IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 2167 OF 2016

Mr. Faizal Wadgama .....Applicant

V/s.

The State of Maharashtra ....Respondent

Mr. A. P. Mundargi senior counsel i/b Mr. Rajendra Rathod
Advocate for Applicant.
Mr. Ajay Patil APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

CLOSED FOR ORDER: 13th FEBRUARY, 2017.

PRONOUNCED ON : 23rd FEBRUARY, 2017.

PC :

1) Heard. This is an application under section 439 of the Code of Criminal Procedure, 1973. Applicant herein is arrested on 05/07/2016 in crime no. 48 of 2015 registered with D.C.B. C.I.D. Mumbai for offence punishable under sections 387, 34, 120 (B), 465, 471 of Indian Penal Code r/w 3 (1) (i) (ii), 3 (2), 3 (4) of Maharashtra Control of Organized Crime Act, 1999 (Hereinafter referred as 'MCOC' Act).

2) It is the case of the prosecution that crime no. 142 of 2015 was

registered at Nagpada Police Station on the basis of the report lodged by one Zulfikar who is in the business of manufacturing of footwear and also owns a hotel at Agreepada. He lodged a report alleging therein that he is the owner of a commercial premises admeasuring 8,300 squaremeters. According to him, the value of the said plot is about 65 Crores. He has alleged that on 18/02/2015, one Tariq Shagir and Faisal Wadgama i.e. present applicant had called upon him to meet them at Persian Darbar Restaurant, Byculla, Mumbai. That the present applicant had informed him that he was redeveloping Sutarwala Chawl. He asked the complainant to hand over the possession of commercial premises and that he would be compensated for the same. Zulfikar did not accede to the said offer. Thereafter, Tariq Shagir had once again approached him with an offer that he can take cash of Rs. 4 Crores or two flats in lieu of commercial premises. Zulfikar had not accepted the said flat.

3) The informant further alleged that on 03/03/2015, Tariq Shagir had again called him, extended threats and asked him to accept the cash from Faisal i.e. present applicant and that would be the end of the issue.

4) Zulfikar was left with no alternative but to approach Nagpada Police

Station and narrate the chronology of events in which he was threatened to part with Sutarwala Chawl by accepting the amount of Rs. 4 Crores. On the basis of the said report, crime no. 142 of 2015 was registered under section 387 r/w 34 of the Indian Penal Code. The investigation was transferred to appropriate cell D.C.B. C.I.D. from Nagpada Police Station and same was re-numbered as crime no. 48 of 2015.

5) In the course of investigation, according to the police it had transpired that the said offence of extortion is committed by the organised crime syndicate and therefore, a proposal was tabled before the sanctioning authority to accord sanction for prosecuting the accused under the provisions of MCOCA. The sanctioning authority had accorded the sanction and thereafter, the police had arrested the accused Tariq, Abdullah, Parvez and Yusuf. The charge-sheet was filed against them under sections 387, 34, 120 (B), 465, 471 of Indian Penal Code r/w 3 (1) (i) (ii), 3 (2), 3 (4) of Maharashtra Control of Organized Crime Act, 1999.

6) On 06/07/2016, applicant was arrested and since he was being prosecuted under provisions of MCOCA, he was produced before the Special Court and on 06/07/2016, he was remanded to judicial custody on health

grounds.

7) Present applicant had filed an application seeking enlargement on bail before the Sessions Court. Prosecution had demonstrated that the investigation against the present applicant is pending in respect of act committed by the applicant under the provisions of MCOCA. The learned Sessions Court had also rejected the application on the ground that since the investigation is in progress, it would be difficult to record a finding under section 21 (4) of MCOCA.

8) Upon perusal of records it appears that on 06/07/2016, when the applicant was produced before the Special Court, he had filed an application through his Advocate contending therein that he is suffering from *Paranoid Schizophrenia.* The learned Special Judge had considered the request and directed the jail authorities to refer him to J.J. Hospital for a treatment and to file a report accordingly. The psychiatric department of J.J. Hospital which consists of mental health experts and clinical psychologists, examined the accused. He was given appropriate treatment. On 13/07/2016 a report was submitted before the Special Court contending therein that the applicant/accused is suffering from schizophrenia currently in partial

remission with depressive features and that he required immediate therapy. Special Judge had called for progress report which was to be submitted fortnightly. On 16/08/2016, the Chief Medical Officer submitted a medical report contending that there are significant improvements in the anxiety and psychotic symptoms, psychological assessment and as per the advise of senior doctors, he was discharged from hospital.

9) Applicant had filed an application seeking enlargement on bail on health grounds, however, the learned Special Judge was of the opinion that there are significant improvements in the health of the accused, had denied enlargement on bail. By an order dated 01/10/2016, application seeking enlargement on bail was rejected. The learned Special Court had specifically observed as follows:

> "*In the present matter D.C.B. C.I.D. has not completed investigation against the accused and filed charge-sheet as such it is difficult to record any finding in favour or against the accused under section 21 (4) of the Act*".

It was also observed that :

> *"According to learned SPP, investigation is still going on, charge-sheet against the applicant is not filed as such findings under section 21 (4) cannot be recorded"*.

10) Investigating agency ought to have filed charge-sheet within 90 days from 06/07/2016. 90 days completed on 03/10/2016. Prosecution had not filed any application seeking extension of time to file charge-sheet. In these premises, applicant had filed an application on 06/10/2016 availing of his indefeasible right to be enlarged on bail under section 167 (2) of Code of Criminal Procedure, 1973. Application was heard on 07/10/2016. Prosecution had contended that investigating agency is in the process of carrying out further investigation under section 173 (8) of Code of Criminal Procedure, 1973. r/w section 309 (2) of Code of Criminal Procedure, 1973 and therefore, applicant is not entitled to seek bail under section 167 (2) of Code of Criminal Procedure, 1973.

11) It is pertinent to note that the records do not indicate that the investigating agency had filed any application seeking extension of time to file charge-sheet. The learned Special Court rejected the application under section 167 (2) of Code of Criminal Procedure, 1973 by an order dated 07/10/2016 by observing as follows:

> "*Indisputably, this court has taken cognizance in respect of the charge-sheet filed by prosecution against the co-accused. In the said charge-sheet Faisal Wadgama has been shown as absconding, to secure his*

presence, this court had issued non-bailable warrant against him and in execution of the non-bailable warrant, he was arrested and produced before this court on 06/07/2016".

12) The learned Special Court had lost sight of the fact that accused/applicant was produced before the Court on 06/07/2016 and 90 days were completed on 03/10/2016 and therefore, on 07/10/2016, since there was no charge-sheet filed against the applicant under the provisions of MCOCA, applicant was entitled to be enlarged on bail. In the order rejecting the bail application, on 01/10/2016, the learned Special Court had observed that investigation is in progress and charge-sheet is not filed against the applicant and therefore, no finding can be recorded under section 21 (4) of MCOCA. In view of the earlier observation in the order dated 01/10/2016, it cannot be said that the Court had taken cognizance of the charge-sheet as investigation was pending.

13) On 03/09/2016, the Special Court had allowed the application filed by the investigating agency seeking police custody of the applicant. The said application was filed by Investigating Officer on 06/07/2016 and remained pending for orders. Pursuant to the order on 03/09/2016, accused was produced before the Special Court and was in police custody till 07/09/2016.

Prosecution has filed affidavit contending therein that the remand application which was filed by investigating agency at the time of first remand was pending and on 03/09/2016, the Special MCOCA Court passed an order of first remand and only thereafter, applicant was remanded to police custody till 07/09/2016 and therefore, according to the prosecution, period of judicial custody for the purpose of 167 (2) of Code of Criminal Procedure, 1973 would commence from 07/09/2016 and not from 06/07/2016.

14) The said submission cannot be taken into consideration in view of the Judgment of the Hon'ble Apex Court in the case of **Central Bureau of Investigation, Special Investigation Cell-I *V/s.* Anupam J. Kulkarni [1992 AIR 1768]** wherein the Hon'ble Apex Court has held as follows:

> "*We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to*

frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused".

15) In the present case, it is a matter of record that the mental health of the applicant was shown to be improving but not that he had fully recovered. The progress of investigation was not brought to the notice of the Court and in any case, the investigation was in progress as on 01/10/2016 as observed by the Magistrate. In fact, the learned Special Court had observed that the cognizance was taken against co-accused but as far as the applicant was concerned, investigation was still in progress and therefore, no finding could be recorded under section 21 (4) of the MCOCA.

16) At the cost of reiteration, this Court cannot be oblivious, of the fact that applicant was produced before the Court on 06/07/2016 and was in custody

till 07/10/2016 in the intervening period i.e. from 03/09/2016 to 07/09/2016, applicant was in police custody and on 07/09/2016, he was remanded to judicial custody. What needs to be considered is the first date of remanding the accused to judicial custody. The fact that he was sent to judicial custody by the Special Court would clearly indicate that he was taken in custody under the provisions of MCOCA and the charge-sheet ought to have been filed within 90 days or else investigating agency ought to have filed an application seeking extension of time. The learned Special Judge has rejected the application on the ground that in the interregnum, charge-sheet was filed against co-accused and hence, applicant could not avail of relief under section 167 (2) of Code of Criminal Procedure, 1973. Needless to say that if the investigation continues even beyond the stipulated mandatory period, the benefit of proviso appended to sub-section 2 of section 167 of the Code would be available to offender.

17) In the case of **Union of India through C.B.I. *V/s.* Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav [AIR 2014 SUPREME COURT 3036]** the Hon'ble Apex Court has observed:

> “W*hen an accused files an application for bail indicating his right to be released as no challan had been filed within the specified period,*

> *there is no discretion left in the Magistrate and the only thing he is required to find out is whether the specified period under the statute has elapsed or not, and whether a challan has been filed or not.*

It is also observed by the Hon'ble Apex Court:

> "*That an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to Sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the, arrest of the accused In such a case, therefore, even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused*".

18) Hence, it is clear that upon failure of investigating agency to file charge-sheet within stipulated period, an indefeasible right would accrue upon the accused to be enlarged on bail.

19) In the present case, since the proceedings under section 309 of Code of

Criminal Procedure, 1973 had never commenced, there was no question of considering the application under section 309 (2) of Code of Criminal Procedure, 1973.

20) In the case of **Dinesh Dalmiya *V/s* C.B.I. [(2007) 8 Supreme Court Cases 770]** the Hon'ble Apex Court has observed that :

> "*A charge sheet is a final report within the meaning of Sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefore. One of the requirements for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge sheet must await the arrest of the accused*".

21) The learned senior counsel submits that the submission of the prosecution that fresh mandatory period of judicial custody would commence

after 07/09/2016 is unwarranted and illogical as the question that would arise would be in respect of his judicial custody prior to 03/09/2016. It is a matter of record that the applicant was sent to J.J. Hospital by the orders of the Special Court. Hence, it is abundantly clear that while under treatment, he was in judicial custody. The treatment had also been extended to the applicant by the orders of the Court and a fortnightly report was called by the Special Court. The learned senior counsel submits that the police custody granted by the Special Court cannot be used as a weapon to defeat an indefeasible right of the applicant to be enlarged on bail under section 167 (2) of Code of Criminal Procedure, 1973.

22) The proforma in form 5-C appended to the charge-sheet, more particularly, coloumn no. 15 indicates that there is no special remark including reasons for not charge-sheeting the applicant. All that is stated is despite special efforts, accused was not found. This would be sufficient to show that no charge-sheet was filed.

23) In the case of **State of Maharashtra V/s Bharati Varma** reported in **2002 ALL MR (Cri) 1215 (S.C.),** wherein the Hon'ble Supreme Court pleased to hold that:

"For the application of the proviso to Section 167 (2) of the Code there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period of such detention. On the expiry of the said period the further custody becomes unauthorised and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have involved in some other offence disconnected from the offence for which he was arrested. In such an eventuality the officer investigating into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167 (2) would remain unextendable. It cannot be said that a new period of 90 days would commence from the date when approval was accorded under Section 23 of the MCOC Act for initiating investigation for any offence under the said Act. In the present case, but on account of the default of the investigating agency to complete the investigation within 90 days from the date of the first remand of the respondent".

24) In fact, in the present case, there is nothing on record to indicate that the cognizance was taken against the present applicant prior to his arrest under the provisions of MCOCA and hence, the learned Special Court has

committed a grave error in holding that the cognizance was taken against the co-accused who were in custody. Charge-sheet could not be filed against the present applicant because he was absconding. In the peculiar fats of the case and in view of the judgments of the Hon'ble Apex Court (*Cited supra),* this court is of the opinion that applicant is entitled to be enlarged on bail.

ORDER

(i) Application is allowed.

(ii) Applicant be enlarged on bail on furnishing P.R. bond in the sum of Rs. 1,00,000/- (Rs. One Lac) with one or more local solvent sureties in the like amount.

(iii) Applicant shall report to the concerned police station on every Monday and Friday between 10.30 a.m. to 01.00 p.m. till the conclusion of the trial and shall also attend every stipulated date before the Special Court.

(iv) Upon failure to attend any two consecutive dates before police station , prosecution would be at liberty to file an application under section 439 (2) of Code of Criminal Procedure, 1973.

(v) Upon failure to attend any two consecutive dates before the Special Court, the learned Special Judge shall issue non-bailable warrant against the applicant and take him into custody.

(vi) Application stands disposed of.

(SMT. SADHANA S. JADHAV, J.)

25) At this stage, the learned counsel for the applicant submits that health of the applicant is not good. Hence, he prays for provisional cash bail.

Applicant is granted provisional cash bail in the sum of Rs. 1,00,000/- (Rs. One Lac Only) for a period of four weeks, within which he shall furnish local solvent sureties to the satisfaction of the Trial Court.

Parties to act on authenticated copy of this order.

(SMT. SADHANA S. JADHAV, J.)