

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1426 OF 2015

GUDDU @ MOHD.HAFIZ HAMZA KHAN)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Smt.Rebecca Gonsalvez, Advocate for the Applicant.

Shri S.K.Shinde, Public Prosecutor, a/w. Smt.V.S.Mhaispurkar, APP
for the Respondent – State.

Shri Subhash Jha a/w. Smt.Rushita Jain i/b.Law Global Advocates,
Advocate for the First Informant.

CORAM : ABHAY M. THIPSAY, J.

DATE : 29th OCTOBER 2015.

ORAL ORDER :

1 The applicant, mentioned as Guddu @ Mohd. Hafiz
Iliyas Khan in the charge-sheet, is one of the six accused – accused
no.2 – in M.C.O.C. Special Case No.10 of 2012, pending before
the Special court under the Maharashtra Control of Organized
Crime Act (hereinafter referred to as M.C.O.C. Act), Thane. The

said case is in respect of offences punishable under Sections 120B, 153A, 307 of the Indian Penal Code (IPC), offences punishable under the Arms Act, apart from the offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the M.C.O.C. Act. Additionally, the applicant and the other accused are alleged to have committed offences punishable under Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967, as amended till 2008 (hereinafter referred to as U.A.P Act). By the present application, the applicant seeks bail.

2 I have heard Smt.Rebecca Gonsalvez, the learned counsel for the applicant, and Shri S.K.Shinde, the learned APP for the State. I have also heard Mr.Subhash Jha, the learned counsel, who sought intervention in the matter, on behalf of the first informant, to oppose the grant of bail. With the assistance of the learned counsel, I have gone through the bail application, the annexures thereto, and all the relevant parts of the charge-sheet. I have also been taken through the affidavit filed by the Investigating Officer for opposing the grant of bail.

3 Initially, two accused in this case i.e. Shamil Saquib Nachan – accused no.3, and Aakif Ateeque Nachan – accused no.4, were released on bail by me (Bail Application No.512 of 2013, decided on 6th May 2013, and Bail Application No.1157 of 2013, decided on 13th August 2013, respectively). The accused no.5 – Tanveer has been, thereafter, released on bail by the trial court on 21st September 2013. Another accused Saquib Nachan – accused no.1, was also released on bail by me (Bail Application No.716 of 2014, decided on 31st July 2014). The facts of the case – which were taken from Column No.16 of Form 5E of the printed prescribed proforma of the charge-sheet – were properly and sufficiently mentioned in my orders deciding the aforesaid bail applications, and as such, they may be mentioned in the same manner here, as follows :

The first informant Manoj Raicha, Advocate, is an active member of the *Vishwa Hindu Parishad*, and *Gowvansh Saurakshan Samiti*. He had, in the past, got the cattle brought in

Bhiwandi for *Qurbani* on the occasions of Muslim religious festivals, taken charge of and sent to *Gowshala*. The accused no.1 Saquib Nachan, therefore, formed a belief that Mohan Raicha was doing injustice to Muslims and entertained grudge against him. He had given threats to Manoj Raicha in the year 2011 in the court campus itself. Because of this grudge, the accused no.1 Saquib Nachan conspired with other accused, namely, accused no.2 Guddu alias Mohammad Hafiz Khan, accused no.3 Shamil Saquib Nachan, accused no.4 Akif Atik Nachan i.e. the applicant, accused no.5 Tanveer Abdul Majid Zamindar and accused no.6 Abu Bakar Rashid Shaikh. In pursuance of the conspiracy, the accused no.6 Abu Bakar, fired at Manoj Raicha on 3.8.2012, causing injury to his shoulder, by a bullet.

4 How the incident which gave rise to this case, took place and how the investigation commenced, can be ascertained from the First Information Report (FIR). The facts, as narrated by Manoj Raicha, in FIR, are to the effect that on 3.8.2012, while he was travelling by his car, with his armed police bodyguard

Achrekar – Police Constable No.3901 – three shots were fired at him from a fire arm. One bullet grazed his right upper arm. His bodyguard got down from the car, but could not see any one. Thereafter, Manoj and his bodyguard Achrekar, came to the police station and lodged a report on the basis of which, a case was registered in respect of offences punishable under Sections 307, & 120B of the IPC and offences punishable under the Arms Act, at Nizampur Police Station, Bhiwandi. The investigation was then transferred to Crime Branch Bhiwandi, under the orders of Commissioner of Police, Bhiwandi, Thane, and thereafter, the provisions of Section 153A of IPC were added to the original FIR. In the course of investigation, it was revealed to the Investigating Officer that the attack on Manoj Raicha was a “*part of larger conspiracy*” and that the same was carried out at the instance of the accused no.1 Saquib Nachan. It was also revealed to be an act of an *organized crimes syndicate*. In the course of further investigation, it was also revealed that it was a “terrorist act” as contemplated under Section 15 of the U.A.P Act, 1967.

5 While dealing with the aforesaid bail applications filed by the co-accused Shamil Saquib Nachan (Bail Application No.512 of 2013, decided on 6th May 2013) and Aakif Ateeque Nachan (Bail Application No.1157 of 2013, decided on 13th August 2013), a number of aspects of the matter were taken into consideration and the applicability of the provisions of the M.C.O.C. Act and the U.A.P. Act was felt highly doubtful. How far the rigours of the provisions of Section 21(4) of the M.C.O.C. Act would go and how the restrictive phrase therein should be interpreted was also considered and discussed while granting bail to the said co-accused. These facts are common with respect to the case of the present applicant, and that of the said co-accused, who were, as aforesaid, released on bail.

6 The case of the present applicant is different from that of the co-accused Shamil Nachan and Aakif Nachan, ***only to the extent that, the present applicant was, apart from being a conspirator, is also alleged to have taken an active part in the assault on Manoj Raicha.*** The allegation against him is that, when the

accused no.6 – Abu Bakar fired at Manoj Raicha, the applicant was also present with him, and that, after the incident, the said Abu Bakar and the applicant left the spot together.

7 The conspiracy was, allegedly, hatched in a meeting which took place between the applicant and co-accused Shamil Nachan, Aakif Nachan, Tanveer Abdul Majid Zamindar (accused no.5) and the absconding accused Abu Bakar, at *Oye Punjabi Dhaba* on the second or third day of the commencement of the holy month of Ramzan.

8 The material against the applicant, like that against the co-accused – Shamil Nachan and Aakif Nachan, consists of statements made by four persons, referred to as witnesses “A”, “B”, “C” and “D” which deal with the aspect of the applicant's involvement in the conspiracy. What these statements disclose and the evaluation of the material in the nature of the statements of the said witnesses has been done while dealing with the bail application filed by the co-accused Shamil Nachan and finds place

in the order granting bail to him. I am, therefore, not inclined to repeat the same observations in the present order, except mentioning that for good and sufficient reasons, the version reflected in the said statements, was doubted. In brief, the reasons therefor, may be given as follows.

9 In the first place, all the statements have been recorded *after* the arrest of the applicant. In the FIR and the statements recorded before the arrest, there is nothing against the present applicant, and therefore, this aspect of the matter assumes significance. Secondly, the statement of Witness "A" was recorded under the provisions of Section 164 of the Code of Criminal Procedure (Code) also, on 7.11.2012. In this, he did not support the version of the investigating agency. Interestingly, his another statement, under the provisions of Section 164 of the Code came to be recorded on 9.11.2012, in which, he somewhat supported the investigating agency. The fact, however, remains, that there exist two statements of Witness "A" which are not consistent and they are somewhat contradictory.

10 So far as Witness “B” is concerned, his statement under the provisions of Section 164 was recorded on 5.11.2012. In his statement, he does not speak of the applicant's presence at the place where the conspiracy is alleged to have been hatched.

11 The theory of the applicant and the other accused meeting in *Oye Punjabi Dhaba* and the conspiracy to kill the first informant Manoj Raicha having been hatched there, has been doubted for good and sufficient reasons while releasing the co-accused on bail, which reasons have been mentioned in the said orders. These reasons hold good in respect of the applicant's case for bail also.

12 The additional allegation against the applicant is that, as aforesaid, he was with the actual assailant Abu Bakar (accused no.6), at the time when the firing took place. It is also alleged that the firearm in question, which had been concealed in the house of accused no.6 Abu Bakar, was recovered therefrom, pursuant to the information disclosed by the applicant to the police in the course of investigation.

13 While releasing the co-accused on bail, the material in the charge-sheet was evaluated for the limited purpose of deciding, whether or not there were reasonable grounds for believing the said co-accused not guilty of an offence punishable under the M.C.O.C. Act, and whether the allegation leveled against them, with respect to the offences punishable under the U.A.P. Act, was *prima facie* true. It was observed that, there was indeed a reasonable doubt about the truth of the prosecution case with respect not only to the involvement of the said co-accused, but about a number of other aspects of the prosecution case, including the occurrence of the incident itself.

14 It is not necessary to reproduce the entire reasoning and the discussion with respect to the perceived infirmities in the prosecution case, which have been mentioned in the orders releasing the co-accused on bail. While dealing with the said bail applications, the prosecution had stretched the matter too far and had advanced extensive contentions requiring a somewhat detailed discussion of the matter, in view of the necessity to record

a satisfaction about the '*existence of reasonable grounds for believing the accused / applicant to be not guilty of the alleged offence*' before granting bail. No arguments on these aspects are advanced by the prosecution, while opposing the present application, rendering it unnecessary to repeat the discussion here. It may only be observed that the infirmities in the case of the prosecution were clearly noticed and have been dealt with in my orders releasing the co-accused Shamil Nachan and Aakif Nachan on bail, and the same hold good with respect to the present applicant also, and that, the case against the applicant needs to be judged in the light of the general infirmities in the prosecution case, creating a reasonable doubt about the vital aspects thereof.

15 The incident has taken place on 3rd August 2012, at about 10.45 p.m., and the FIR came to be lodged immediately thereafter, i.e., within three hours (at 1.20 a.m. on 4th August 2012). According to the prosecution case, the applicant was with the accused no.6 – Abu Bakar, when the firing took place, and he has been identified as such, by Achrekar, bodyguard of Manoj

Raicha. The learned counsel for the applicant submitted that the identification of the applicant, as the person who was accompanying the actual assailant – alleged to be accused no.6 Abu Bakar – is not reliable and is rendered doubtful on the face of it. She submitted that this is based on the identification by a sole witness, viz., Sudhir Achrekar, bodyguard of Manoj Raicha, who has not attributed any specific role to the applicant, while identifying him during the Test Identification Parade. *Interestingly, the FIR not only does **not** indicate that Achrekar, the bodyguard of Manoj Raicha, had seen any one, but, on the contrary, categorically states, that the bodyguard had **not** seen anyone.* Manoj Raicha and his bodyguard Achrekar had been together after the firing, and had gone to the police station together. Achrekar was present when the FIR was registered, and inspite of this, a categorical statement that the bodyguard had not seen anyone, was made in the FIR. Surely, when the bodyguard's statement was recorded thereafter, he did state about having seen two persons going away on a motorcycle, after the firing, but, in view of the fact that FIR mentions that **he had not seen anyone**, that there is

a conflict in the material collected during investigation, in that regard, is obvious.

16 The learned counsel for the applicant has raised a number of arguments suggesting that, whether the incident of firing indeed took place, was itself doubtful.

17 Indeed, that firing had actually taken place, is not free from doubt, even at this stage. These doubts have been reflected in the aforesaid orders granting bail to the co-accused. In brief, it may be observed that, as per the case of the investigating agency, the bullet had been fired from the right side of the car from which Manoj Raicha was travelling and that one bullet had entered through right side window and had passed through the car by grazing the right upper arm of Manoj Raicha. The injury, sustained by him, which is of a minor nature, could not be opined to be such, as could be caused (only) because of a firearm. Further, Manoj Raicha was supposed to be wearing a full sleeves shirt at the time of the incident, but, admittedly, there was no hole

or any mark on his shirt. Undoubtedly, this was attempted to be explained by the learned Public Prosecutor by saying that 'Manoj Raicha had folded the sleeves of his shirt', but undoubtedly, the matter requires consideration.

18 The additional material that is available against the applicant is to the effect that, he was with the actual assailant at the time when the firing took place. Now, this is based on the identification of the applicant as such, by a solitary witness i.e. the Police Constable Achrekar, bodyguard of Manoj Raicha. *The FIR shows and categorically asserts that the Manoj Raicha and even his bodyguard had not seen anyone after the incident.* In the statement of bodyguard Achrekar, *which was recorded later*, he does say that he had seen two persons, supposed to be the assailants, but the conflict in that regard cannot be overlooked at this stage, while judging the existence of *prima facie* case against the applicant.

19 A peculiar aspect of the matter of the prosecution case is that, it is not that the investigation proceeded in order to find

out who were the actual assailants. It is not that the applicant came to be traced in that manner. The investigation commenced by suspecting the accused no.1 Saquib Nachan, and it was he, who was immediately arrested after the incident.

20 The present applicant was arrested on 24th August 2012. The TIP was held on 10th October 2012. No specific role was attributed by the identifying witness to the applicant during the TIP. The supplementary statement of the identifying witness has not been recorded after the TIP.

21 The weapon of assault, as aforesaid, is said to have been recovered from the house of the absconding accused Abu Bakar, at the instance of the present applicant. This was immediately on the date of his arrest i.e. on 24th August 2012.

22 In this regard, the learned counsel for the applicant submitted that the material showing that the weapon was recovered at the instance of the applicant, is not satisfactory. She

also submitted that, whether what was recovered was the same weapon, that was allegedly used for firing, was also not clear. According to her, the recovery of the empties from the spot of incident, on the basis of which the individuality of the firearm is sought to be established, was not free from doubt. It is submitted that the empties, though are supposed to have been seized on 4th August 2012, within a few hours after the alleged firing, under a panchnama, in the remand applications, *despite there being a specific column for showing seized property*, there was no mention of the empties having been seized. Indeed, in the remand applications dated 4th August 2012 and 10th August 2012, the seized articles are said to be 'nil.' A mention of the empties having been seized finds a place in the remand application, for the first time, on 16th August 2012. The learned Public Prosecutor, in this regard, submitted that, the seizure of the empties was not mentioned in the earlier remand applications, due to inadvertence. He, however, submitted that, entry in that regard was made in the muddemal register of the police station. Though no conclusion, that 'actually no empties were seized from the

spot', can be drawn at this stage, the fact undoubtedly remains that this material is not entirely free from doubt.

23 The doubt increases because of another factor, on which emphasis is placed by the learned counsel for the applicant. As per the prosecution case, the panchnama under which the seizure of the empties was made, i.e. the spot panchnama, has been drawn by Police Inspector Nighot. The information collected by the applicant under the provisions of the Right to Information Act, discloses that, PI. Nighot was not on duty at the police station on that night, at all. The learned Public Prosecutor, while replying to this, submitted that, the presence of PI. Nighot in the police station on 3rd August 2012, has been mentioned in the muster roll / attendance Register, maintained at the police station. He submitted a copy thereof for the perusal of the court. However, there has been no reference to the muster roll / attendance register in the **counter** affidavit of Ravindra Daundkar, P.I., attached to Crime Branch, Thane. Though one may not, at this stage, draw an inference that PI. Nighot was not on duty at the

material time, the fact remains that, even this aspect of the matter is not entirely free from doubt.

24 The learned counsel for the applicant also contended that the whole prosecution case is fabricated and pointed out certain discrepancies, which collectively, create a serious doubt about the honesty and sincerity of the investigation. She pointed out that there is a discrepancy in the prosecution case, as to, when and in what manner the investigation of the case was transferred to Crime Branch. Indeed, it appears that the supplementary statement of the First Informant was recorded by Police Inspector Wadekar from the Crime Branch on 4th August 2012, either at 2.30 hours or 3.20 hours. The matter, however, was actually entrusted to Crime Branch only at about 11.00 a.m. on 4th August 2012. Her contention is that, it is, therefore, not *likely* that P.I. Wadekar from the Crime Branch had recorded the supplementary statement of the First Informant before the papers of the matter were handed over to Crime Branch. She also pointed out that there was material to show that P.I. Wadekar had gone to Padgha at about

3.20 a.m. to apprehend accused no.1 Saquib Nachan, and that, this also indicated that he could not record the supplementary statement of the First Informant at that time. There has been no satisfactory reply to these contentions.

25 It appears that the prosecution case is that the applicant disclosed certain information and led the police to the house of the accused no.6 Abu Bakar (then absconding), which house was locked. The police got prepared a key of the lock put on the house by bringing a key maker, and got it opened. The weapon – pistol – was kept in a cupboard which had also been locked and the key of the cupboard was also got prepared, and the pistol was recovered.

26 The identity of the pistol, as the same one, from which the firing was done, is sought to be established on the basis of a report of the Ballistic Expert, which indicates that the empties of the bullets test fired from the said pistol tallied with the empties, that were found on the spot after the incident. As aforesaid, the

material showing the recovery of the empties from the spot, at the material time, is not free from doubt, but what is further interesting to note that the shirt of the First Informant and the empties, said to have been recovered from the spot, were sent to the Chemical Analyser for examination only on 5th September 2012. *Interestingly, the pistol was sent only on 22nd September 2012, though it had been recovered on 24th August 2012 itself, as per the case of the prosecution. Thus, on 5th September 2012, when the other articles were sent to the Chemical Analyser, the pistol was not sent, though it was available with the investigating agency.*

27 The motorcycle, by which the accused no.6 Abu Bakar and the applicant had gone to the place where the firing had taken place, was allegedly recovered, pursuant to the information disclosed by the applicant on 28th August 2012. The recovery is said to have been effected, from near a public toilet.

28 It is also alleged that the applicant was having a mobile telephone having a particular connectivity number, and

that, the applicant was in telephonic contact with accused no.6 Abu Bakar. In this regard, the learned counsel for the applicant pointed out that the recovery of the mobile telephone was effected only on 24th October 2012, in a rather unusual way. According to the prosecution, the brother of the applicant produced the same before the investigating agency. The case is that the brother of the applicant had met the applicant in prison, when the applicant asked him to produce the said mobile telephone before the investigating agency. The learned counsel also pointed out that the brother's statement was recorded on 2nd October 2012, but it does not mention anything about the mobile telephone.

29 Mr.Jha, the learned counsel for the First Informant / intervenor raised a number of contentions. He submitted that the applicant's previous application for bail was rejected by the court of Sessions on 21st March 2013, and that, the applicant, therefore, should have moved the court of Sessions itself first, before approaching this court for bail. I find no substance in the contention.

30 Mr.Jha submitted that the role of the applicant was greater than some of the accused, who are released on bail, in as much as, he went to the spot along with the actual assailant, and that, he had been identified as such, by Achrekar, bodyguard of the First Informant. The material in that regard has already been discussed earlier. It may only be observed that it is not that the court is required to come to a positive finding, that the prosecution case is false, in holding the applicant to be entitled to be released on bail. All that needs to be seen is, whether there exists a reasonable doubt about the complicity of the applicant, and that too, in the offences which are punishable under the provisions of M.C.O.C. Act and U.A.P. Act.

31 Mr.Jha further submitted that the applicant, being an associate of accused no.1 Saquib Nachan, who is dangerous, does not deserve to be released on bail. Mr.Jha submitted that accused no.1 had approached this court for quashing his prosecution in this case, but his application was rejected by the Division Bench of this court holding that there was a prima facie case against him.

Thus, according to Mr.Jha, since the applicant is said to be an associate of accused no.1, against whom a prima facie case of serious offence exists, the applicant should not be released on bail. I am not impressed by this contention. It may be observed that accused no.1 was also granted bail by this court by holding that there was no *prima facie* case against him. The matter was taken to the Supreme Court of India by the State and by the First Informant, and Their Lordships of the Supreme Court of India were pleased to set aside the order granting bail on the ground that, this court had failed to record its satisfaction to the effect that '*the accused no.1 was not likely to commit any offence while on bail*', which was the requisite of Clause (b) of Section 21(4) of M.C.O.C. Act. The orders granting bail to accused nos.3 and 4 were also challenged before the Supreme Court of India, but that challenge failed. Thus, Their Lordships felt only the case of accused no.1 to be distinguishable - by reason of his antecedents – from that of the other accused. Though the applicant is said to be involved in one previous case, which is in respect of rioting, he is not alleged to be involved in any case, where he was associated with accused no.1, previously.

32 Considering that the applicability of the provisions of M.C.O.C. Act and U.A.P. Act to the present case is not free from doubt, that the material showing the involvement of the applicant in the alleged offences is also not free from doubt, that the applicant is in custody for a period of more than three years, and that the trial has yet not commenced, I think it fit to release the applicant on bail, subject to certain conditions. This, certainly, is a case, where there are reasonable grounds for believing that the applicant is not guilty of the alleged offences, or at any rate, the offences punishable under the M.C.O.C. Act or U.A.P. Act. Appropriate conditions can be imposed to render it unlikely, that the applicant would commit any offence, while on bail.

33 The application is allowed.

34 The applicant is ordered to be released on bail in the sum of Rs.30,000/-, with one surety in like amount, or two sureties in the sum of Rs.15,000/- each, on the condition that he shall report to the trial court on the First Monday of each calendar month, till the disposal of the case.

Should the trial court be closed on any given Monday, the applicant shall report to the trial court on the next working day.

35 The applicant shall also attend the office of the investigating agency and make himself available for investigation / interrogation, as and when required by the investigating agency.

36 At this stage, Mr.Jha submits that the operation of the order be stayed for a period of three weeks. Though I am not inclined to grant such a prayer, I am inclined to direct that the applicant shall report to Bhiwandi Police Station everyday, between 7 p.m. and 8 p.m., for a period of three weeks from his release.

37 The prayer to stay the operation of the order is rejected.

38 All concerned to act on an authenticated copy of this order.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment /Order.**