

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.1334 OF 2020

IMTIYAZ KHWAJA PATHAN

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Aniket Nikam i/b. Mr.Vivek Arote, Advocate for the Applicant.

Mr.H.J.Dedhia, APP for the Respondent – State.

CORAM : V. G. BISHT, J.

RESERVED ON : 18th NOVEMBER 2021
PRONOUNCED ON : 29th NOVEMBER 2021

P.C. :

1 The present application has been moved by the applicant under Section 439 of the Code of Criminal Procedure in Crime No.19 of 2019 registered with Police Station Vanwadi, Pune, for offences punishable under Section 307, 120B, 201, 143, 144, 147, 148, 149, 506(2) of Indian Penal Code (IPC), under Section 37(1) read with 135 of Maharashtra Police Act,

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under Section 3, 4(25) of Arms Act, Section 7 of Criminal Law Amendment Act and under Section 3(1)(ii) and 3(2) of Maharashtra Control of Organised Crime Act (MCOC Act).

2 It is the case of prosecution that on 4th January 2019 the informant learnt that some of the residents of Kanjarbhat vasti / relatives of the informant were assaulted by accused Tipu Pathan, Nadeem Khan and others. On 5th January 2019 the accused came near the residence of the informant armed with weapons. The accused assaulted the informant in front of his house. Accused Tipu Pathan had raised pistol and threatened the people. However, the informant managed to run inside his house. As the informant wanted to avoid any damage being caused to his vehicle Land Rover, he decided to keep the vehicle in the house of his neighbour. However, while he was proceeding in his vehicle, the accused, who were in large number, chased him and attacked his vehicle. It is also alleged that Tipu Pathan even fired at the vehicle. However, the informant somehow managed to reach Hadapsar Police Station and lodged the First Information

Report (FIR). There are several cases registered against said Tipu Pathan who is running a crime syndicate and after the invocation of provisions of MCOC Act, charge-sheet came to be filed.

3 Mr.Aniket Nikam, learned counsel for the applicant, submits that there is no evidence against the applicant indicating or pointing out his involvement in the crime. This being so, the provisions of MCOC are wrongly applied qua the applicant. Further, according to the learned counsel, neither he is named in the FIR nor is seen in the CCTV footage collected by the investigating agency. It is only on the basis of statement of co-accused that the applicant has been roped in. Except antecedents, nothing is brought on record to show that the applicant was, in any manner, involved in the present crime. The learned counsel, therefore, submits that the applicant is entitled to be released on bail.

4 Mr.Dedhia, learned APP, on the other hand, opposed the submissions and invited my attention to paragraphs 7, 8 and

9 of the Affidavit-in-Reply of the Investigating Officer. Since the applicant is an active member of organised crime syndicate and there are number of antecedents, he does not deserve to be released on bail.

5 Perused the investigation papers. I have also gone through the Affidavit-in-Reply of the Investigating Officer. At the outset, I may note from the FIR that when the informant somehow had reached to Police station Hadapsar and was lodging the complaint against the other accused, meantime, police had caught the present applicant armed with a weapon and after seeing that person, the informant immediately identified him as one of the assailants. When the police confronted the said person, he revealed his name as Saddam Salim Pathan i.e. accused no.1. It is further seen from the said FIR that when the police made enquiries with said Saddam Salim Pathan, he revealed the name of other accused namely Tipu Pathan, Nadeem Khan, Rajesh Pawar, Shahrukh Atti, Tanveer Shaikh, Sohail Pathan, Ejaj Pathan, Ejaj Patel, Jayed Bagwan,

Imtiyaz Pathan (applicant), Mateen Sayyed, Azim Shaikh @ Antya and others. Thus, prima facie, a bare reading of the FIR would show that the name of applicant came to be revealed by accused Saddam Salim Pathan.

6 Now, I come to the CCTV footage dated 26th February 2019 wherein the names of other accused are shown, except the applicant, who were seen in the CCTV footage of the place of the incident. There is no quarrel to the fact that the present applicant was not seen in the CCTV footage.

7 Even the reply of the Investigating Officer and more particularly paragraph 5 shows that there was a telephone conversation between the gang leader Tipu Pathan and co-accused Ejaj and the present applicant's name surfaced during their conversation and it was revealed that he is a member of the organised crime syndicate headed by Tipu Pathan and had facilitated the commission of the crime. The said telephonic conversation is at page no.337. This conversation is

between accused Rizwan @ Tipu Pathan and Ejaj Inamdar Patel. While conversing the accused Tipu Pathan purportedly asked accused Ejaj Patel to hand over the phone to Imtiyaz i.e. the present applicant, to which Ejaj Patel replied that Imtiyaz had not met him. This is the only reference qua the applicant. I fail to understand, how, as is claimed in paragraph 7 of the Affidavit-in-Reply, the applicant facilitated the commission of the crime.

8 The only circumstance against the applicant is the antecedents, the details of which are given at paragraph 9 of the Affidavit-in-Reply. Assuming for the sake of argument that the applicant is a member of organised crime syndicate headed by Tipu Pathan, whether that factor alone can bring him in the ambit of provisions of MCOC Act, unless it is shown that he also had taken part in the present crime with which he is charged. To understand that, one is required to go through the definition of **“organised crime”** and **“continuing unlawful activity.”**

9 Section 2(e) defines “**organised crime**” as any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised 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.

10 In this regard, it is also necessary to go through the definition of “**continuing unlawful activity**” which is defined under Section 2(d) of the MCOC Act. It means 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 organised 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.

11 What necessarily “continuing unlawful activity” signifies is that there must have been commission of cognizable offence which is the very essence of the definition and it is necessary for a member to either participate actively or passively in such crime and then only he can be charged for the offence punishable under the provisions of IPC and then the member who has knowingly participated either actively or passively can also be further prosecuted under Section 3(4) of the MCOC Act.

12 I have already stated that assuming that the applicant is a member of crime syndicate headed by Tipu Pathan but at the same time, his participation is also necessary in the commission of an offence committed by that particular gang i.e. to say the present crime in which he is roped in on the basis of statement given by the accused Saddam Salim Pathan and so called telephonic conversation. But if the prosecution fails to establish, prima facie, the involvement of the applicant, then merely on the basis of he being a member of organised crime syndicate, cannot simply be roped in.

12 The material on record does not come to the rescue of prosecution, in as much as, I am unable to lay my hands on any incriminating or convincing evidence to show that the applicant was in some manner connected with the crime in question.

13 I am also mindful of Section 21(4)(b) of MCOC Act which states that Court shall satisfy itself regarding two conditions while granting bail. The first condition is that the Court has to satisfy that there are reasonable grounds that the person has not committed a particular offence for which the crime is registered. The second condition is that he is not likely to commit offence while on bail. At the cost of repetition, I may reiterate, this Section also, in no uncertain terms, contemplates that there should be commission of an offence and the material placed and allegations made against the accused in that offence, has to be taken into account by the Court first, and thereafter, the Court has to consider second circumstance that he is not likely to commit any other offence while on bail.

14 I have already made it clear that the prosecution has not been able to establish the involvement of the applicant in the alleged offence, prima facie, and this being so, it would be far-fetched to anticipate or visualize that in future the applicant, without there being any material on record, in all probability would commit cognizable offence.

15 In the light of above analysis, considering the fact that the role of the applicant is not satisfactorily established by the prosecution, the restrictions under Section 21(4) of the MCOC Act would not preclude the Court from granting bail to the applicant.

16 Needless to say, a case for bail is made out. Hence, I pass the following order :

ORDER

- (i) Applicant – Imtiyaz Khwaja Pathan shall be released on bail in Crime No.19 of 2019 registered with Police Station Vanwadi, Pune, on his executing PR.Bond in the sum of Rs.50,000/- with one or two sureties in like amount.

- (ii) The applicant shall not tamper with prosecution evidence.
- (iii) The applicant shall stay outside the jurisdiction of Vanwadi Police Station till conclusion of the trial.
- (iv) Bail before the trial Court.
- (v) Parties to act on copy of this order duly authenticated by the Sheristedar of this Court.
- (vi) It is made clear that the observations made herein are prima facie and the trial Court shall decide the case on its own merit, in accordance with law, uninfluenced by the observations made in this order.
- (vii) The application is allowed in the aforesaid terms and stands disposed off accordingly.

(V. G. BISHT, J.)