

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.2816 OF 2019

Mukesh Kantilal Chavan .. Applicant
Versus
The State of Maharashtra .. Respondent

...

Mr.Aniket U. Nikam with Mr.Piyush Toshnival, Mr.Ashish Satpute, Mr.Amit Icham i/b Mr.Vivek N.Arrote for the Applicant.

Mr.R.M.Pethe, APP for the State.

...

CORAM: BHARATI DANGRE, J.
DATED : 5th APRIL, 2021

P.C:-

1. The applicant is arraigned as an accused in C.R.No.546 of 2017 registered with Hinjewadi Police Station, Pune for the offence punishable under Section 395 of the Indian Penal Code (hereinafter referred to as, **“the IPC”**), on a complaint filed by one Yogesh Bhimsen Kumbhar. In the same C.R., the provisions of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as, **“the MCOCA”**) were extended and this included, invocation of Sections 3(1)(ii), 3(2) and 3(4) of the said Act. The applicant is arrested in the said C.R. on 23rd January, 2018 and on completion of investigation, charge-sheet has been filed. His application before the Special Judge came to be rejected on 26th June, 2019, resultantly, he remain incarcerated for last three years.

2. A complaint came to be filed by the complainant on 11th December, 2017 alleging that he was working as a driver with 'Shree Travels', Kagal, Dist. Kolhapur and was discharging his duties as entrusted by the owner of the travel company, who owns various vehicles and give them on hire. He reported an incident of 28th November, 2017, when on the instructions of his master, he went to receive the passenger from Mumbai International Airport and to drop them to Pune in an Innova Car. When the complainant was leaving for Mumbai International Airport, he picked up one family at Bhumkar Chowk, Pune and dropped them at the Airport at 10.30 p.m.. Since one of the family members wanted to travel to Pune, the complainant drove with that passenger. It is alleged that on 29th November, 2017, at about 2.00 a.m., when they reached near Bhumkar Chowk, Pune, the person dropped him at the said location and he left the Innova Car. At about 3.00 a.m., the complainant was in search of some transport and when black colour Skoda Car arrived there, he sought a lift. Two persons were sitting inside the Car and the complainant requested him to drop at Kolhapur, Kagal. He was asked to sit in the Car and after some time, the Car took a 'U' turn and when questioned, the driver replied that he want to pick up the two girls in the Car. At the time when they were moving towards Bhumkar Chowk, the driver stopped the Car and the complainant's mobile phone, cash of Rs.1,000/-, driving licence, Voting Card and PAN Card were forcibly removed from him.

In respect of an incident dated 29th November, 2017, the First Information Report (FIR) was lodged on 11th December,

2017 against two unknown persons. In the said complaint, the complainant also gave reason for delay in lodging the FIR as he was in a hurry on account of his sister's marriage.

3. The complainant got his supplementary statement recorded on 13th December, 2018 and he supplied further information in the said report. He stated that when he sat in the Car, he asked to stop the Car suspecting that something is wrong and asked permission to get down for the purpose of urinating. The complainant alighted and attempted to run away, but, the person sitting next to the driver, followed him and caught hold of him and made him to sit in the Car. The complainant supplemented his original statement by stating that the person sitting next to the driver, took out a weapon like 'kukri' and brandished the said weapon at him and asked him to hand over all his belongings. This compelled him to hand over the mobile handset as well as some money and certain documents. It is alleged that the said person searched his pockets and the person driving the vehicle took a kukri from the other person and attacked him by means of the said weapon on his private part by his rear side. At that point of time, another three persons came towards the Car and they were ranging between the age of 25 to 30 years and one of the persons caught hold of him and others assaulted and abused him. He was pushed due to which, he fell down on the ground. Then all the five persons left in the Skoda Car. The complainant being confused and frightened, was lying on the spot for 10 minutes and thereafter with the help of a watchman of a hotel nearby, made phone call seeking help.

4. On the basis of the said allegations, the offence was registered and the provisions of the MCOCA were invoked. The charge-sheet allege that the said offence was committed by an organised crime syndicate, which involved five accused persons, the applicant being implicated as accused No.1. The present applicant has been described as a gang leader and the charge-sheet has compiled the offences registered against the present applicant alongwith the co-accused in the police stations at Pune, which include two offences being registered with Yerwada Police Station in the year 2017 and 2018 respectively and another two offences with Bundgarden Police Station and Hadapsar Police Station. All the offences invoke Section 392 read with Section 34 of the IPC and charged the applicant alongwith the members of the gang to commit offences as a gang for gaining pecuniary advantage.

5. Learned counsel Mr. Nikam states that the charge-sheet has been filed in the said offence and the applicant is incarcerated for long. He submits that the version of the complainant is doubtful as at the first instance, there is a delay in lodging the FIR and the allegation that five persons had assaulted him on the date of incident and that they were armed with weapon, comes by way of supplementary statement and that too, at much later point of time. He states that if the complainant was at all attacked in the manner, as per his supplementary statement, he would have immediately rushed the police station and lodged the report, but he walked in the police station leisurely and omitted to mention about he being assaulted by five persons and that the accused persons

were armed with weapons. According to Mr.Nikam, this creates a doubt about the entire prosecution case. He states that the only material collected against the present applicant and compiled in the charge-sheet is the confessional statement of the co-accused Ashok Ganpat Bansode and one Mohsin Ayub Pathan.

6. As far as Mohsin Ayub Pathan is concerned, though he made a confessional statement, he has retracted the said statement on 9th May, 2018 before the C.J.M., Pune by stating that he has not given any statement, but he was made to sign on a paper on which, something was scribed upon a threat that if he does not sign the paper, he will be falsely implicated in several other cases. He has also stated that the statement was not read over to him and, therefore, according to Mr.Nikam, his statement is not sufficient at this stage to hold the applicant guilty.

7. Another confessional statement of Mr.Ashok Ganpat Bansode, according to Mr.Nikam, suffers from a major legal impediment being that the said confessional statement was recorded by the Deputy Commissioner of Police and at the end of the statement, it is recorded that the officer is convinced that the accused is giving confession voluntarily and it was recorded in Marathi. The imperative mandate of the rules framed under the MCOCA, which describes the procedure for recording of a confession statement under Section 18 of the Act is not adhered to, in particular, clause (6) of Rule 3 of the

Maharashtra Control of Organised Crime Rules, 1999, which contemplate that the confession recorded, if it is in writing, is to be signed by the person who has made such confession and also by the police officer recording the confession and it is mandatory for the police officer to make a memorandum at the end of the confession, which should be to the following effect :-

“I have explained to (name of the confessor) that he is not bound to make a confession and that, if he does so, any confession that he makes, may be used as evidence against him and I am satisfied that this confession has been made voluntarily. It has been made before me and in my hearing and has been recorded by me in the language in which it is made and as narrated by, the confessor. I have read it over to the confessor and he has admitted it to be verbatim and correct, and containing also full and true account of the confession/statement made by him.”

8. The submission of Mr.Nikam is that the confessional statement of the co-accused, which is heavily relied upon by the prosecution to implicate the applicant as a gang leader, does not contain such an endorsement/memorandum. The learned APP has invited my attention to the compliance of clause (8) of Rule 3 of the Maharashtra Control of Organised Crime Rules, 1999 whereby the accused was produced before the C.J.M., Pune and he has admitted that he had given the confessional statement voluntarily and his statement was read over to him. This, according to the learned APP, is sufficient compliance.

9. Admittedly, the confessional statement of the co-accused Ashok Ganpat Bansode is without a memorandum, but its

effect will have to be tested at the time of trial. The Apex Court in the case of **State of Maharashtra V. Bharat Chaganlal Raghani & Ors.**¹, while dealing with the Terrorist and Disruptive Activities (Prevention) Act, 1987 and a confessional statement recorded under the said Act, has propounded upon the admissibility of the confessional statement where there is a omission to make a prescribed memorandum at the end of the confession as contemplated by Rule 15(3) of the Terrorist and Disruptive Activities (Prevention) Rules, 1987, which is identically worded as clause (6) of Rule 3 of the Maharashtra Control of Organised Crime Rules, 1999, on which Mr.Nikam has placed reliance. The Apex Court has placed reliance upon the Constitution Bench judgment in the case of **Kartar Singh V. State of Punjab**² and has reiterated the spirit of a confessional statement on the line of fundamental fairness and in conformity with well recognised and well established principles.

10. The effect of the statement on which the applicant is sought to be indicted will be determined at the time of trial, but at present, *prima facie*, it can be noted that the confessional statement is without the said memorandum as stipulated under the Rules for recording confession. It being a matter of trial, no advantage can be drawn at this stage, but at present, this being a only evidence against the present applicant and he being incarcerated for more than three years, in my considered opinion, is entitled to be released on bail. The learned APP Mr.Pethe fairly submits that the charge is not

1 (2001) 9 SCC 1

2 (1994) 3 SCC 569

yet framed in the present crime. The applicant cannot be incarcerated for long, particularly in the wake of the material, which resulted in invocation of the provisions of the MCOCA where, *prima facie*, there is a delay in lodging the FIR and there is an improvement in the version of the complainant, which refers to a gang of five persons, much later after the incident took place. It is made clear that the observations made here-in-above are, *prima facie*, in nature and confined to the adjudication of the present bail application only.

: **ORDER** :

- (a) Application is allowed.
- (b) Applicant - Mukesh Kantilal Chavan shall be released on bail in C.R.No.546 of 2017 registered with Hinjewadi Police Station, Pune on furnishing P.R. bond to the extent of Rs.50,000/- with one or two sureties of the like amount.
- (c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer
- (d) The applicant shall not tamper with the prosecution evidence.
- (e) The applicant shall report to the Investigating Officer, on first Monday of every Month between 10.00 a.m. to 2.00 p.m. until the charge is framed. After the charge is framed, it

is open for the Special Court to stipulate a condition of marking presence before it so as to ensure the presence of the applicant for trial.

11. The application stands disposed of in the above terms.

SMT. BHARATI DANGRE, J