

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3403 OF 2019

Arbaz Ziauddin Shaikh

Applicant

versus

The State of Maharashtra

Respondent

Mr.Raju D. Suryawanshi with Mr.Suraj N. Naik, Advocates, for applicant.

Mr.S.R.Agarkar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 1st September 2021

PC :

1. The applicant is arrested on 13th December 2018 in connection with CR No.I-174 of 2018 registered with Shil Daighar Police Station. The FIR was lodged on 9th October 2018 for offences under Sections 3(1)(ii), 3(2), 3(4), 3(5) of Maharashtra Control of Organized Crimes Act ('MCOC Act' for short).

2. The case of the prosecution is that on 5th October 2018 the complainant alighted from auto rickshaw. At that time two persons came on motorcycle and snatched mobile phone of the complainant. The accused fled away from the place of incident. Investigation proceeded. During the course of investigation it was revealed that some of the accused involved in this case, were arrested in CR No.123 of 2018 which was also registered with Shil Daighar Police Station for offences under Sections 392, 411 r/w 34 of IPC. Application was preferred before the Court of learned Judicial

Magistrate, First Class seeking custody of the said accused in the present case. Accused no.1 Mustafa Shaikh, accused no.2 Yasin Shah and accused no.3 Rehan Kazi were arrested in the present case on 12th October 2018. It is the case of prosecution that accused Zulfikar Jafri, Jafar Ali Jafri, Mohammed Jafri, Abbas Abbasi and Tahir Hussain are absconding. During the course of investigation it was revealed that accused no.1 is the gang leader and operating crime syndicate and committing offence along with members of crime syndicate. Prior approval was granted on 20th November 2018. Investigation was completed. Sanction was granted for prosecution under the provisions of MCOC Act. Charge sheet was filed.

3. The applicant had preferred application for bail before Special Court under MCOC Act. The said application has been rejected.

4. Learned advocate for applicant submitted that there is no evidence to constitute offence under MCOC Act. There is no evidence to establish that the applicant was a member of crime syndicate headed by the gang leader and involved in several similar crimes. There is no evidence to establish complicity of applicant in the present crime. He has not participated in the offence. He was not present at the scene of offence. He was not involved in snatching the mobile phone of the complainant. Although the incident had occurred on 5th October 2018, the FIR was lodged on 9th October 2018. The confessional statement of the co-accused Rehan Kazi recorded u/s.18 of MCOC Act was retracted by him on 13th December 2018 by stating that he was assured that he would be made approver. Assuming the averments in the confessional statement of the co-accused are true, there is no cogent evidence to

establish involvement of the applicant in the present crime and other offences registered against gang leader. There is no corroboration to allegations in the confessional statement of the co-accused. The applicant is in custody for a period of about two and half years. There is no progress in trial. The FIR in CR No.174 of 2018 is concocted. There is no explanation for recording FIR on 9th October 2018. Nothing is placed on record as to how applicant is involved in case registered vide CR No.I-160 of 2018. It is not clear whether applicant was arrested in that case.

5. Learned APP submitted that there is sufficient evidence to show the involvement of applicant in crime. During the course of investigation statement of witness is recorded, who has stated that immediately prior to the incident, the applicant was in company with the co-accused, who proceeded towards place of incident and committed the offence. The gang leader is involved in several cases. Learned APP relied upon the contents of affidavit-in-reply filed by prosecution opposing bail. In the reply it is stated that investigation revealed that the stolen mobile phones were received by the co-accused Mustafa Shaikh who was arrested in CR No.123 of 2018 registered with same Police Station for offences under Section 392 r/w 34 of IPC. He was interrogated in the present FIR and arrested on 12th October 2018. As far as accused no.1, the gang leader is concerned, several cases were registered against him. All the cases are relating to the offence of robbery. CR No.I-160 of 2018 was registered against the gang leader in which even the applicant was involved. The said proceedings are pending in the Court. The confessional statement of Rehan Kazi disclosed the involvement of applicant in the offence. The statement of complainant was recorded

u/s.164 of Cr.P.C.. The statement of eye witness was recorded u/s.161 as well as u/s.164 of Cr.P.C.. The statement of witness who had stated that applicant was in the company of co-accused before occurrence of the incident, was also recorded u/s.164 of Cr.P.C.. Learned APP submitted that in view of the evidence against the applicant, Bail Application may be rejected.

6. The FIR was registered on 9th October 2018 in relation to the incident which had occurred on 5th October 2018. The FIR was registered against unknown persons u/s.392, 411, 34 of IPC. Apparently, although the incident had occurred on 5th October 2018, the FIR was lodged after four days. The statement of complainant was recorded u/s.161 as well as u/s.164 of Cr.P.C. According to him two unknown persons were involved in the crime. They came on motorcycle. The pillion rider snatched the cell phone from his possession and they fled away from the place of incident. Undisputedly the applicant is not amongst two persons who had snatched the cell phone of the complainant. The record indicate that Mustafa Shaikh, Yasin Shah and Rehan Kazi were arrested in CR No.123 of 2018 registered with the same Police Station and during their interrogation it was revealed that they are involved in the present case. Hence, their custody was sought from other case. Application for seeking custody was preferred before the Court of learned JMFC on 10th October 2018. It is pertinent to note that the said accused were arrested before registration of CR No.I-174 of 2018. Accused no.1 Mustafa Shaikh was arrested on 6th October 2018, Yasin Shah was arrested on 8th October 2018 and Rehan Kazi was arrested on 8th October 2018. Apparently present FIR was registered on 9th October 2018 and on 10th October 2018 their

custody was sought in present case. During the course of investigation statement of alleged eye witness to the incident Amjad Khan was recorded on 24th October 2018. The statement of another witness Shahrukh Shaikh was recorded on 22nd October 2018. The eye witness has stated that on 5th October 2018 he saw the complainant alighting from the auto rickshaw. He was carrying cell phone. Thereafter he saw Zulfikar Jafri riding motorcycle and Mohammed Jafar was pillion rider. They proceeded towards Kalyan Phata. They were followed by Yasin Shah and Rahan Kazi. Yasin Shah was riding the scooty and Rehan Kazi was pillion rider. Rehan Kazi snatched the mobile phone from the hands of complainant and all of them fled away from the place of incident. From the tenor of the said statement it is clear that the applicant was not amongst those persons who were involved in the crime. The prosecution is relying upon the statement of Shahrukh Shaikh. His statement was recorded on 22nd October 2018. He has stated that on 5th October 2018 at about 8.00 pm, he saw Mustafa Shaikh, Yasin Shah, Rehan Kazi, Mohammed Jafri, Jafar Ali Jafri, Zulfikar Afzal Ali and Arbaz Shaikh(applicant). They had discussion and after that they left on two wheeler towards Kalyan Phata. Thereafter he again saw them together and that Rehan Kazi had handed over one cell phone to Mustafa Shaikh. By no stretch of imagination it can be inferred that applicant is involved in the present offence as undisputedly he was not present at the spot of incident and involved in snatching the cell phone of complainant. The prosecution is also relying upon confessional statement of Rehan Kazi. It was recorded on 13th December 2018. It is pertinent to note that on the same day the applicant was arrested. The averments in confession are not fortified by cogent evidence. The said statement also does not indicate that

applicant was involved in snatching the cell phone. It is vaguely stated that he is associated with the co-accused. It is also stated that applicant and co-accused followed the accused after incident of snatching mobile. On 13th December 2018 the said accused has stated that he has voluntarily given confessional statement since he was promised that he would be made approver. This creates doubt about his version. The statement of complainant was recorded u/s.164 of Cr.PC on 21st December 2018. The said statement does not attribute any overt act to the applicant. The statement of the eye witness to the incident was recorded u/s.164 of Cr.PC on 21st December 2018. Even he has not attributed any overt act to the applicant and not shown presence of the applicant at the scene of offence. Shahruxh Shaikh has rejected his version in the statement recorded u/s.164 of Cr.PC on 13th January 2019. Learned advocate for applicant submitted that CR No.I-160 of 2018 was allegedly registered against applicant but there is nothing to show his arrest in that case or his involvement. There is no evidence to show association of the applicant with accused no.1. It is pertinent to note that in the present case there is no semblance of evidence to show his complicity in the crime. He has not been identified as the person who was involved in snatching the mobile phone. There is no recovery from him. In the circumstances, the embargo u/s.21(4) of MCOC Act would not come into play and there would be no impediment in granting bail to the applicant. Hence, I pass following order :

ORDER

- (i) Bail Application is allowed and disposed of;
- (ii) The applicant is directed to be released on bail in CR No.I-174 of 2018 registered with Shil Daighar Police Station, on executing PR

bond in the sum of Rs.25,000/- with one or more sureties in the like amount;

(iii) The applicant shall report Shil Daighar Police Station once in three months on every first Saturday of the month between 11 am and 1 pm till further orders;

(iv) The applicant shall not tamper with evidence;

(v) The applicant shall attend Trial Court proceedings regularly on the date of hearings, unless exempted by the Trial Court.

(PRAKASH D. NAIK, J.)

MST