

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO.121 OF 2021

SAYYED JAVED ALI ANSAR ALI
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicant : Mr. Menezes Joslyn
APP for Respondent No.1 : Mr. V. M. Kagne
Advocate for Respondent No.2 : Mr. Ameya N. Sabnis

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
24-03-2022**

**Date of Pronouncing The Order :
07-06-2022**

ORDER :

1. Present application has been filed by the original informant under Section 439 (2) of Cr.P.C. to challenge the order dated 05-05-2021 passed in Criminal Bail Application No.325 of 2021 by learned Special Judge, MCOC Act, Beed, in Crime No.403 of 2019, registered with Shivaji Nagar Police Station, Beed, for the offence punishable under Section 302, 143, 147, 120-B, 201, 195-A of Indian Penal Code read with Section 3/25, 4/25 of the Arms Act, r.w. Section 7 of the Criminal Amendment Act, read with Section 135, 37 (1), 37 (3) of the

Maharashtra Police Act, read with Section 3(1)(i), 3(2), 3(4) of the Maharashtra Control of Organized Crime Act, 1999.

2. Heard learned Advocate Mr. Menezes Joslyn A. for applicant, learned Advocate Mr. A. N. Sabnis for respondent No.2, and learned APP Mr. V. M. Kagne for respondent No.1-State.

3. It has been vehemently submitted on behalf of the applicant that the learned Judge has failed to consider the basic aspects required for dealing with an application under Section 439 of Cr.P.C. In his application, present respondent No.2 had taken the plea of alibi on the ground that he was present before a Notary at Pune on 19-09-2019 which was the date of incident in Beed. He also submitted documents stating that he was present in the house of ex-minister Mr. Jaydatta Kshirsagar at Mumbai on 18-09-2019 for giving representation of the delegation of Beed Auto-rickshaw Union. This has been considered as a proof by the learned Special Judge and the learned Special Judge has also come to a conclusion that the provisions of Section 2 (d) and 2 (e) of MCOC Act are not *prima facie* made out in view of the fact that only one case is pending against the present applicant that too filed in the year 2011 and the present crime has been committed in the year 2019, it does not

amount to continuing unlawful activity with objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person by using violence or threat of violence or intimidation. The criteria that has been applied by the learned Special Judge for releasing the applicant on bail was wrong. He had not seen the documents on record. Statements of two witnesses were considered who were alleged to be the eyewitnesses and had not taken the name of the present applicant, but he failed to consider that there are statements of other eyewitnesses who have specifically stated that the present applicant was holding a scythe in his hand. Even his name is reflected in the FIR with the same weapon and for the same act. The applicant with co-accused who were holding deadly weapons like Kukri, Scythe, big knife, knife, sword etc., were giving blows by those weapons on the person of the deceased. Such statement has been given by witness Shaikh Afroz Shaikh Bashir under Section 161 and 164 of Cr.P.C. Though his name has not been taken by Shaikh Nisar @ Babbar Shaikh Maheboob, it can be seen that he had come to the place of incident after hearing the noise but then another witness Shaikh Ayub @ Titi Shaikh Yakub has stated that the present applicant holding deadly weapon was rushing along with others towards deceased.

Thereafter, Shaikh Ayub fled from the said place shouting "भागो गुज्जर और पुरे आगये." Another witness Ksuar Babamiya Momin has also stated about the active part by the applicant that is assault by scythe on the person of the deceased. Similar statement has been given by Shaikh Aslam Abdul Razzak under Section 161 as well as Section 164 of Cr.P.C. The learned Special Judge failed to consider the post mortem report in which the Column No.17 gives about 15 injuries and most of them are stab wound and incised wound. The probable cause of death is stated as "shock and haemorrhage due to multiple stab wounds." It was the brutal murder in day light. Further, the activity of the gang collectively is required to be seen. The applicant is the member of Anwarkhan @ Gujjarkhan Mirzakhan gang. Against Anwarkhan there are 12 offences. Even chapter cases were initiated and preventive action was taken against him. Other members of the gang are also involved in many cases. Therefore, taking into consideration all these aspects the bail application ought not to have been allowed.

4. The learned Advocate for the applicant has relied on the decision in *Kavitha Lankesh Vs. State of Karnataka and Ors., Criminal Appeal No.1236 of 2021 (Arising out of SLP (Criminal))*

No.8049 of 2021) and Criminal Appeal No.1237 of 2021 (Arising out of SLP (Criminal) No.5387 of 2021), whereupon reliance was placed on Ranjitsingh Brahmajeetsing Sharma Vs. State of Maharashtra, reported in 2005 (5) SCC 294, in which paragraph No.85 from the Judgment of Prasad Shrikant Purohit Vs. State of Maharashtra, reported in (2015) 7 SCC 440 was considered. The ratio that has been reiterated is that :-

"Therefore, even if one may not have any direct role to play relating to the commission of an "organised crime", but when the nexus of such person with an Accused who is a member of the "organised crime syndicate" or such nexus is related to the offence in the nature of "organised crime" is established by showing his involvement with the Accused or the offence in the nature of such "organised crime", that by itself would attract the provisions of MCOCA."

Further reliance has been placed on the decision in *Criminal Appeal no.418 of 2020 (Prem s/o Chunnilal Yadav (Gwalwanshi) Vs. The State of Maharashtra, by the Division Bench at Nagpur, decided on 09-12-2021)*, wherein relying upon *Kavitha Lankesh (Supra)* on the ground of specific role attributed to each accused and focus of the competent authority while according sanction has been

reiterated.

Further reliance has been placed on *Govind Sakharam Ubhe Vs. The State of Maharashtra (criminal Appeal No.18 fo 2009, decided on 11-06-2009)*, wherein it has been held that :-

“Material creates a strong and grave suspicion leading this Court to presume that appellant is member of organized crime syndicate and is involved in its continuing unlawful activities, therefore, the Special Judge has rightly rejected the discharge application.”

Further in this case it was observed that :-

“The words ‘in respect of which more than one charge-sheet have been filed’ cannot go with the words ‘a member of a crime syndicate’ because in that case, these words would have read as ‘in respect of whom more than one charge-sheet have been filed.’”

5. Further, in *Ranjitsing Brahmajeetsing Sharma (Supra)* the Hon’ble Supreme Court held that :-

“The order granting or refusing bail must demonstrate application of mind as to why applicant has been granted or denied privilege of bail.”

It has been submitted that though a detailed order has been passed, yet it is based on the material which ought not to have been

considered by the learned Special Judge or the learned Special Judge has failed to consider proper record before him.

6. Per contra, the learned Advocate for respondent No.2 has vehemently submitted that only one previous case is against the present respondent No.2. It was Sessions Case No.106 of 2011 registered by MIDC Police Station, Paithan and it was under Section 399, 402, 353, 307 r.w.34 of IPC and other sections under the Arms Act and Bombay Police Act. Respondent No.2 has been acquitted by the competent Court on 28-10-2021. Therefore, no case except the present one is pending against him. The entire charge-sheet would show that he never acted as member of the crime syndicate and in fact his presence itself was not stated by two of the prosecution witnesses namely the tea hotel owner Shaikh Salim Shaikh Usman. Though the presence of respondent No.2 was stated in the FIR, it was not made clear as to whether he had used the scythe and that fact has been noted by the Special Judge. It is then stated that another witness Shaikh Nisar @ Babbar Shaikh Maheboob whose statement has been recorded by the Investigating Officer on 27-09-2021 had not seen the actual murder nor he had taken the name of the applicant. Thereafter, the learned Special Judge has taken

efforts to consider as to whether the provisions of MCOC Act are *prima facie* made out against present respondent No.2 and relying upon various authorities it has been observed that *prima facie* those provisions are not attracted. Another fact has also been considered that when there is evidence on record in the form of a document that respondent No.2 was not present at the spot, but he was present at a different city which is about five to six hours of journey, then it would be the fit case where the discretion would be exercised by the concerned Court in favour of the accused. No fault can be found in the detailed order passed by the learned Judge and there is no necessity to curtail the liberty that has been restored in favour of respondent No.2.

7. At the outset, as regards respondent No.2 is concerned now, it appears that the only case in which he was involved as an accused has been decided by the learned Additional Sessions Judge, Aurangabad on 28-10-2021 and he has been acquitted from the said case. That means, except the present case there is no other case in which he is involved. The prosecution has come with a case that he is the member of a particular gang and all the accused persons together are the members of crime syndicate. The documents on

record would definitely show that almost each of the accused is involved in many cases and some of them are facing only the present case i.e. Special Case (MCOCA) No.51 of 2020. It has been alleged that all the accused persons who are 18 to 19 in number involved themselves in the act of extortion, dacoity, and in that process they are causing grievous hurt or even tried to commit murder of the police officers. As aforesaid, in *Govind Sakharam Ubhe (Supra)*, *Prem s/o Chunnilal Yadav (Supra)* what is important is to see whether the concerned accused is acting as a member of crime syndicate. The definition of the continuing unlawful assembly under Section 2 Sub-clause (d) of the MCOC Act provides that such activity must be undertaken as a member of an organised crime syndicate or on behalf of such syndicate and Sub-clause (e) states in respect of which more than one charge-sheet have been filed before a competent Court. Therefore, in *Govind Sakharam Ubhe (Supra)* it was observed that :-

“In respect of which more than one charge-sheet have been filed’ cannot go with the words ‘a member of a crime syndicate’ because in that case, these words would have read as ‘in respect of whom more than one charge-sheet have been filed’.”

Thereafter, the Division Bench has further elaborated the same finding and observed that :-

“Therefore, if within a period of preceding ten years, one charge-sheet has been filed in respect of organized crime committed by the members of a particular crime syndicate, the said charge-sheet can be taken against a member of the said crime syndicate for the purpose of application of the MCOCA against him even if he is involved in one case. The organized crime committed by him will be a part of the continuing unlawful activity of the organized crime syndicate. What is the important is the nexus or the link of the person with organized crime syndicate. The link with the ‘organized crime syndicate’ is the crux of the term ‘continuing unlawful activity’. If this link is not established, that person cannot be roped in.”

Therefore, it is not necessary that all the accused persons should be accused in one case previously investigated. It would be very premature to comment that there is absolutely no connection between the crimes those have been committed by the co-accused and the part/role played by the present applicant.

8. The learned Special Judge has almost accepted finally the plea of alibi taken by respondent No.2 that he was present in Pune and on the previous day at Mumbai. Plea of alibi cannot be so accepted

without proof by a Court dealing with bail application. The fact which is to be proved by an accused by adducing cogent evidence, cannot be accepted without evidence at a interim stage. At the most, it can be considered as a supplementary ground to the main ground. It can be certainly seen from the charge-sheet that the learned Special Judge has not considered the statements of the other witnesses apart from the contents of the FIR. Presence of respondent No.2 has been stated by Shaikh Afroz Shaikh Bashir whose statement has been recorded on 21-09-2019 under Section 161 of Cr.P.C., and he has specifically stated that the present respondent No.2 along with other co-accused who were holding Khanjar, Kukri, Scythe, Knife, Sword went to the hotel of one Shaikh Salim Shaikh Usman where deceased Sayyed Sajed Ali was sitting. All of them went running towards Sayyed Sajed and assaulted him brutally. Similar statement has been made by him in his statement under Section 164 of Cr.P.C. Witness Shaikh Ayub @ Titi Shaikh Yakub in his statement recorded under Section 161 of Cr.P.C. on 22-09-2019 has also made the said statement and he is also one of the eyewitnesses. Witness Pathan Khurramkhan Bismillakhan has also stated in his statement under Section 161 as well as 164 of Cr.P.C. about the presence of the present respondent

No.2 along with weapons and all of them were assaulting deceased Sajed. Similar statement has been made by Shaikh Sarfaraj @ Baba Shaikh Bashir under Section 161 of Cr.P.C. This fact taken together with post mortem report would show that deceased was brutally attacked. In the FIR it is stated that Sajed Ali had lodged complaint/ FIR under Section 307 of IPC and also about the illegal demand of amount by way of extortion against accused No.1. Deceased was getting threats by accused No.1 Anwarkhan and when he had refused to withdraw that previous case, he has been attacked and murdered.

9. Now turning towards the observations by the learned Special Judge that there is no continuous criminal activity. The aforesaid decisions are not considered by him and further as regards pecuniary gain is concerned, it is not even necessary to consider the same at this stage. Further the word, "other advantage for himself or any other person," used in Section 2 of MCOC Act have been recently reiterated in *Abhishek Vs. The State Of Maharashtra* by Hon'ble Apex Court (Criminal Appeal No.869 of 2022, Arising Out of SLP (CRL.) NO. 1157 of 2022, decided on 20-05-2022), wherein the decision by the Division Bench of this Court in *State of Maharashtra*

Vs. Jagan Gagansingh Nepali and Anr., reported in (2011) SCC OnLine Bombay 1049, holding that the crimes of bodily offence could be the crimes committed with an intention to establish supremacy and which could lead to gains other than pecuniary benefit or advantage has been confirmed. Here, the previous case that was filed by the deceased was with the specific allegation that he was tried to be murdered on the count of refusal to pay money.

10. When the learned Special Judge has misinterpreted the provisions and has not taken into consideration the decisions by this Court, then the order granting bail to respondent No.2 cannot be allowed to sustain. There was clear evidence about specific role played by the accused and there are eyewitnesses to the incident and the plea of alibi ought not to have been considered at the stage of bail when such evidence in the form of statements of eyewitnesses under Section 161 and 164 of Cr.P.C. were before the concerned Court. Even at this stage, it cannot be said that the statement under Section 164 of Cr.P.C. which is on oath before Magistrate ought to have been given more importance than the documents to support plea of alibi. The discretion has been wrongly applied, and therefore, impugned order deserves to be set aside. Hence, the following order.

ORDER

- 1) Application stands allowed.
- 2) The order passed by learned Special Judge (MCOCA), Beed in Crime No.403 of 2019 dated 05-05-2021, releasing respondent No.2 under Section 439 of Cr.P.C., is hereby set aside.
- 3) The bail bonds given by respondent No.2 stands cancelled.
- 4) Respondent No.2 Shaikh Babbar Shaikh Yousuf to surrender before learned Special Judge (MCOCA), Beed, on or before 10-06-2022 before 05.00 p.m., and thereafter, the learned Special Judge to take up the steps as per the law.
- 5) In case of failure on the part of respondent No.2 to surrender on or before the given date and time, the learned Special Judge would be at liberty to take up the legal steps to secure presence of respondent No.2.

(SMT. VIBHA KANKANWADI)
JUDGE

LATER ON :

After pronouncing the order, learned Advocate Mr. A. N. Sabnis for respondent No.2 prays for Stay of the order as respondent No.2 intends to approach the Higher Court. In view of this, the operation of this order is stayed till 30-08-2022.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.