IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.343 OF 2020

Fahim Akhtar Abdul Majid Khan .. Applicant

Vs.

The State of Maharashtra .. Respondent

…

Mr. Amin Solkar with Mr. Pratik Karande for the applicant.

Mr. Y.Y. Dabake, A.P.P. for the State.

…

CORAM : SMT. BHARATI DANGRE, J.

DATED : 25TH NOVEMBER, 2021.

P.C:-

1. The applicant, who is charge-sheeted in C.R. No.I-392 of 2017 for the offences punishable under Sections 395, 341, 342, 400, 120-B of the IPC read with Sections 3 and 25 of the Arms Act and Section 135 of the Maharashtra Police Act as well as the provisions of Sections 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as **"the MCOCA"**) seeks his release on bail on the ground that he

has been arrested in the said C.R. on 10/11/2017 and continued to remain incarcerated. The submission advanced on behalf of the applicant is to the effect that there is no material to foist the charge under the MCOCA against him and the material in the charge-sheet falls short of meeting the said charge.

2. The prosecution case is that the complainant alleges that on 27/10/2017 at about 1200 hours when she returned to her residence from the Gymnasium, someone rang the bell of her house and when she opened the door, one boy and one girl were standing in front of the door with a gift box. She accepted the same and the duo asked for water. When she entered the kitchen, the unknown boy followed her and by brandishing a revolver, threatened her as well as her mother, who was present in the house. At the very same time, four other persons present there, entered into her house and the person in white shirt asked about the papers. They robbed her of her money, dollars, gold and silver ornaments and other valuable articles and packed the booty in a suitcase and in a traveler bag and threatened the complainant and her mother and also tied them to a chair. Somehow, they managed to untie themselves and help was sought from neighbours and a complaint came to be lodged in the Vashi Police Station. The case came to be registered by invoking Sections 395, 341, 342 of the IPC along with Sections 3 and 25 of the Arms Act and Section 135 of the Maharashtra Police Act against six unknown persons.

3. In the course of investigation of the said C.R., the applicant came to be arrested on 10/11/2017 and it is alleged that an amount of Rs.8 lakhs was recovered from him. The investigation proceeded and the statements of witnesses were recorded. Prior approval under Section 23(1)(a) of the MCOCA was granted to the said C.R. by order dated 22/12/2017 and a proposal for invoking the provisions of MCOCA was forwarded to the Additional Commissioner of Police. Sanction order under Section 23(2) of the MCOCA was granted and, on 09/04/2018, the charge-sheet was filed against the applicant along with others in the aforesaid C.R. before the Special Court at Thane along with the relevant provisions of the IPC and the case was numbered as Special Case No.5 of 2018.

4. The applicant moved an application seeking his release on bail before the Special Court, which was rejected on 30/01/2019, which constrained him to move the present application.

5. Heard Mr. Solkar, learned counsel for the applicant and Mr. Dabake, learned A.P.P. for the State. By inviting my attention to the bulky charge-sheet, which is filed in the C.R., the submission of Mr. Solkar is that there is no cogent and convincing evidence collected by the prosecution to establish the involvement of the applicant in the present crime. According to him, the ingredients of the MCOCA are not even attracted nor

disclosed in the charge-sheet qua the present applicant. He submits that the most essential feature of the MCOCA being continuing unlawful assembly by an organized crime syndicate for the purpose of economic gain is conspicuously absent and, there is no material in the charge-sheet, which would even lead to a reasonable ground to believe that the applicant is guilty of offences under the MCOCA. It is further argued by him that the confessions made by the co-accused are subsequently retracted and the recovery of the amount from his house is also not proved, is his submission. The identification parade is also in violation of the guidelines set out in the Criminal Manual is his submission. Considering the long incarceration, the submission is, his client deserves his release.

6. Learned A.P.P. while opposing the application, placed reliance on the affidavit filed by the Assistant Commissioner of Police on 27/09/2021 and has relied upon the incriminating material compiled against the applicant in the charge-sheet. Learned A.P.P. would submit that the offence registered with the Vashi Police Station was an offence of dacoity and huge amount was looted. According to him, the statement of the mother of the complainant was recorded and she referred to one Anita Mhasane, who is alleged to be the gang leader and with whom there was a family relationship. The mother of the complainant has stated that a loan of Rs.2,50,000/- was advanced to Anita Mhasane by keeping the original papers of the property and

when she insisted with Anita Mhasane to repay the amount, there was a quibble and, that is why, the dacoity was planned wherein the relevant papers were also removed. Learned A.P.P. submits that the CCTV footage of the premises was inspected where the entry and exit of the accused persons in the house has been recorded and one of the accused Mohammed Umer Mehandi Shaikh is identified in the CCTV footage. The vehicle in which the accused persons arrived at the spot was also recorded in the CCTV footage and the said vehicle was found to be registered in the name of Umar Mehendi Razak Shaikh. This accused led to the other accused persons. The applicant is arraigned as Accused No.7, who was arrested on 10/11/2017 and learned A.P.P. would submit that the presence of the applicant is also seen in the CCTV footage and he is also identified by the complainant and the witness i.e. the mother of the complainant. Apart from this, it is argued that the gold and silver ornaments and cash amounting to Rs.1,17,88,067/- were recovered from the accused persons in the said incident and from the present applicant, the cash of Rs.15,850/- was recovered and in the house search, cash of Rs.8 lakhs was seized under the memorandum of panchnama under Section 27 of the Evidence Act. As far as his involvement in the offence under the MCOCA is concerned, it is submitted by learned A.P.P. that the applicant is a member of the organized crime syndicate and having 10 members in the said gang and the said gang committed series of offences including offences by use of violence or threat of violence or intimidation or coercion or by other unlawful means with the motive of gaining illegal pecuniary benefits for alleged organized crime syndicate. The following statements are made in the affidavit :

> *"I say that the said gang has committed various offences in Malegaon, Navi Mumbai, panvel areas. Offences against Gang leader namely Anita Mhasane."*

Sr. No.	**Police Station**	**C.R. No. & Date**	**Sections**
1.	Chavani	106/13	394, 452, 341 r/w 34, 120-B of IPC.
2.	Kharghar	08/14	420, 406, 504, 506 of IPC
3.	Panvel	398/17	420 of IPC
4.	Kharghar	427/17	420 r/w section 34 of IPC.

> *22. I say that during the course of investigation, it was transpired that around 4 charge sheets have been filed against the gang leader Anita Mhatre before the Competent Courts and the concerned courts have taken cognizance of the offences.*
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> *23. I say that during the course of investigation, it was also transpired that the aforesaid the present applicant accused and his associates i.e. the other accused persons have committed offence against person and property, with the sole intention of gaining illegal pecuniary benefits by use of violence or threat of violence or intimidation or coercion or any other unlawful means and*

> *they further continued in commission of offence against human body and property and the existing provisions of penal and procedural law of the land have not been found effective to curb or control their illegal activities and therefore, they are required to be dealt with under the provisions of the M.C.O.C. Act, 1999."*

7. When learned A.P.P. is specifically asked about the commonality of the offences between the gang leader and the present applicant, the submission is that the applicant has no criminal antecedents and this is his first offence, but there are reasonable grounds to show his involvement and active participation as a member of the gang, taking into consideration the criminal antecedents of the leader of the gang. An apprehension is expressed that if he is released on bail, he may indulge in similar activities in future. The application is also opposed on the ground that four of the accused persons in the said C.R. are still absconding and the gang leader is a hardcore criminal so also her husband, who is also involved in many criminal cases.

8. The Maharashtra Control of Organized Crime Act is an Act, which contain special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang. The special enactment prescribes punishment for organized crime. "Organized crime" is defined under the

said Act as a continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. The "continuing unlawful activity" is defined in Section 2(d) of the Act as an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence. The organized crime syndicate is assigned a definite connotation to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organized crime.

9. The punishment under the Act is for committing an offence of organized crime. The crime must be committed in the capacity as an organized crime syndicate either singly or collectively. The material relied upon by the prosecution to establish that a case under the MCOCA, as far as the present application is concerned is that, he is a member of an organized

crime syndicate. However, when learned A.P.P. is asked to point out the material to establish the said assertion, learned A.P.P. is unable to point out any particular material. The affidavit makes a mention of the offences registered against the gang leader, but there is no offences registered against the present applicant along with the gang leader or other members of the gang in the past, but for the present C.R., in which he is charge-sheeted, invoking an offence of dacoity. The applicant has no antecedents to his credit and the material in the charge-sheet, therefore, falls short of establishing the applicant being a member of the organized crime syndicate. This being my *prima facie* observation on perusal of the material in the charge-sheet, the applicant deserves his release on bail in the offence with which he is charged being offences of serious nature i.e. under Section 3 of the MCOCA. As far as the offence punishable under Sections 395 and 342 are concerned, the investigation being complete and material being collated, the incarceration of the applicant, awaiting his trial for more than five years, is sufficient for me to release him on bail. Down the line for five years after registration of the C.R., the charge is not yet framed.

10. Learned A.P.P. has placed reliance on the latest decision of the Apex Court in ***Kavitha Lankesh v. State of Karnataka & Ors.*** reported in ***Criminal Appeal Diary No.13309 of 2021 decided on 21/10/2021*** and the observations on which he seeks reliance can be gainfully referred to:

> *"However, if the role of the offender is merely that of a facilitator or of an abettor as referred to in Section 3(2), 3(3), 3(4) or 3(5), the requirement of named person being involved in more than two charge-sheets registered against him in the past is not relevant. Regardless of that, he can be proceeded under the 2000 Act, if the material collected by the Investigating Agency reveals that he had nexus with the accused who is a member of the organized crime syndicate or such nexus is related to the offence in the nature of organized crime. Thus, he need not be a person who had direct role in the commission of an organized crime as such."*

The position of law on the said aspect that more than two charge-sheets should be filed against the crime syndicate is certain, but it is imperative for the prosecution to establish that a particular accused is a member of the organized crime syndicate and which can be reflected by pointing out material in the form of offences shared by him along with the gang leader or the material reflecting that he to be a facilitator or an abettor. In absence of any such ingredients being found in the charge-sheet, I am inclined to grant his release on bail. In the wake of the aforesaid, the applicant is entitled to be released on bail subject to the following conditions:

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

(a) The applicant – Fahim Akhtar Abdul Majid Khan shall be released on bail in C.R. No.I-392 of 2017 registered with Vashi Police Station pertaining to Special Case No.5 of 2018, on executing P.R. bond in the sum of Rs.20,000/- and furnishing at least one local surety in the like amount.

(b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case and shall not tamper with prosecution evidence.

(c) The applicant shall mark his attendance in the Special Court dealing with MCOC Special Case No.5 of 2018, once in every month, till framing o the charge.

11. The bail application is allowed in the aforestated terms.

[SMT. BHARATI DANGRE, J.]

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