

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

**INTERIM APPLICATION NO.810 OF 2019
IN
CRIMINAL APPEAL NO. 1185 OF 2019**

Mahesh Bapu Lohar
Age : 42 Years. Occ : Worker
R/at : Plot No.15, Indira Nagar,
Chinchwad gaon, Near Bhoir Nagar,
Chinchwad, Pune. ... Applicant
(Presently lodged at Nashik Central Jail)

Versus

The State of Maharashtra ... Respondent

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Mr. Niranjan Mundargi i/b Ms. Vinaya G. Padwal, Advocate for the Applicant.
Ms. A. A. Takalkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 27th NOVEMBER, 2020.

PER COURT:

1. This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal No.1185 of 2019 preferred by the applicant challenging the Judgment and Order dated 26th April 2019 passed by Additional Sessions Judge and Special Judge under the Maharashtra Control Organized Crime (for short “MCOC” Act) for Greater Mumbai at Mumbai in MCOC Special Case No. 4 of 2015.

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2. The applicant is convicted for the offence punishable under Section 120-B of Indian penal Code (for short “IPC”) and sentenced to suffer rigorous imprisonment for 4 years and to pay fine of Rs.5,000/-. He is also convicted for the offence under Section 387 read with 34 of the IPC and sentenced to suffer imprisonment for 4 years and to pay fine of Rs.5,000/-. He has been further convicted for the offence under Section 3 (1) (ii) of the MCOC Act and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 5,00,000/- (Rupees Five Lacs Only) and in default to suffer rigorous imprisonment for 1 year, and for the offence under Section 3 (2) of MCOC Act and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 5,00,000/- in default to suffer rigorous imprisonment for 1 year. The applicant is acquitted for the offence under Section 25 (1-B) (a) of Arms Act and for the offence under Section 135 read with 37 (1) of the Maharashtra Police Act vide Section 235(1) of the Code of Criminal Procedure, 1973.

3. The prosecution case is that, the complainant received call from unknown persons on 27th August 2014 at

about 04:25 p.m. on his mobile No.9821117412 claiming himself to be Ravi Poojari and demanded Rupees Two Crores and gave his mobile number for contact. He again received call at about 09:56 p.m. and threat was given for extortion. Thereafter, on 29th August 2014 at about 04:04 p.m. the complainant again received call for extortion amount and threat. On the same day he received another call at about 11:44 p.m. but he did not attend it. On 28th November 2014 at 05:31 p.m. he received call from mobile number 917715091387 on his mobile. The caller questioned him why he did not talk to his boss and asked him to talk to his boss. The complainant received message that he should talk to Ravi Poojari and settle the issue or face dire consequences. At 06:15 p.m. he again received message asking him as to why he has closed his old number. PW No.21 approached Extortion Cell and lodged report. Offence was registered. At 09:50 p.m. PW No.25 received information that some persons are coming to Chembur to eliminate the builder. They proceeded to Chembur at about 11:00 p.m. At about 11:45 p.m. three persons were found in front of Hotel Shubh Laxmi and they were identified by the

informer as associates of Ravi Poojari. They were apprehended. Personal search was conducted. Accused No.1- Vijay Krishna Rao was found in possession of country made revolver with one cartridge and cash of Rs.1,00,000/- (Rupees One Lac Only) 12 SIM Cards in the plastic container were found with him. Three mobiles were also recovered from him with SIM Cards. Accused were arrested. Investigation was conducted, charge sheet was filed.

4. Learned Advocate for the applicant submitted that the applicant is falsely implicated in this case. The applicant was in custody at the time of alleged phone calls received by the complainant. The accused No.1 has been attributed role of making calls dated 28th November 2014. Evidence of PW No.4, PW No.5, PW No.16, DW No.1 and DW No.2 establishes that accused were in custody of police on 28th November 2014. There is no evidence to show that the applicant was member of crime syndicate. Electronic evidence was not proved in accordance the provisions of Evidence Act. Electronic evidence suffer from serious discrepancies. The confessional statement is not in accordance with provisions of law. There is no certificate

in accordance with Section 18(3) of MCOC Act. There is no corroboration to the confession of the accused. The SIM Cards allegedly recovered from the accused were in the name of other persons. Their statements were not recorded. They were not examined as witnesses. The applicant is in custody for a period of about 6 years. The fine amount imposed by trial Court is huge. The sentence of imprisonment as well as fine may be suspended. Recovery of cartridges has been disbelieved by trial Court. There are no criminal antecedents against applicant.

5. Learned App submitted that, there is evidence to show that the applicant is member of Organized Crime Syndicate headed by Ravi Poojari. 12 SIM Cards of different numbers were found in possession of accused at the time of arrest. The voice sample matches with recorded conversation. Panchnama of arrest is on record which mentioned that the accused were arrested on 29th November 2014. The confessional statement disclosed his associations with Ravi Poojari. Accused No.1- Vijay Krishna Rao is involved in threatening the complainant and demanding of extortion amount. After arrest of accused No.1, 4 live cartridge recovered at the instance of

applicant under Section 27 of the Evidence Act.

6. The applicant is in custody from the day of his arrest. He has undergone period of about 6 years of custody. The case of the prosecution is seriously challenged on the ground that the applicant and other accused were arrested on 28th November 2014 and falsely shown arrested at 29th November 2014 at midnight. PW No.3 has stated that he knows accused No.2 and applicant. Accused No.2 was secretary of Mathadi Kamgar Sanghatna. In the cross-examination he stated that on 28th November 2014 Dattatray Sawant has informed him that applicant was arrested by Police at 12:30 noon to 01:00 p.m. His friend Mahendra Chinchwade also informed him about the same. PW No.5 Suryakant Phuge has deposed that on 28th November 2014 he received call from Anti-Terrorism Squad (for short "ATS") officer that his brother (Accused No.2) was arrested. He went to meet him. On 28th November 2014 accused No.1 was also arrested with him. He saw them on 29th November 2014 in the office of ATS. Sunil Mane-(PW No.16) API attached to Property Cell Crime Branch, stated that accused No.1 to accused No.3 (applicant) were arrested at Chembur on

28th November 2014. It is the defence of accused that the question of threatening the complainant by the accused, after their arrest does not arise. The applicant was in custody at the time when alleged call was made to PW No.21. The contention of the applicant before the trial Court was that the CDR cannot be admitted in the evidence as the evidence of Nodal Officers on the point of control of the server is not proved under Section 65-B (4) of the Evidence Act. The trial Court in paragraph No.38 of the Judgment has observed that on consideration of the evidence of the Nodal Officers from tenor of the cross-examination it was challenged on the location of the server. The trial Court observed that even if, there are some discrepancies in the certificate under Section 65-B of the Evidence Act, the evidence of CDR cannot be ignored. In paragraph No. 170 it is observed that the prosecution has examined PW No.6 who is the panch to the panchnama. PW No.21 produced the CD before the Police. PW No.21 stated that he prepared the CD of the conversation which was recorded in his mobile phone and CD was produced on 18th February 2015 before the Police. The staff who prepared the CD containing the record of conversation

which PW No.21 had with the accused No.1 and accused No.5 have not been examined. In paragraph 171 of the Judgment it was observed that as per Section 65-B of the Evidence Act, the information which was stored, recorded in optical or magnetic media without production of original on fulfillment of conditions mentioned therein is not admissible. Admittedly, the mobile phone from which the compact disc was prepared was not seized by the police. Hence, in order to make compact disc article admissible in evidence, it is necessary to fulfill requirement of Section 65-B (4) of the Evidence Act. However the prosecution has not produced for certificate nor the staff of PW No.21 who prepared the compact disc Article-F is brought before the Court. Thus, there is departure from the mandatory provisions of Section 65-B of Evidence Act and the contents of the electronic record of the compact disc Article-F could not be looked into evidence for the purpose of identifying the voice of accused No.1 and Accused No.5 from the voice sample collected on 2nd January 2015 and 10th February 2015 in the memory card Article-H and G respectively.

7. The appeal preferred by the applicant is admitted

and pending for final disposal. The applicant is in custody for substantial period of time. Learned counsel for the applicant has relied upon the decision of the Supreme Court in the case of **Kiran Kumar Vs. State of M.P. (2001) AIR SCW 5130** In the said decision it was observed that normal rule is that in cases of short-term sentence, the sentence should be suspended and rejection is only by way of exception. The accused, therein was convicted under Sections 450, 367, 325 and 506 of IPC for a period of 7 years. He also relied upon another decision of the Supreme Court in the case of **Bhagwan Rama Shinde Gosai and others Vs/ State of Gujarat,** wherein it was observed that, when the convicted person is sentenced to fixed period of sentence and he files appeal under any statutory right, suspension of sentence can be considered liberally unless there is exceptional circumstances or any statutory restrictions. The accused therein was convicted for the offence under Section 392 read with Section 397 and sentenced to suffer imprisonment for 10 years. Learned counsel relied upon the order dated 20th February 2019 passed by the Division Bench of this Court in Criminal Application No. 520 of 2018 and connected applications. It was

observed that, the accused were convicted for the offence under provisions of MCOC Act and the substantive sentence imposed upon them was for 8 years with fine of Rs.5,00,000/- (Rupees Five Lacs Only). The accused had undergone sentence for a period of 6 years fine was not paid. The sentence in default was rigorous imprisonment for 1 year. Thus, out of total sentence of 9 years, the said applicant had undergone sentence of 6 years and 4 months. Considering the pendency of old appeals and the number of appeals of the accused in jail who was undergone sentence for more than 6 years. Appeals before the Court were not likely to be listed for final hearing in near future. Since, applicant had undergone 2/3rd of substantive sentence, they will have to be enlarged on bail. The Court allowed the application by suspending the substantive sentence till the final disposal of the appeal and accused were enlarged on bail. By order dated 18th July 2019 Single Judge of this Court suspended the sentence of the accused imposed under the provisions of MCOC Act with fine of Rs. 10,00,000/- (Rupees Ten Lacs Only). The Court considered that the applicant was in custody for 7 years. The sentence was 10 years imprisonment. Hence, the

substantive sentence was suspended. The applicants were allowed to deposit 50% fine amount in two months after order is uploaded. Learned counsel placed for relied upon another order of this Court passed in Interim Application No. 1 of 2019 and other connected applications dated 14th February 2020 wherein the accused were convicted for the offence under MCOC Act with huge fine amount of Rs. 5,00,000/- (Rupees Five Lacs Only). This Court suspended the substantive sentence inflicted upon the applicant. He was directed to deposit 50% of the fine amount within two months. Learned counsel also relied upon the decision of the Supreme Court in the case of *Nilesh Dinkar Paradkar Vs. State of Maharashtra (2011) 4 SCC 143* the decision relies to voice identification and its veracity. It was observed that Accurate voice identification is difficult than visual identification, which is prone to tampering and editing. The Court have to be extremely cautious in basing a conviction purely on the evidence of voice identification.

8. The trial Court in paragraph 89 of the Judgment has observed that the accused were involved in C.R. No. 83 of 2010. The charge sheet in that case was placed on record. The co-

accused in that case was Poojari which shows nexus with crime syndicate. Learned Advocate for the applicant, contends that applicant is not accused in that case. The applicant is not involved in any case with the said accused. Thus, there is challenge to applicability of provisions of MCOC Act. It is also submitted that huge fine is imposed by trial Court. The applicant is in jail from date of arrest. He cannot deposit the fine amount due to financial constraint.

9. Considering the aforesaid circumstances the substantive sentence of imprisonment can be suspended. Hence, I pass the following order :

ORDER

(i) The substantive sentence imposed upon the applicant vide Judgment and Order dated 26th April 2019 passed by Additional Sessions Judge and Special Judge under MCOC Act in MCOC Special Case No. 4 of 2015 shall stands suspended till final disposal of the appeal and applicant shall be enlarged on bail in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand Only) with one or two local surety in the like amount;

- (ii) The applicant shall report to the concerned Special Judge on first Monday of January and July every calendar year till the disposal of appeal;
- (iii) The applicant shall deposit 50% of the total fine amount imposed by Trial Court within three months from the date of release;
- (iv) Application stands disposed of.

10. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)