

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.91 OF 2016
IN
CRIMINAL APPEAL NO.84 OF 2016**

Vinod @ Sai D. Ghogale)...Applicant

V/s.
State Of Maharashtra)...Respondent

Mr. Pankaj Kavale, Advocate for the Applicant.

Mr. V.S.Mhaispurkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 2nd MARCH, 2017.

P.C. :

This is an application for suspension of sentence and releasing the Applicant/Original Accused No.5 on bail during the pendency of the Appeal filed by him. The Applicant/Original Accused No.5 has been convicted of the offences punishable under Sections 3(2) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (In short 'MCOC Act'). For the offence punishable under Section 3(2) of the MCOC Act, he has been sentenced to suffer RI for 10 years apart from payment of fine of Rs.5 Lakhs in

default to undergo further RI for 3 years. No separate sentence was awarded to him for the offence punishable under Section 3(4) of the MCOC Act.

2 Heard learned Advocate appearing for the Applicant/Accused. He argued that Applicant/Accused has undergone 7 years imprisonment in jail and his sentence is coming to an end. There is no possibility of hearing appeal on merits and therefore, on this count itself, he deserves to be released on bail. It is further argued that co-accused i.e., Accused No.2-Mahesh Kalingan has been released on bail by this Court vide order dated 12.1.2016 in Criminal Application No.1351 of 2015. Accusations against this co-accused are similar in nature. Therefore, on the principle of parity, the present Applicant-Accused is entitled for bail. It is further argued that the Applicant-accused was not present on the scene of offence nor he has been charged for the offence punishable under Section 120B of the IPC. By taking me through the impugned judgment and order as well as deposition of P.W.40-Nilesh Kelwalkar, it is argued that evidence of this witness is not reliable and the learned trial Court ought not to

have accepted evidence of this witness for convicting the Applicant-Accused. It is further argued that Accused Persons had retracted confession on the first available opportunity and Accused No.3-Umesh Ammu Pujari has been acquitted by the learned trial Court. Therefore, his confessional statement cannot be relied. It is argued that retracted confession cannot be made use of for convicting the accused. It is further argued that in the earlier instituted sessions case, P.W.40-Nilesh Kelwalkar has not deposed in the manner in which he has deposed before the trial Court, therefore, on the principle of estoppel, his evidence is not admissible.

3 The learned APP opposed the application by contending that the trial Court has rightly relied upon the evidence of P.W.40-Nilesh Kelwalkar, confessional statement of co-accused. It is further argued that evidence of P.W.23-Sudhakar Shetty shows stay of the present Applicant-Accused at various hotels after the incident and it reflects on the conduct of the Applicant-Accused. The learned APP further placed reliance on P.W.26-Virendra Yadav to show that the Applicant-Accused was

using his SIM card for making calls.

4 In reply, the learned Advocate appearing for the Applicant-accused has argued that evidence of PW.26-Virendra Yadav and particularly about so-called call detail record has been disbelieved by the trial Court and as such, it cannot be made use of in the appeal filed by the Applicant-accused.

5 I have carefully considered the rival submissions and also perused evidence adduced by the prosecution as well as the impugned judgment and order.

6 At the outset, let us consider whether the Applicant-Accused can claim parity with Co-accused-Mahesh Kalingan, who has been released on bail by this Court vide order dated 12.1.2016. Perusal of that order goes to show that the only reason available in that order is to the effect that Accused No.2-Mahesh Kalingan is entitled for bail as his appeal cannot be heard immediately. Perusal of the order passed by this Court on 12.1.2016 shows that no other reason was recorded for releasing the Accused No.2-Mahesh Kalingan on bail except that his appeal cannot be heard immediately. Thus, bail was granted to Accused

No.2-Mahesh Kalingan not on merits and, therefore, this order cannot be made use of to claim parity for releasing the applicant-accused on bail.

7 According to the prosecution case, the Applicant-Accused No.5 is a member of an Organised Crime Syndicate headed by Accused-Kumar Pillai, who was then absconding. According to the prosecution case, members of this Organised Crime Syndicate indulged in firing at the office of the victim/first informant on 9.11.2009 in order to extract an amount of Rs.50 Lakhs from him. That is how the crime in question came to be registered.

8 It is seen from the evidence of the prosecution that prosecution had relied upon the confessional statement of accused persons and particularly that of Accused No.1-Sanjit Krishna Shetty @ Lafda Shetty, Accused No.2-Mahesh Kalingan and Accused No.3-Umesh Ammu Pujari recorded under Section 18 of the MCOC Act. Such statements by themselves are substantive evidence and it is for the Applicant/Accused to point out from evidence on record that those were not made voluntarily. On this

aspect, it appears that PW.15-Sawant DCP who had recorded confessional statement of the accused no.1 was cross-examined but there are no suggestions to this witness that he has pressurised, induced or made promises to Accused No.1-Sanjit Krishna Shetty @ Lafda Shetty for extracting confession. Upon scrutiny of evidence on record, the learned trial Court came to conclusion that confessional statement of Accused No.1-Sanjit @ Lafda Shetty qualifies the test of being truthful. As such, this confessional statement, at this stage, can be considered as substantive evidence against accused persons.

9 The law regarding confession recorded as per provisions of several statutes imposing criminal liabilities is well settled. Confession recorded under Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (In short 'TADA Act') was under consideration of the Apex Court in the matter of **Manjit Singh @ Mange v. CBI** reported in (2011) 3 SCC(Cri.)413.

Section 15 of the TADA Act is in pari-materia with the provisions of Section 18 of the MCOC Act. It is held in the matter of **Manjit Singh (Supra)** that even if accused making confession is

acquitted, his confession can be used against co-accused.

10 Perusal of the confessional statement of the Accused No.1-Sanjit shows how the organised crime syndicate was operating of which present applicant-accused was one of the members. It is seen from confessional statement of Accused No.1-Sanjit @ Lafda Shetty that the present applicant-accused was aware about activities of Organised Crime Syndicate and he was actively taking part in those activities. He had taken bullets from Pan shop of Accused No.3 on one occasion and had taken delivery of box containing pistols, live cartridges and cash on another occasion. It is seen from the confessional statement of Accused No.1-Sanjit @ Lafda Shetty that the Applicant-accused has taken training of loading and unloading fire arms. He was aware about mission to be accomplished.

11 For gaining corroboration to confessional statement of co-accused no.1-Sanjit @ Lafda Shetty, the learned trial Court made use of evidence of P.W.40-Nilesh Kelwalkar. This witness had turned hostile to the prosecution and as such the learned PP has cross-examined him. It is well settled that only because the

witness turns hostile, his entire evidence cannot be discarded. The Court is duty bound to cull out nuggets of truth from the evidence of such hostile witness. It is also well settled that, that part of evidence of the hostile witness which supports prosecution can be pressed into service. This is exactly what has been done by the learned trial Court in accepting the relevant part of the evidence of Nilesh Kelwalkar for convicting accused persons. This is not stage to discard evidence of P.W.40-Nilesh Kelwalkar. Issue before this Court is whether in this fact situation, it can be said that neither confessional statement nor evidence of P.W.40-Nilesh Kelwalkar can be made use of by the prosecution. Such is not the case. Evidence of P.W.40-Nilesh Kelwalkar was made use of in the light of provisions of Section 8 of the Indian Evidence Act, 1872 to prove conduct of the Applicant-Accused regarding pre-event as well as post-event happenings. The learned trial Court by accepting his evidence came to conclusion that this witness was knowing happening of incident of firing and thereafter resided with several lodges and hotels away from his usual place of abode. The learned trial Court has also accepted his evidence to the effect

that the Applicant-accused has directed all his associates to switch of their mobile phones as because of incident of firing at Vikroli, which was the subject matter of trial, the police was tracking accused persons.

12 In the light of this evidence and object for enacting MCOC Act, though Applicant-Accused has undergone 7 years of sentence, this is not a fit case to grant bail to him and, therefore, the order:

- (1) Application is rejected.
- (2) However, hearing of the appeal is expedited. The same be put up for final hearing as per its turn in jail appeals.

(A. M. BADAR, J.)