashtra**¹ which states that once the charge is framed, the Magistrate has no power under Section 227 of the Cr.P.C. or under any other provision of the Code to consider a discharge application and revisit the earlier stage of proceedings at the stage of Section 273 of the Cr.P.C. to discharge the accused and the natural course would therefore be to proceed with the trial and pronounce the judgment. In short, the prosecution has submitted that after framing of the charge, court cannot discharge the accused.

7. The Appellant in reply has referred to and relied upon the decision of this Court in the case of **Vikrant Rajkumar Gupta Vs. The State of Maharashtra**² which states that an opportunity of hearing is required to be given to the accused before the charge is framed. The impugned order has been passed merely on the ground that when the Sessions Case was taken up for framing of charge, the accused had given their no-objection and therefore, the grievance of the accused that no opportunity of hearing was given is not true. However it is an admitted position that the application under Exhibit '623' for quashing of charges under the provisions of the MCOC Act was pending and it remained to be heard on the date of framing of charge i.e. on

1 AIR 1979 SC 94

2 2015 ALL MR (Cri) 1572

10.12.2013 and was subsequently disposed of as 'not survived'.

8. The application filed by the Appellant and original accused No. 6 vide Exhibit '623' for quashing of the charges under the MCOC Act which was pending on the date of framing of the charge ought to have been decided by the Trial court before proceeding to frame the charges. Once the Court had taken cognizance of the pending application under Exhibit '623' and also framed the question calling upon the prosecution to show cause as to why the charges under MCOC Act should not be dropped, it was not open to the Trial court to have disposed of the application as 'not surviving'. The same should have been decided by the Trial court before proceeding to frame the charges. Further Exhibit '623' could not have been disposed of as 'not surviving' subsequent to the framing of charges when a valuable right is accrued upon the accused under the provisions of Section 216 of the Cr.P.C. wherein the Court is empowered to add or alter a charge at any time before the judgment is pronounced and even after the charges have been framed. It is also asserted by the Appellant that the order dated 10.12.2013 of framing of the charge does not disclose that the Appellant / accused or their counsel were heard on the point of charge before it was framed and thus the same is in violation of the provisions of Section 227 and 228 of the Cr.P.C. At this stage, we would not like to enter into the merits of the case and the rival

contentions, save and except to state that since the application under Exhibit '623' was admittedly pending and remained unheard as specifically noted by the Trial court in the impugned order, we are of the opinion that Appellant's valuable right is jeopardized.

9. The Appellant and the original co-accused No.6 is given liberty to file a fresh application for quashing of the charges under the MCOC Act before the Trial court within a period of four weeks from today. The prosecution shall file its affidavit-in-reply to the said application within a period of four weeks thereafter before the Trial court and the learned Trial court is directed to decide the said application finally within a period of sixteen weeks thereafter strictly in accordance with law after hearing the parties and by passing a speaking order. All rights and contentions of the parties are kept open before the Trial court.

10. Criminal Appeal No. 220 of 2022 thus stands disposed of accordingly.

11. Criminal Appeal No. 221 of 2022 has been filed by four accused persons in Sessions Case No. 4 of 2015 (the Appellant in Criminal Appeal No. 220 of 2022 is Appellant No. 2 in this Criminal Appeal) to quash and set aside the charges framed on 10.12.2013 by the learned Special Judge under the MCOC Act and for a direction to the Trial court to frame the charges afresh. However in view of the

order passed while disposing of Criminal Appeal No. 220 of 2022 and directing the Trial court to consider the fresh application filed by the Appellant, Criminal Appeal No. 221 of 2022 is not pressed by the Appellants. The learned counsel appearing on behalf of the Appellants has sought to withdraw Criminal Appeal No. 221 of 2022. Criminal Appeal No. 221 of 2022 is accordingly disposed of as withdrawn.

12. In view of the aforestated order, Criminal Appeal (St.) No. 4762 of 2022 seeking bail as well as Criminal Interim Application Nos. 987 of 2022 and 989 of 2022 also stand disposed of.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV, J.]

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