

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2373 OF 2017

Mohsin Rafik Shaikh, Age 27 years,
R/o.Room No.403, Umar Palace Apartment,
Kismat Colony, Kausa, Mumbra,
District Thane (Presently lodged in Judicial
Custody at Thane Central Prison) Applicant
versus
The State of Maharashtra Respondent

Mr.Mubin Solkar I/by Ms.Tahera Qureshi for applicant.
Mr.A.R.Kapadnis, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 5th October 2018

PC :

1. This is an application for bail in MCOC Special Case No.10 of 2016. The applicant is charged with offences punishable under Sections 394, 395, 396, 302 read with Section 120(B) of Indian Penal Code and under Sections 3(1)(ii), 3(2) and 3(4) of Maharashtra Organized Crime Syndicate Act, 1999 ('MCOC Act'). The FIR was registered on 19th July 2016 against unknown persons. The applicant was arrested on 19th July 2016.

2. The case of prosecution is that the complainant's brother-in-law Sabbar Khan (deceased) was called for dinner by the complainant, however, due to heavy rains, he could not reach his house. The complainant received a call from Shil-Daighar Police Station informing that his brother-in-law has visited the police

station in injured condition and and he is being taken to Shivaji Hospital, at Thane for treatment. Hence, the complainant and his family went to Shivaji Hospital, at Thane. Sabbar Khan was being treated at the said hospital. The complainant inquired with him as to what has happened. He was informed by the injured that on 19th July 2016 at about 12.30 am, when he reached near Bharat Gear Company, three unknown persons showed him knife and demanded the gold chain which he was wearing on his person. On refusal to fulfill their demand, they started assaulting him. The injured tried to defend himself and at that time one of the accused had stabbed him on his abdomen. The accused forcefully snatched the gold chain worth Rs.60,000/- as well as mobile phone and fled away from the spot. The FIR was registered vide CR No.I-183 of 2016 on 19th July 2016 with Shil-Daighar Police Station.

3. Subsequently the provisions of MCOC Act were invoked. Investigation is completed and charge sheet has been filed. The applicant and others were arrested.

4. Learned counsel for applicant submitted that there is no substantial evidence to connect the applicant with the said crime. The injured was assaulted by three unknown persons and it is not the case of prosecution that the applicant was one of them. It is submitted that during the investigation the statements of two alleged eye witnesses namely Imran Shaikh and Riyaz Shaikh have been recorded. However, they do not refer to the presence of applicant at the place of crime. It is submitted that there is no evidence on record to establish that the applicant has participated in the crime. It is submitted that the investigating machinery has recorded

confession of the co-accused Nisar Shaikh. It is submitted that even the said confession statement does not indicate involvement of applicant as an assailant in the crime. As per the confession statement, the said accused and others including the applicant were consuming Ganja in his hut when one of the accused received call from the co-accused Javed. Subsequently Samir Choti, Dhad and applicant came out of the hut. The co-accused Dhad, Nisar and Samir came out of slum area on the motorcycle of accused Dhad. He had further stated that while proceeding towards Toll Naka near Kalsekar Hospital, Samir received call that he along with co-accused Asma and Sabbar Khan (deceased) are coming on motorcycle and that Sabbar Khan is wearing a gold chain which is to be snatched from him. Pursuant to that, allegedly accused had committed the crime. It is submitted that provisions of MCOC Act cannot be applied to the applicant, as prima facie, there is no evidence to substantiate involvement of applicant in the present crime. It is submitted that the prosecution is relying on the antecedents of applicant. He was implicated in the cases by police. It is further submitted that assuming that there are antecedents against the applicant, the prosecution has to establish the involvement of applicant in the present case to which provisions of MCOC Act are made applicable. There is no evidence to substantiate the charges under Sections 3(1) (ii), 3(2) and 3(4) of MCOC Act.

5. Learned APP submitted that there is involvement of applicant in the crime. The investigating officer has filed an affidavit opposing the application for bail. It is submitted that during the course of investigation, the statements of two witnesses Imran Shaikh and Riyaz Shaikh were recorded under Section Section 164 of Cr.P.C.

Their statements show the involvement of applicant. It is submitted that the CDR records show that there were calls inter-se between the applicant and the co-accused. The applicant is the prime accused. It is further submitted that there are about eight cases pending against the applicant.

6. Learned APP on instructions further submitted that accused Nasir Shah resiled from his confessional statement before the Magistrate when he was produced by the investigating machinery. It is submitted that the gold chain was recovered from the applicant. The call records indicate the involvement of applicant. It is submitted that considering the role played by the applicant in the present crime and his antecedents, the application for bail be rejected.

7. I have perused the charge sheet. The alleged incident had occurred on 19th July 2016. It is the prosecution case that two persons got acquainted with the deceased and had reached the spot on his motorcycle. The deceased was wearing a gold chain. The information was provided by others to the assailants and on receipt of the information, with a view to commit robbery of gold chain, three persons reached at the spot. Apparently one of them was having knife and since the deceased had confronted them, he was stabbed by him. It is not the case of prosecution that the applicant was one of the person who was present at the scene of offence and had assaulted the injured. The prosecution has recorded statement of two persons under Section 161 as well as under Section 164 as spelt out in the affidavit by the investigating officer. The statements of Imran Shaikh and Riyaz Shaikh do not show that the applicant

was participant in the act of robbery and/or in assaulting the deceased. The record indicate that the prosecution case is that the gold chain which was allegedly robbed by the accused was given to the applicant for the purpose of sale. Thus, at the most, the evidence against the applicant is that he was found in possession of gold chain. The prosecution is relying on the call records which were made inter-se between the applicant and others. However, that cannot be considered as a substantial piece of evidence to detain the applicant in custody. The prosecution is also relying on the antecedents of applicant. In all those cases which are registered in the years 2013, 2014, 2015 and 2016, were relating to the offences under Atrocities Act, robbery, Sections 307 and 324 of IPC etc and same are pending in the Court. Pendency of cases would be one of the factor which can be considered as a material factor while dealing with the issue of bail. However, in the absence of strong evidence showing involvement in the crime, the applicant cannot be detained in custody. He is arrested on 19th July 2016 and for a period of about two years he is in custody. Admittedly there is no evidence to show that the applicant was present at the scene of offence. The confessional statement is withdrawn by the co-accused and in any case even that statement taken as it is, was not showing the involvement of applicant as participant in the crime of robbery and assault upon deceased. In the aforesaid circumstances and in the light of observations of Hon'ble Supreme Court in the case of Ranjit Singh Sharma, although Section 24(4) refers to the embargo for grant of bail, prima facie, the said restrictions cannot be applied in the present case considering the nature of evidence as stated hereinabove. In the circumstances, case for grant of bail is made out.

8. Hence, I pass following order :

ORDER

- (i) Criminal Bail application No.2373 of 2017 is allowed and disposed off;
- (ii) The applicant is directed to be released on bail in connection with MCOC Special case No.10 of 2016 pending in the Court of MCOC Special Court, at Thane, on furnishing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- (iii) The applicant shall report Shil-Daighar Police Station once in a month of every first Saturday between 10 am and 12 noon till further orders;
- (iv) The applicant shall not tamper with evidence;
- (v) The applicant shall attend the Trial Court on the dates of hearing regularly, unless exempted by the Court for some reason.

(PRAKASH D. NAIK, J.)

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