

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1696 OF 2014

Mangesh Manik Kanchan	... Applicant
Vs.	
The State of Maharashtra	... Respondent

WITH
BAIL APPLICATION NO. 1930 OF 2014

Navanath Vilas Chavan	... Applicant
Vs.	
The State of Maharashtra	... Respondent

Mr. S.V. Kotwal i/b. Mr. Avinash Kamkhedkar, Advocate for the applicant in BA/1696/2014.

Mr. Abhishek Yende, Advocate for the applicant in BA/1930/2014.

Mr. Arfan Sait, APP for the State in both the matters.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **JULY 13, 2015**

P.C.:

These two Bail Applications are heard and decided together, as both the applicants/accused are involved in the same offence in C.R. No. 170 of 2012 punishable under sections 395 and 201 of the Indian Penal Code, sections 4, 27 of the Arms Act and under section 3(1)(4) of the Maharashtra Control of Organized Crime Act, 1999.

2. It is the case of the prosecution that these two applicants belong to a gang headed by Santosh @ Lubhya Chandilkar. On 31st October, 2012 at around 7.30 a.m., complainant was travelling on Highway from Pune to

Mandangad in his Ford Figo Car bearing no. MH20/B.Y./1405 and when he reached near Village Adarwadi, co-accused nos. 1 to 5 arrived there at Honda City car and stopped the car of the complainant. They were armed with sickle and axe. They pulled the complainant out of the car and threatened him of the weapons. They robbed laptop, cell phone, cash of Rs.15,000/- and car of the complainant. Thus, they took away articles valuing Rs.2,27,000/-. During the course of the investigation, the police found that co-accused 1 to 5 are members of gang headed by Santosh @ Lubhya Chandilkar. Applicants/accused are also the members of said gang. It is the case of prosecution that all these gang members are continuously involved in unlawful activity of robbery and assault during last 5 to 6 years and they have jointly committed total 29 offences. Therefore, Santosh alias Lubhya Chandilkar along with his other associates including applicants/accused were also made accused in C.R. No. 170 of 2012. The police moved an application for invoking MCOC Act and on 26th February, 2013 MCOC Act was applied. Thereafter, accused Mangesh was shown arrested on 14th March, 2013 and accused Navanath on 18th March, 2013. Hence these Bail Applications.

3. The learned counsel for the applicants/accused have submitted that both the applicants/accused are not involved in this crime of robbery. They were in the prison at the relevant date. The learned counsel Mr. Kotwal submitted that applicant Mangesh was inside the prison from 19th March,

2012 in some other offence and the learned counsel Mr. Yende submitted that applicant Navanath was in prison since 23rd September, 2012. It is submitted that only because the applicants/accused are allegedly associated with gang of Santosh @ Lubhya Chandilkar and there are criminal antecedents against the applicants/accused, their bail was rejected by the learned Sessions Judge. The learned counsel for the applicants/accused submitted that learned Sessions Judge in fact has released Vijay Khawale/accused no. 9 and Ganesh Buchade/accused no. 8 on bail though they were having criminal antecedents. The learned counsel further submitted that the prosecution ought not have roped the applicants/accused in the present crime. The learned counsel further submitted that while invoking MCOC Act against the applicants/accused, the prosecution has committed mistake of erroneous interpretation of the legal terms, i.e., continuing unlawful assembly and member of organized crime.

4. Learned APP vehemently opposed the Bail Applications. He submitted that the applicants/accused are hardcore criminals and members of Santosh @ Lubhya Chandilkar. 13 cases are pending against applicant Mangesh and 6 cases are pending against applicant Navanath. The offences are of similar nature and they are the members of the gang headed by Santosh @ Lubhya Chandilkar. He further submitted that the gang has been involved in continuing unlawful activity and nearly 29

offences have been committed by the members of the gang, therefore, MCOC Act is invoked and they are rightly prosecuted under section 3(1) (4) of MCOC Act. Learned APP further relied on Section 21(4) of MCOC Act. He submitted that there is bar on granting bail if accused is facing charges under MCOC Act. He submitted that under section 21(4) of the Act, the Judge has to satisfy himself that if an offender is released on bail, there are restriction on the Court to grant bail because the Court has to satisfy itself that there are reasonable grounds for believing that the applicant is guilty of such offence and he is not likely to commit any offence while on bail. Learned APP argued that considering the criminal record of these applicants/accused and as they are the members of organized crime syndicate, they are definitely going to commit offence of similar nature if they are granted bail.

5. Perused the FIR and the papers produced by the prosecution and the learned counsel for the applicants/accused. It is not a case of the prosecution that the offence of robbery registered at C.R. 170 of 2012 of Paud Nagar Police Station was committed by the applicants. Moreover, admittedly both the accused were in the prison on 31st October, 2012, i.e., on the date of the incident. There is no material on record to show that the applicants/accused along with co-accused nos. 1 to 5 who have actually committed the offence, have hatched conspiracy of the said robbery and have participated passively in the said crime. It is not a case that the

applicants/accused have received any amount or any share out of this offence. Thus, the material before this Court which is placed by the prosecution for invoking MCOC Act against these applicants is that they have very bad criminal record of the commission of the offences of similar nature during the last 6 to 7 years. Moreover, they are the members of the gang headed by Santosh @ Lubhya Chandilkar. There is material on record to show that at the relevant time, the applicants were arrested and inside the prison for some other offence which they have committed along with other gang members. Considering this evidence against the applicants/accused, if MCOC Act would not have been invoked, then these applicants/accused would definitely have been out released on bail because they are not connected with the commission of robbery. However, in the present case, the prosecution has invoked MCOC Act and therefore, these Applications for bail are to be considered in the light of provisions under MCOC Act. A question to be decided is as follows:

“Whether a member of a gang if not concerned with a particular offence which is committed by the other members of the gang; can be prosecuted for the offence under section 3(4) of the MCOC Act?

6. To be a member of an organized crime syndicate is an offence under section 3(4) of the Act, which reads as follows:

3. Punishment for organised crime-

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which

shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

7. Before invoking section 3(4) of MCOC Act, it is necessary to consider 3(1) of the Act. Section 3 speaks about the Punishments for the organized crime and Section 2 states the definitions of the terms under the MCOC Act. The continuing unlawful activity is suppose to be a core of the offences. The definition of continuing unlawful activity under section 2(d) reads as under:

"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;

8. Thus, "the activity" should be prohibited by law for the time being in force. That activity is a cognizable offence punishable with imprisonment of three years or more. Therefore, continuing unlawful activity necessarily contemplates commission of cognizable offence. A person can be a member of a particular gang but he may not participate at all in a commission of offence committed by a particular member of the gang. For each and every commission of the offence, all the gang members, who are from that gang, cannot be roped in. It will lead to a tyrant situation. These members may work under one leadership, however, they may commit

offence independently which should fall under the definition of “continuing unlawful activity” as either singly or jointly as a member of an organized crime syndicate. However, it is necessary for a member to either participate actively or passively in such crime, then only he can be charged for the offence punishable under the Indian Penal Code and then the member who has knowingly participated either actively or passively can also be prosecuted under section 3(4) of the MCOC Act. For better understanding of this legal position, the definition of continuous unlawful activity & organized crime needs to be considered. The definition of organized crime reads as under:

"organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency”

9. Continuous unlawful activity contemplates commission of cognizable offence and therefore, if at all there is a commission of cognizable offence along with other ingredients, then it is a continuous unlawful activity may amount to organized crime and the person who is involved in such commission of offence and if at all he is a member of the organized crime syndicate, he can be punished under section 3(4) of the MCOC Act. These all definitions are circular and interlinking with each other and therefore, a prosecution simplicitor under section 3(4) of the

MCOC Act though is available in the Act, is practically not possible. A member of syndicate may commit cognizable offence jointly, then section 3(4) can be invoked for the offence and he can be chargesheeted accordingly. However, if cognizable offence is not committed and though he is known as a member of organized crime syndicate, cannot be prosecuted and charge sheeted for being a member of organized crime alone. Though there is a penal provision yet due to circular definitions of the terms under sections 2(d) and 2(e) of the Act, a member of a gang practically cannot be prosecuted under section 3(4) of the Act simplicitor.

10. Life flows and a member may repent and he may withdraw himself from the gang. A person may not remain a member of the gang throughout his life and therefore, it is draconian to permanently keep him under a hanging sword that he can be prosecuted under section 3(4) of the MCOC Act for any crime committed by any member of the gang. Therefore, penal section 3(4) is necessarily controlled by defining sections 2(d) and 2(e) of the Act. A power to grant bail in cases under the Act to be used if conditions under section 21(4) are fulfilled.

11. Section 21(4)(b) of the Act restricts discretion of the Court, which reads as under:

“Where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable ground for believing that he

is not guilty of such offence and that he is not likely to commit any offence while on bail”.

12. Learned APP, while buttressing his submissions on the point of the discretionary power of the Court while granting bail under MCOC Act, relied on the judgment of the Hon'ble Supreme Court in the case of **State of Maharashtra vs. Vishwanath Maranna Shetty, reported in 2013 Cri. L.J. 2015.**

13. I have carefully gone through the case of **Vishwanath Maranna Shetty** (*supra*). In that case, there was a murder and an offence under section 302 r/w. 120B of the Indian Penal code and other sections of MCOC Act were invoked. Maranna Shetty was a member of the organized crime syndicate of Bharat Nepali. One person was murdered. The accused was instrumental in handing over an amount to the actual shooter who killed one person named Farid Tanasha.

14. In the present case, the applicants/accused were inside the prison. There is no iota of evidence of conspiracy. There is no charge under section 120B r/w. 34 of the Indian Penal Code and they are not attributed any active or even a passive role in the present offence. In the case of **Vishwanath Maranna Shetty** (*supra*), Hon'ble Supreme Court has formulated a point in paragraph 5 as follows:

“The only point for consideration in this appeal is whether in the

light of the allegations made and materials placed by the prosecution, the High Court was justified in granting bail, particularly in the light of restriction imposed under section 21(4) of MCOCA?

15. Thus, the answer to the question raised in the present case is in fact found in the point formulated by the Hon'ble Supreme Court in **Maranna's** case. The learned APP submitted that considering very bad criminal record of the present applicants/accused, there is no guarantee that they are not likely to commit offence while on bail. Learned APP rightly submitted that on the background of antecedents there is more chance that the applicants would commit offence in future while on bail, however, the Hon'ble Supreme Court has held that in the light of allegations made and materials placed by the prosecution, the Bail Application is to be decided.

16. Let us advert to Section 21(4B) of the Act which states that Court shall satisfy itself regarding two conditions while granting bail. The first condition is that the Court has to satisfy that there are reasonable grounds that the person has not committed a particular offence for which the crime is registered. Then, section speaks of a second condition that he is not likely to commit offence while on bail. Thus, Section 21(4) also contemplates that there should be commission of an offence and the material placed and allegations made against the accused in that offence (such offence) has to be taken into account by the Judge first and

thereafter the Judge has to consider second circumstance that he is not likely to commit any offence while on bail. There is always more chance of a criminal having very bad record of many cases on his account is likely to commit offence in future, however he cannot be detained in anticipation and apprehension in the prison for the offence he may commit in future. There should be actual commission of offence by him in the present. A past of a criminal cannot be linked always with his future when he has not committed any offence in the present. Otherwise he would be completely denied the opportunity to improve. This is against a basic principle of the criminal jurisprudence. For example, Under the Evidence Act, bad character of an accused is not a relevant fact. A person may commit a crime and he be convicted for the same, however, he cannot be labelled as a member of the gang throughout his life. Such member may repent for his act and may leave that gang, however, it is difficult to ascertain a time of his leaving gang. Sometimes repentance may be a compelling factor for a human being to withdraw from criminal activity. Thus, there is a more possibility that a person having a bad criminal record may commit offence in future if released on bail, however, that is not the condition which can be considered first in interpreting Section 21(4) of the MCOC Act but the Court has to consider the material allegations against the applicants available in respect of that particular crime committed in the present. Under such circumstances, considering this position of law, I

am inclined to grant bail to the applicants/accused on the following terms and conditions:

ORDER

- i) Applications are allowed.
- ii) The applicants shall be released on bail upon furnishing P.R. Bond in the sum of Rs.50,000/- each with one or two sureties in the like amount;
- iii) The applicants shall not commit any such offence under MCOC Act, while on bail;
- iv) The applicant shall not threaten or pressurize the witnesses;
- v) The applicants shall make themselves available and attend all Court dates;
- (vi) The applicants shall not abscond and and furnish their address to the police along with address proof.
- (vii) Violation of any of the conditions imposed shall amount to cancellation of bail forthwith.
- (viii) The applicants shall not leave India without the prior permission of the Court.

17. The Applications stands disposed of on above terms.

(MRS.MRIDULA BHATKAR, J.)