IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 349 OF 2015

1 Mohd. Zuber Yakub Shaikh
2 Pramod Yellappa Sanai @ Pamya.
4 Mohd. Iliyas Abdul Rashid Shaikh. ... Applicants.
Versus
The State of Maharashtra. ... Respondent.

Mr. Aniket Vagal, advocate for Applicants.

Ms. P.P. Shinde, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : JULY 20, 2015

P.C.:

1 Heard the learned Counsel for the applicants and the learned APP for State. Perused the papers.

2 This is an application under Section 439 of the Code of Criminal Procedure, 1973. The applicants herein are arrested on 4/3/2014, 16/4/2014 and 20/4/2014 respectively in Crime No. 175 of 2014 registered at Santacruz Police Station for offence punishable under Section 143, 144, 145, 147, 149, 450, 387, 427, 307, 120B, 506(II) of

the Indian Penal Code read with Section 4 and 25 of the Arms Act and Section 3(1)(ii), 3(2) and 3(4) of MCOCA Act.

3 It is the case of the prosecution that on 1st March, 2014 first information report was lodged by Shri Dynaneshwar Bhivson Javjal at Santacruz Police station alleging therein that he is working on the site of HDIL company. The office is situated at shop No. 47, Pioneer-2, Daulat Nagar, Santacruz. HDIL company has taken a project and the construction is in progress on the adjacent site. That on 1/3/2014 he was present in the office. The security guard was standing outside his cabin. At about 3.45 p.m. he heard noise of breaking of glasses and window pane of his office and there was hue and cry. He heard the people hurling stones and abuses. He came out of the office to see what was happening. He saw 10 to 15 people armed with iron sickles and iron rods entered into his office. Some of the miscreants had muffled their faces and had put on caps. The handkerchief of one of the person had slipped and the complainant identified him as Ajmal, a resident of Daulatnagar. He then identified associates of one Zulfikar namely Asif, Sayeen Khan @ Mavya, Sufiyan. Ajmal was

armed with a sickle. Asif was armed with iron rod. Mavya was armed with stump and Sufiyan was armed with wooden log. They were proceedings towards him and asking him the whereabouts of Yusuf Pathan and why he had not paid money. The miscreants were attempting to assault the complainant. At that juncture, the security guard fired in the air. The miscreants had caused damage to the office furniture and had fled from the spot. Surrounding shops in close proximity had pulled down their shutters. One of the adjacent shop was also attacked.

4 The complainant could identify some of the assailants. According to him, some of the accused had visited the office in November, 2013 and were enquiring about Yusuf Pathan. On every occasion, they used to say that the brother of Zulfikar is still in jail and Rs. 8 Lakhs are necessary for releasing him and therefore, they were demanding money from Yusuf Pathan. According to the complainant, Zulfikar and his associates had also attacked the house

and vehicle of Yusuf Pathan in Lohia Nagar. It is specifically alleged that all the accused were working at the behest of Zulfikar and were troubling the complainant and Yusuf Pathan since 2013. The name of the applicant does not find place in the FIR.

5 By an order dated 31st May, 2014 the Commissioner of Police, Brihan Mumbai in exercise of his powers under section 23(2) of the MCOC Act had accorded sanction to prosecute the accused in C.R. No. 175 of 2014 under Section 3(1)(ii), 3(2), 3(4) of M.C.O.C. Act, 1999.

6 The investigation is completed and charge-sheet is filed and the case was registered as MCOC Special Case No. 4 of 2014.

7 This Court (Coram : Smt. Sadhana S. Jadhav, J) by an order dated 11/11/2014 had granted bail to one of the accused namely Ashique Iqbal Shaikh @ Lukka in Crime No. 175 of 2014. The said order is not challenged before the Hon'ble Apex Court and hence, has attained finality.

8 The papers of investigation would show that in the personal search of Pramod Yellappa Sanai @ Pamya, a cell phone is found. A motor cycle is recovered under Section 27 of the Indian Evidence Act. The learned APP submits that the present applicant has been referred to in the confessional statement of Accused Kabir Ansari and Irfan. It is also submitted that the applicant has criminal antecedents. As against this, the learned Counsel for the applicant submits that the applicant herein has been acquitted in Crime No. 10 of 2012 in Sessions Case No. 89 of 2014. There are lacunas in the investigation. That the statement of co-accused can be considered under Section 30 of the Indian Evidence Act at the time of trial in the eventuality that it is corroborated by the cogent evidence. However, at this stage, it cannot be said that the applicant was a member of the syndicate. It is incumbent upon the prosecution to show that the present applicant was a member of the syndicate and that he had participated in the continuing unlawful activities of the syndicate. The learned APP submits that the applicant had criminal antecedents. Although it is

admitted that he has been acquitted, the applicant would not be entitled to grant of bail.

9 As far as applicant Mohd. Zuber Yakub Shaikh is concerned, he does not have any criminal antecedents. In his personal search, the Investigating Officer had seized a motor cycle. He has been seen in C.C.T.V. footage. He has been referred to in confessional statement of Ajmal. But there is no corroborative material to that effect.

10 As far as the applicant Mohd. Iliyas Abdul Rashid Shaikh is concerned, he does not have any criminal antecedents. He has been referred to in confessional statement of Ajmal. The contents of the charge-sheet would show that the present applicant is in contact with the principal accused Zulfikar.

11 The learned APP submits that the contents of the charge-sheet would show that the principal accused Zulfikar was in jail and he was in contact with the present applicants and therefore, it can be said

that the applicants are members of the syndicate of Zulfikar and therefore, they do not deserve grant of bail.

12 Section 2(d) of the MCOC Act contemplates as follows :

> “2(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such, syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;”

Prima facie, there is nothing on record to indicate that the applicants had participated in any continuing unlawful activities with the principal accused i.e. Zulfikar prior to the present incident and therefore, the applicants would be entitled to be enlarged on bail.

13 The Division Bench of this Court in the Judgment passed in **Criminal Appeal No. 25 of 2014** has considered the Judgment of the Division Bench of this Court in the case of **Govind Sakharam Ubhe**

v/s. State of Maharashtra reported in 2009 All M.R. (Cri) 1903 has held has follows :

> "The Division Bench in an unequivocal terms laid down the ratio that requirement of more than one charge-sheet is qua the unlawful activities of the organized crime syndicate and not qua individual member thereof."

14 In such a situation, it would be incumbent upon the prosecution to first demonstrate that the said accused is a member of the syndicate and he has been singly or jointly charge-sheeted with Zulfikar. In the present case, it was the first occasion, when the applicants have been to the office of the HDIL Company when the alleged incident had occurred. The principal accused Zulfikar has been charge-sheeted in several cases, however only because there was exchange of telephonic calls between Zulfikar and the present applicants, it cannot be said that they work for Zulfikar or have been his associates.

15 As far as the present case is concerned, it is seen that the only allegation against the applicants is that they had visited the premises on that day and caused damaged to the property of HDIL company.

16 The learned Counsel for the applicants submits that at the most it can be said that the applicants have committed offence punishable under Section 425 and 380 of the Indian Penal Code. However, this can be considered at the time of framing of charge or at the time of trial. The applicants have been in jail for more than one year i.e. almost 15 months and in view of this, applicants deserves grant of bail.

17 Taking into consideration the role attributed to the applicants in the present case, the applicants would be entitled to be enlarged on bail. Having regard to the facts of the case, compilation of the charge-sheet and the submissions advanced across the bar, prima facie, it would be difficult to record a subjective satisfaction that the applicants may in all probabilities commit similar offences, if enlarged

on bail and therefore, in C.R. N. 175 of 2014 the applicants would be entitled to be granted bail.

18 It is made clear that the observations made hereinabove are restricted to an application under Section 439 of the Code of Criminal Procedure, 1973. The same shall not be considered while deciding the application for discharge or for quashing of FIR or at the time trial. The learned Trial Court shall decide the matter uninfluenced by the above said observations and arrive at a conclusion only on the basis of the substantive evidence adduced by the prosecution at the time of trial.

19 Hence, following order is passed :

ORDER

(i) The application is allowed.

(ii) The applicants be enlarged on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- each and one or more local solvent sureties.

(iii) After release on bail, the applicants shall report to the concerned police station on 1st Sunday of every month till conclusion of trial.

20 The application is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)