

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.329 OF 2022
AND
INTERIM APPLICATION NO.328 OF 2022
IN
CRIMINAL APPEAL NO.111 OF 2022

Shakir Nasir Pathan @ Motha Pathan	Applicant
versus	
The State of Maharashtra	Respondent

AND
INTERIM APPEAL NO.452 OF 2022
IN
CRIMINAL APPEAL NO.119 OF 2022

Ganesh Suresh Wagh @ Ganya Kavlya	Applicant
versus	
The State of Maharashtra	Respondent

Mr.Hrishikesh Mundargi i/by Ms.Paavani Chadha, Advocate for applicants in IA Nos.329 and 328 of 2022.
Mr.Ajay Patil, APP, for State.
Mr.Aniket Nikam with Mr.Piyush Toshnival and Mr.Vivek Arote, Advocate for applicant in IA No.452 of 2022.
Mr.Arfan Sait, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 11th March 2022

PC :

1. Interim Application Nos.329 of 2022 and 328 of 2022 in Criminal Appeal No.111 of 2022 are preferred for suspension of sentence/bail and suspension of fine by convict Shakir Nasir Pathan (accused No.5). Whereas Interim Application No.452 of 2022 in Criminal Appeal No.119 of 2022 is preferred by convict Ganesh Suresh Wagh @ Ganya Kavlya (accused no.1).

2. The accused were tried for the offences punishable under Sections 395, 397, 307, 387, 120B, 143, 144, 147, 506, 427, 323, 504 r/w Section 149 of Indian Penal Code. Section 3/25 of The Arms Act, Section 135 of Bombay Police Act and Section 3(1)(ii), 3(2) and 3(4) of Maharashtra Control of Organized Crimes Act.

3. The case of prosecution is that the informant (PW-11) is the resident of Shivpuri Chowk, Nashik. He is a fruit vendor. On 31st May 2016 he was proceeding to his house. Accused No.5 Shakir Nasir Pathan, Saidya Shaikh (Juvenile), Ganesh Suresh Wagh (accused no.1), Mukesh Rajput (accused no.4) and 4 to 5 other members of Tipper Gang were gathered at Shubham Part road. Informant was called by accused no.5. The informant went to him. Accused no.5 was holding pistol. The accused nos.1 and 4 were armed with iron rods. Saidya Shaikh (Juvenile) was holding sword. Accused no.5 questioned the first informant and demanded Rs.5 lakh. The accused no.1 abused him and stated that he has money as he has sold his house, he is fruit merchant, and he should give the money. He was threatened that if he does not oblige, his parents would be killed. Accused no.5 abused informant and applied pistol on his left ear and stated that if he raise alarm he would be killed. He was assaulted by fist and kick blows. Accused Saidya Shaikh (Juvenile) assaulted the informant by sword. He received injury on left side of chest. Cash of Rs.7,300/- was forcibly taken. The FIR was registered by first informant (PW-11) with Ambad Police Station. Provisions of MCOC Act were invoked.

4. By judgment and order dated 28th September 2021 the Special Court under MCOC Act convicted the applicants. The accused nos.1

and 5 were convicted under Sections 307, 387, 506(II) and 397 of IPC. Applicants were also convicted u/s.3(1)(ii) and Section 3(4) of MCOC Act. The accused no.4 was convicted under Section 3(4) of MCOC Act. For conviction under Section 307 KPC, the applicants were sentenced to suffer imprisonment of ten years and fine of Rs.3,000/- each. For conviction under Section 387 r/w 34 of Indian Penal Code, the applicants were sentenced to suffer imprisonment of five years and fine of Rs.2,000/- each. The applicants were sentenced to suffer imprisonment of six months, one month and eight years for conviction under Section 506(II) r/w 34 of IPC, 426 r/w 34 IPC and 397 of IPC. They were sentenced to imprisonment of 10 years and fine of Rs.5,00,000/- each for conviction under Section 3(i)(ii) of MCOC Act. The applicant and accused no.4 were sentenced to suffer imprisonment of eight years and fine of Rs.5,00,000/- each for conviction under Section 3(4) of MCOC Act.

5. Learned advocate appearing for applicant in Interim Application Nos.328 and 329 of 2022 submitted that the applicant (accused no.5) is in custody for a period of about 5 years 7 months. The appeal may not come up for hearing within short span of time. The applicant has not caused injury to the first informant. The co-accused Mukesh Rajput (accused no.4) has been granted bail by this Court by order dated 13th November 2021 with direction to deposit 50% of the fine amount. The applicant is entitled for bail on the ground of parity. Learned advocate relied on the judgment of Supreme Court in the case of **Dinesh Kumar Sinha Vs. State of Jharkhand through CBI**¹, order passed by Supreme Court in the case of **Ramnik Singh Vs. Intelligence Officer, DRI**² and order of Supreme

1 (2009)6-SCC-628

2 2013-SCC Online-SC-2013

Court dated 5th October 2021 in **Saudan Singh Vs. The State of Uttar Pradesh**³.

6. Learned APP submitted that the case of applicant can be distinguished from the case of accused no.4 Mukesh Rajput. The applicant was armed with pistol at the time of incident. The applicant has been convicted on two counts under the provisions of MCOC Act. The co-accused Mukesh Rajput was convicted u/s.3(4) of MCOC Act. Antecedents of said accused were not brought to the notice of the Court while considering his application. 30 cases were registered against applicant Shakir Pathan at various Police Stations. Amongst the cases registered the prosecution has considered 20 cases while invoking provisions of MCOC Act.

7. The father of applicant Shakir Pathan has filed an affidavit in this Court dated 4th March 2022. Learned counsel for applicant submitted that most of the cases registered against him were for minor offences. In some cases he has been acquitted and some cases are pending. The co-accused whose sentence has been suspended by this Court, was also having criminal antecedents and nine cases were registered against him. In the affidavit it is stated that amongst 20 cases considered for invoking MCOC provisions, CR No.205/2009, CR No.311/2009, CR No.312/2009, CR No.313/2009, CR No.314/2009, CR No.316/2009, CR No.544/2007, CR No.148/2007, CR 192/2010, CR 310/2010, CR 544/2010, CR 148/2010, CR 414/2010 are pending. Punishment provided for said offence is less than three years. In CR No.369/2010 and CR No.169/2010 he has been acquitted. In CR No.414/2010 he could not get information. In CR Nos.151/2010, 163/2010 also he could not get information. CR

³ Special Leave to Appeal (Cri.) No.4633/2021

No.301/2010 is pending against applicant. Co-accused has been acquitted. In CR No.303/2010 name of applicant is not appearing in online roznama. Co-accused is acquitted. CR No.317 of 2020, CR No.331/2010 and CR No.404/2010 are pending but co-accused is acquitted.

8. Learned advocate for the applicant in Interim Application No.452 of 2022 submitted that the applicant Ganesh Wagh @ Ganya Kavlya is in custody from the date of arrest. He has undergone substantial sentence. There are serious discrepancies in the evidence. It is the case of prosecution that he was armed with iron rod. Similar role was attributed to the co-accused Mukesh Rajput. The co-accused Mukesh Rajput was granted bail and sentence has been suspended. The applicant is entitled for bail on the ground of parity. In other cases shown pending against him, the applicant has been granted bail. No role of assault is attributed to applicant. There are discrepancies in evidence.

9. Learned APP submitted that the applicant has been convicted under the provisions of MCOC Act. He is the gang leader. About 32 cases were registered against him. The case of applicants and the co-accused who has been granted bail by this Court pending appeal, can be distinguished. While granting bail to the co-accused the antecedents of the said accused were not brought to the notice of Court. The applicant is convicted in another case for the offences under MCOC Act. He had preferred application for suspension of sentence in the said case which has been rejected by this Court by order dated 28-6-2018. The applicant is also in custody in relation to the said case. Applicant had also preferred Special Leave Petition

before Supreme Court which has been disposed of by order dated 4-3-2022 with observation that in case he is granted bail/suspension of sentence in other case, it will be open for him to file fresh application for suspension of sentence.

10. From the submissions of learned APP it can be gathered that 30 cases were registered against applicant Shakir Pathan @ Motha Pathan. Some cases are disposed off. As against Ganesh Wagh @ Ganya Kavlya, 32 cases were registered. Ganesh Wagh is the gang leader of Tipper Gang. Both the applicants are involved in the present case.

11. The co-accused Mukesh Rajput has been granted bail by this Court by suspending sentence vide order dated 30-11-2021. He was convicted for the offences under IPC as well as under Section 3(4) of MCOC Act. He has been acquitted for offence under Section 3(1)(ii) of MCOC Act. The applicants were convicted under the provisions of IPC and Section 3(1)(ii) of MCOC Act and 3(4) of MCOC Act. The order dated 30-11-2021 passed by this Court does not indicate that the Court has taken into consideration the antecedents of the said accused. From the report filed by learned APP it is apparent that large number of cases were registered against both the applicants. Although some cases are resulting in acquittal several other cases are pending against applicant. The applicants are also convicted for the offences under Section 307 of IPC and Section 397 of IPC and sentenced to suffer imprisonment of ten years and eight years. The applicant Ganesh Wagh has been convicted in another case where provisions of MCOC Act were invoked. Considering the circumstances, no case is made out for suspension of sentence.

Hence, I pass following order :

ORDER

- (i) Interim Application Nos.329/2022, 328/2022 and 452 of 2022 are rejected;
- (ii) Hearing of Criminal Appeal Nos.111/2022 and 119/2022 is expedited;
- (iii) Liberty to mention the appeals for final hearing after paper book is ready.

(PRAKASH D. NAIK, J.)

MST