IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.1889 OF 2018

Riyaz Ahmed Rasool Shaikh .. Applicant
Vs.
State of Maharashtra .. Respondent

WITH
CRIMINAL BAIL APPLICATION NO.1890 OF 2018

Sajid Gulabali Shaikh .. Applicant
Vs.
State of Maharashtra .. Respondent

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Mr.Anil G. Lalla a/w. Breeta Bajwa, Ms.Anchal Lalla i/b. M/s.Lalla And Lalla, Advocate for the Applicant.

Mr.R.M. Pethe, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATED : DECEMBER 18, 2018.

P.C. :

These are the applications for bail in connection with C.R. No.No.II–16 of 2017, registered with Manikpur Police Station, District–Palghar, for the offences punishable under Sections 25(a)(g)(k), 27(a) and 29 of Narcotic Drug and Psychotropic Substances Act (“NDPS Act”, for short) subsequently provisions of MCOC Act were invoked.

2 The brief facts of the prosecution case are as follows:

On the basis of specific information, on 24th September, 2017, Manikpur Police Station, District–Palghar intercepted an Audi car and apprehended three persons, who gave their names as Sarfaraz Memon, Sohail Memon and Uchenna Stephen (accused nos.1 to 3). Search of the vehicle resulted in recovery of 21.700 kilograms of Ephedrine, which is a controlled substance. On 3rd October,2017, accused Sohail Memon made a disclosure statement and at his instance police proceeded to a farm house at Dapchari Prkalp, Plot No.124, Talasri, Taluka Dahanu and recovered incriminating articles, which hare in occupation of accused Faiyaz Ahmed Rasool Shaikh. Applicant Riyaz Shaikh (accused no.4) was arrested on 12th October, 2017. On the basis of the alleged statement of co-accused, he was produced before the concerned Court for remand. Subsequently, the provisions of MCOC Act were invoked and thereafter he was produced before the Special Court for MCOC. Co-accused Sabid Shaikh was arrested on 22nd January, 2018. Prior approval was sought by the investigating agency, which was granted vide order dated 22nd November, 2017. Subsequently, sanction order is also issued on 22nd February,

2018. On completing investigation, charge–sheet has been filed.

3 Learned advocate for the applicant submitted that the provisions of MCOC Act are not applicable in this case and the same are misused. It is submitted that the respondents have failed to appreciate the object and scope of MCOC Act, and granted approval and sanction invoking said provision. There is no recovery at the instances of the applicant. There are no antecedents against the applicant. The applicant has been implicated in this case on the basis of the statement of the co-accused, which is not admissible in the present case, being statement recorded by police during the course of investigation. There is no element of crime syndicate and organized crime. The requisite ingredients to invoke provisions of MCOC Act are totally absent in the case, as there is no organized crime, organized crime syndicate or continuing unlawful activities. It is further submitted that in the absence of any any evidence to show the involvement of the applicant in the crime, he cannot be subjected to detention by invoking the provisions of the MCOC Act. Assuming that the provisions are applicable, there is no *iota* of evidence against the applicant to show his complicity in the crime. Only on the basis of the statement of the co-accused,

applicant cannot be incarcerated in custody. One of the pre condition to invoke the MCOC At is that there are more than one charge–sheet filed in the preceding ten years where punishment is for three years when the Court having taken cognizance of these offences. Therefore, unless and until these pre conditions are satisfied MCOC cannot be invoked. It is submitted that the prosecution has relied upon the registration of the offences against the co-accused. The applicant is not involved in any case registered against the co-accused. The continuing unlawful activities should be disclosed from the record, which is lacking in the present case. The last case registered against the co-accused Faiyaz Shaikh, who is purportedly the gang leader of the organized crime syndicate was of 2014 and the provisions were invoked four years thereafter. Invoking the provisions of the Act is completely unwarranted and unjustified. The approval order and sanction order are defective. It is further submitted that on 3rd October, 2017, Ephedrine was not prohibited under the NDPS Act and was notified as Narcotic Substance under the provisions of the said Act vide notification dated 26th April, 2018, issued by the Ministry of financce. The applicant was never apprehended by the police or any other investigating agency for contravention of the provisions of the NDPS Act. The applicant was never found in possession of any narcotic drug. He is arrested only on the statement of the co-accused. The provisions of the MCOC Act were brought into force to curb the menace of illegal operation of organized crime syndicate, which could not be curtailed under the normal procedure of law. The organized crime syndicate was at that time were believed to be a threat to a civilized society and for this purpose the said act was enacted. The applicants in both these applications are not members of the organized crime syndicate, and, they have not indulged in any activities of violence, extortion, threat to members of public etc. therefore, invoking the stringent provisions of MCOC Act is unusual and probably the first case wherein the investigating agency has resorted to the provisions of MCOC Act. It is further submitted that Ephedrine is a controlled substance and neither a narcotic drug nor a psychotropic substance. It is a raw material used for manufacturing talcum powder, perfumes, toiletries, medicines ect. and also has some illegal uses too. In view of that the Government has framed Rules to monitor possession, trade, transport etc., of Ephedrine which attracts punishment under Section 25A of NDPS Act. Considering the punishment and the object of the said provisions, the MCOC Act ought not to have been invoked against the applicant. The provisions of NDPS Act carries the embargo under Section 37 of NDPS Act, to prevent the applicant from indulging such activities and based on the pre condition of grant of bail, thus, it is not necessary to invoke the provisions of MCCOC Act, which also contains restriction under Section 21(4) of the said Act. Learned counsel relied upon the decision of this Court in the case of ***Sherbahadur A. Khan Vs. State of Maharashtra***[1]. In the said decision, it was held that an Organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. The organised crime syndicate is a gang which indulges in organised crime. It is further observed that this gang may consist of two or more persons, either acting singly or collectively. Such a gang should be found to indulge in continuing unlawful activity i.e. an activity which is prohibited by law and is a cognizable offence punishable with imprisonment for three years and more. An activity would be termed as a continuing unlawful activity, if more than one charge-sheet has been filed before the competent Court against the members of the gang either individually or jointly within the preceding ten years. However, it must be established that such an offence or unlawful activity is undertaken by a person with the

1 2007(1) Bom.C.R.(Cri.)26

objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or for promoting insurgency and such unlawful activity could include the use of violence or threat of violence or intimidation or coercion. merely stating that a gang leader and his associates run a crime syndicate with a view to gain pecuniary benefits and advantages and supremacy over rival gangs by violence, intimation and other coercive means, is not sufficient to maintain a prosecution under the MCOC Act. It is submitted that while while applying the principles enunciated in the aforesaid decisions, the provisions of MCOC Act ought not to have been applied in the present case.

4 Learned APP opposed the application for bail. It is submitted that the provisions of MCOC Act are attracted in this case. Several cases are registered against gang leader Faiyaz Shaikh. Contraband was recovered from co-accused. The statements recorded during the investigation show the complicity of the applicant in the crime. Large quantity of the contraband were recovered from the co-accused. There are criminal antecedents against the leader of the gang. There are restrictions in grant of bail on account of invocation of provisions of MCOC

Act. In the light of Section 21(4) of the MCOC Act. The submissions advanced by the learned counsel for the applicant with regards to the applicability of the provisions of the MCOC Act can be dealt with at the time of trial and not while entertaining the application for bail. The investigating officer has filed affidavit opposing the application for bail. The applicant is not entitled for bail.

5 The applicants are impleaded as accused nos.4 and 6. The prosecution case proceeds on the basis that on 24th September, 2017, information was received from anonymous source that one Sarfaraj and one Sohail residents of Vasaigaon are planning to sell contraband Ephedrine to one person at Saibaba Mandir at Vasai. Trap was laid. One vehicle was intercepted. Two persons, namely, Sarfaraz Memon and Sohial Memon were sitting in the car. Another person namely Uchenna Stephen arrived at the car with bag also sat in the car. Search was conducted. There was recovery of white colour powder from the bag, lying in the car. It was Ephedrine weighing about 21.700 grams., valued Rs.21,70,000/-. FIR was registered and investigation has commenced. During the course of investigation three persons were arrested. They were produced before the

Court for remand. During the police custody remand on 12th October, 2017, accused Sohail Memon took the police to Dapchari, Talasari, in a farmhouse. When the farm house was searched, there was a recovery of white coloured powder and white coloured granules. The white coloured powder were tested positive for Heroin and the white granules substance tested positive for Isosfrole/MDMA. The contrabands were seized. Three accused, namely, Riyaz Ahmed Rasool shaikh, Fayaz Ahmed Rasool Shaikh and Gulab Khan were impleaded as accused. Riyaz Ahmed Rasool Shaikh (Accused no.4/Applicant) was arrested on 12th October, 2017 and Fayaz Ahmed Rasool Shaikh was arrested on 22nd January, 2018, alongwith Sajid Shaikh. As per the approval order dated 27th November, 2017, the provisions of Sections 3(1)(ii), 3(2) and 3(4) of MCOC Act were added. Sanction was also granted vide order dated 22nd February, 2018. During the course of investigation, it is revealed that accused no.4 Riyaz Ahmed Rasool Shaikh is the brother of Faiyaz Ahmed Rasool Shaikh (accused no.5), who is allegedly the gang leader. Three cases are registered against accused no.5 by Narcotic Control Bureau, Hyderabad, Ahmedabad and Mumbai. Statements of various witnesses were recorded. The affidavit filed by the prosecution refers to four cases registered against Faiyaz Ahmed

Rasool Shaikh. On completing investigating, as stated above, charge–sheet is filed.

6 The prosecution case, as stated above, against the present applicant in Bail Application No.1889 of 2018, is that he is the brother of accused no.5. Admittedly, there is no recovery at the instance of the said applicant and he is being impleaded on the basis of the statement of co-accused, during the interrogation. The investigation has been carried out police authority and such a statement cannot be relied to convict the accused in view of Section 25 of the Evidence Act. There is no recovery from appliant in Bail Applicaiton No.1890 of 2018. The statement of the accused or the co-accused is not admissible in evidence. There is no other independent evidence to show the involvement of the applicants. The entire case of the prosecution is based on the statements recorded during the interrogation. Apparently, before the applicant could apply for bail, the provisions of MCOC Act were invoked in the present case. The sanction order indicate that from the papers of investigation of crime registered at distinct police station within the territorial jurisdiction of District–Palghar, Mumbai, Gujarat, and Hyderabad, it was revealed that the accused Sarfaraz and others are involved

in the crime. Faiyaz Ahmed Shaikh is the leader of the gang. It is also stated that the members of the organize crime syndicate alleged to have been involved in the series of offences including the present offence by use of threat or violence, intimidation, coercion or other unlawful means for the sole object of gaining illegal pecuniary benefit for alleged organize crime *viz-a-viz* the crime. It is also stated that more than one charge–sheet has been filed against Faiyaz Ahmed Rasool Shaikh, who appears to be the leader of the alleged syndicate for an offence punishable with imprisonment of three years before the competent Court which is precede period of 10 years and concerned Court have taken cognizance of the said offence. Learned counsel for the applicant, however, pointed out that the finding of the sanctioning authority is factually incorrect. It was also contended that on considering the material collected during the investigation, there is no semblance of threat violence, as reflected in the sanction order. Learned counsel relied on the observations of this Court in the decision referred to hereinabove wherein it was observed that the mere fact that the accused are related to each other and have committed offences would not lead to inference that the accused formed an organised crime syndicate. In the present case, there is no involvement of the applicants with the co-accused in any other case. It is submitted that three other cases are registered against Faiyaz Shaikh. It is also submitted that the evidence does not disclose that the brother of the applicant in Bail Application No.1889 of2018 (accused no.5) is the gang leader. There is no other case registered against the said applicant for contravention of the provisions of NDPS Act, or any other provisions of law. If the involvement of the applicants in both the applications in crime, predicate offence pursuant to the recovery of the contraband from the co-accused, itself is not made out, by applying the provisions of MCOC Act, the applicants cannot be subjected to incarceration. The recovery of contraband is from the co-accused. It is true that at the stage while considering the application for bail, it is not necessary to give a finding with regards to the applicability of the provisions of law, however, to consider grant of bail, it will have to be considered whether the embargo stipulated under Section 21(4) of the MCOC Act, would deprive the applicant–accused from granting bail. The law is well settled in the decision of the Supreme Court in the case of ***Ranjitsingh Brahmajeetsing Sharma***[2], wherein it is observed that for considering the application of bail under Section 21(4) of MCOC Act, *prima facie* case is required to be considered whether

2 (2005) Vol -5, SCC 294

the accused is involved in the crime. It would be open to the applicant to challenge the proceedings before the appropriate Court with regards to the applicability of the provisions of the MCOC Act. However, in the light of the principles enunciated in the aforesaid decision, and considering the material collected during the investigation and the observations made hereinabove, there is no impediment in granting bail to the applicants, inspite of the restrictions enunciated under Section 21(4) of the MCOC Act. For the reasons stated above, case for grant of bail is made out.

8 Hence, I pass the following order:

:: <u>O R D E R</u> ::

(i) Bail Application Nos.1889 and 1890 of 2018, are allowed;

(ii) Applicants are directed to be released on bail in connection with C.R. No.II–16 of 2017, registered with Manikpur Police Station, District–Palghar, on their furnishing P.R. Bond in the sum of Rs.25,000/-, each, with one or more sureties in the like amount;

(iii) Applicants are directed to attend the Manikpur Police Station, District–Palghar, once in a month on first Saturday of the month between 10:00 a.m. to 12:00 noon, till further orders;

(iv) Applicants shall not tamper with the evidence;

(v) Applicants are permitted to furnish cash security in the sum of Rs.25,000/-, each, in lieu of surety for a period of six weeks from today;

(vi) Bail Applications stand disposed of.

(**PRAKASH D. NAIK, J.)**