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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL BAIL APPLICATION NO.37 OF 2019

Nilesh Bansilal Gaywal	...Applicant
Versus	
The State of Maharashtra	...Respondent

Mr.U.P.Warunjikar, for the Applicant.

Mr.Nilesh Tribhuvann, Special Public Prosecutor a/w Ms.P.P.Shinde, A.P.P
for the Respondent - State.

Ms.Darshna Naval a/w Mr.Pranav Avhad, for the Intervener.

CORAM : REVATI MOHITE DERE, J.

DATE : 17th SEPTEMBER, 2019

P.C. :

1. In view of the 'Not Before me' order passed by Hon'ble Shri Justice Sarang V. Kotwal, the aforesaid application is placed before this Court.
2. Heard learned counsel for the parties.
3. By this application, the Applicant seeks his enlargement on bail in connection with C.R.No.188 of 2017 registered with the Koregaon Park Police Station, Pune, for the alleged offence punishable under

Section 395 of the Indian Penal Code. Subsequently, Sections 3 (1)(ii), 3(2) and 3(4) of Maharashtra Control of Organized Crime Act (for short 'M. C. O. C. Act'), came to be applied.

4. Learned Counsel for the applicant submits that no case as alleged is made out *qua* the applicant. He submits that the falsity of the prosecution case is evident from the N.C. lodged soon after the incident of 12th November, 2017 i.e. on 13th November, 2017, wherein there is no mention of any cash being removed from the cash-box of the hotel, whereas, in the FIR lodged after 3 days of the incident i.e. on 15th November, 2017, it is stated that the accused had committed dacoity of Rs.13,000/- odd. He submits that admittedly the applicant was not present when 4 people had allegedly gone to the hotel and had allegedly removed cash of Rs.13,000/- odd. He submits that soon after the applicant was acquitted from an M.C.O.C. case on 2nd February, 2019, the aforesaid C.R. came to be registered as against him. He submits that taking the prosecution case as it stands, no offence as alleged is disclosed, *qua* the applicant and merely because the applicant has antecedents, cannot be a ground to deny him bail.

5. Learned Special Public Prosecutor opposed the application.

He submits that although the applicant was not present when the alleged cash was removed from the cash-box of the hotel, the applicant was sitting in his car, below the said hotel. He submits that there is a presumption under Section 22 of the M. C. O. C. Act as well as there is bar under Section 21(4) and (5) of the M. C. O. C. Act to grant of bail. He further submits that there are 2 independent witnesses, who have seen the applicant at the spot sitting in the car, when the alleged incident took place.

6. Perused the papers. According to the complainant/first informant – Vicky Ravani, he was working in a hotel as a waiter, when the alleged incident took place. The complainant has alleged that on 12th November, 2017, after the hotel was shut down, at about 12.00 midnight, 7 to 8 persons came to the hotel, out of which, 3 persons stood near the staircase and 5 persons came near the counter. The complainant has stated that one of the said persons stated that he was Sagar Jogwade and that Nileshbhai (applicant) had sent him to find out where Vivek Yadav was. The complainant has stated that when he disclosed that he had no knowledge, the said persons assaulted him with fist and kick blows on his face, nose and eyes, pursuant to which, he sustained bleeding injuries. The complainant has further stated that one of the persons, pulled out cash i.e. Rs.13,700/- out of Rs.17,340/- which was in the cash-box. He has stated

that thereafter, all the accused fled from the spot. He has further stated that when he checked the cash-box, he realized that out of Rs.17,340/-, which was collected on that day, the accused had forcibly taken Rs.13,700/- and left balance amount of Rs.3,640/-. The complainant has further stated that he informed the owner of the hotel – Rakesh Gupta and later learnt from Vishal@Chotu that the accused had come in 3 cars i.e. Jaguar Car, Safari Car, Innova Car and one Activa. It is pertinent to note that in the said FIR, there is no mention that Vishal@Chotu had disclosed the presence of the applicant in the Jaguar Car. It appears that in the supplementary statement recorded on 16th November, 2017, the complainant has stated that Vishal@Chotu had disclosed to him that the applicant was sitting in the Jaguar Car. A few dates are relevant. Although the aforesaid incident is stated to have taken place on 12th November, 2017, the FIR was lodged only on 15th November, 2017. It is pertinent to note that prior to the registration of the FIR, an N.C was lodged by the complainant – Vicky. The said N.C. is on page 34 (Exhibit - 'E') of the application. A perusal of the said N.C. shows, that the complainant has disclosed that 4 persons had come to his hotel and had asked him about Vivek Yadav and when he said that he had no knowledge, the said person slapped him on his face. It is pertinent to note that there is no mention of any people standing in the staircase or forcible removal of any cash from the cash-box, in the said N.C. It may also

be noted, that the complainant as per the FIR is alleged to have received bleeding injuries, pursuant to the assault on him, however, the injury certificate does not corroborate the said injuries allegedly sustained by the complainant. Although, in the N.C. there is a mention of 4 persons, in the FIR, the complainant has stated that 7 to 8 persons had come, 3 persons were standing in the staircase and 5 persons came and asked him about Vivek Yadav and on stating that he had no knowledge, assaulted him on his face, causing bleeding injuries. It appears that the aforesaid FIR was registered as against the accused, only for the offence punishable under Section 395 of the Indian Penal Code and neither Section 120B or Section 34 of the Indian Penal Code, has been applied. It further appears that on 30th January, 2018, approval was granted to apply M. C. O. C. Act under Section 23(1)(a) and on 16th May, 2018, sanction was accorded under Section 23 and on 18th May, 2018, charge-sheet was filed as against the accused.

7. A perusal of the statements of the 2 independent witnesses recorded in May, 2018 i.e. after 6 months of the incident show that the applicant, a gang leader, having several offences registered against him was sitting in the car on 12th November, 2017. There is no recovery of any incriminating material, as against the applicant. As noted above, admittedly,

the applicant is not alleged to have been present when an amount of Rs.13,000/- odd was allegedly taken from the cash-box of the hotel. *Prima facie*, there are inconsistencies in the statements as well as what is stated in the N.C. lodged first in point of time and the FIR which was lodged after 3 days of the incident. The medical injury certificate of the complainant also does not support the prosecution case. Considering the material on record, *prima facie*, it cannot be said that the applicant is guilty of the offences with which he is charged. Although, much is said about the antecedents of the applicant and bar under Section 21(4) and (5) of the M. C. O. C. Act, it appears that the applicant has been acquitted in the two M.C.O.C. cases of the year 2003 and 2010 respectively. The applicant has also been acquitted of the offences registered against him in 2001, 2003 and 2010. Having regard to the facts, merely because the applicant has antecedents, cannot be a ground to reject his application. Investigation is complete and charge-sheet is filed.

8. Considering the aforesaid, the application is allowed on the following terms and conditions:-

ORDER

i) The Applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.1,00,000/- with one or two local solvent sureties in the like

amount;

ii) The Applicant shall attend the concerned Police Station, on the first Saturday of every month, between 10:00 a.m. to 11:00 a.m., till the conclusion of the trial;

iii) The Applicant shall inform his latest place of residence and mobile contact number immediately after being released and/or change of residence or mobile details, if any, from time to time to the trial Court as well as to the concerned Police Station, in writing;

iv) The Applicant shall not tamper with the evidence or attempt to influence/contact the complainant, witnesses or any person concerned with the case;

v) The Applicant shall co-operate in the conduct of the trial and shall attend the trial Court on every date of hearing, unless exempted by the trial Court;

vi) An undertaking to the aforesaid clauses (ii) to (v), shall be filed by the Applicant, in the Registry of the trial Court, within two weeks of his

release;

vii) If there are 2 consecutive defaults either in attending the Police Station or in appearing before the trial Court or breach of any of the conditions as stated above, the prosecution will be at liberty to apply for cancellation of Applicant's bail.

9. The Application is allowed and disposed of in above terms.

10. It is made clear, that the observations made herein are *prima facie*, and the trial Court shall decide the case on its own merits, in accordance with law, uninfluenced by the observations made in this order.

11. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.