

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 1100 OF 2021

SANTOSH
SUBHASH
KULKARNI

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Date: 2022.08.11
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Pawan Anil Aadhatrao ...Applicant

Versus

The State of Maharashtra ...Respondent

Mr. Aniket Nikam, i/b Mr. Piyush Toshnival, for the
Applicant.

Ms. P. N. Dabholkar, APP for the State/Respondent.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 14th JUNE, 2022

PRONOUNCED ON: 11th AUGUST, 2022

ORDER:-

1. The applicant – accused no.10, who is arraigned along with 26 co-accused in CR No.244 of 2018, registered with Pandharpur City Police Station, District Solapur, for the offences punishable under Section 120B, 302, 303, 201, 143, 147, 148 and 149 of the Indian Penal Code, 1860 (“the Penal Code”), Sections 3 and 4 read with Section 25 and Section 5 read with Section 27 of the Arms Act, 1959 and Section 135 of the Maharashtra Police Act, 1951 and Sections 3(1)(i), 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (“MCOC Act”) has preferred this application to enlarge him on bail.

2. The prosecution case can be stated in brief as under:

(a) Gopal Bajirao Ankushrao (A18) is the leader of a gang styled as "Sirji". Gopal (A18) and his associates and hirelings have created a reign of terror in and around Pandharpur city. Grave offences of murder, attempt to commit murder, kidnapping for ransom extortion and causing grievous hurt are committed by the members of the Sirji gang. Sandip Pawar (the deceased), the son of the first informant (Surekha Pawar), was a Councillor of Pandharpur Municipal Council. The deceased was active in social work. The deceased resisted illegal and unlawful activities of Gopal (A18) and his associates. Resultantly, the clout of Gopal (A18) and Sirji gang was waning. Thus, Gopal (A18) and the members of his gang had a grudge against the deceased.

(b) It would suffice to note that the prosecution has attributed myriad motives to an individual accused or a group of accused, ranging from the deceased having been accused of the murder of Vinayak Kamble, who was stated to be a near relative of Gopal (A18), Sandip Adhatrao (A6) and a close friend of Sunil Wagh (A25), Vishal Pawar (A16) and Vicky @ Shital More (A5), to Akshay Survase (A1) was inimically disposed towards the deceased on account of

previous disputes, to Pundlik Vanare (A2) and Bhaktraj Dhumal (A4) had strained relations with the deceased on account of an altercation in a road rage, to Sachin Waghmare (A9) was demanding more amount than the agreed consideration from the deceased etc.

(c) The prosecution alleges that actuated by diverse motives to eliminate the deceased, on 16th December, 2017, initially accused Gopal (A18), Shital @ Vikas @ Vicky More (A5), Sandip Adhatrao (A6) and Sunil Wagh (A25) hatched a conspiracy to commit the murder of the deceased. For the said purpose Sunil Wagh (A25) approached Dada Ghasani @ Piraji Lagade (A20), Digambar @ Diga Janrao (A21), Shahrukh Shiakh (A22) and Eknath @ Natha Shinde (A23) and they were drafted in as confederates in the conspiracy. Sunil (A25), allegedly at the instigation of Gopal (A18), the gang leader, invited Dada Lagade (A20), Digambar (A21), Shaharukh Shaikh (A22) and Eknath Shinde (A23) at Shetphal Chowk, Taluka Mohol and handed over two pistols, two sharp scythes and Rs.50,000/- to them and made arrangements for their stay at Devkate Mala, Pandharpur. Another co-accused Bablu Shinde (A27) was also drawn into the conspiracy and arrangements for his stay were also made

at Devkate Mala. Eventually, the conspiracy was hatched to commit the murder of deceased on 18th March, 2018. Deadly weapons and masks were provided to the assailants.

(d) The prosecution alleges that in pursuance of the said conspiracy Akshay Survase (A1) and Sandip Adhatrao (A6) had entrusted the task of keeping a watch on the deceased to Pundalik Wanare (A2), Bhaktraj Dhumal (A4), Rupesh Survase (A8), Sachin Waghmare (A9) and Pawan Adhatrao (A10), the applicant herein, and Chintya @ Abhishek Survase (absconding A17).

(e) On 18th March, 2018, when the deceased was having tea at Hotel Shriram Bhojnalaya, Station Road, Pandharpur, Akshay Survase (A1), Manoj Shirsikar (A3), Sandip Adhatrao (A6), Onkar Jadhav (A11), Rais Khan (A14), Vishal Pawar (A16), Dada @ Piraji Lagade (A20), Digambar Janrao (A21), Shahrukh Shaikh (A22), Eknath Shinde (A23), Bablu (Absconding A27), Sonu Pukle (A13) and Sagar @ Khandu Bansode (A24) came thereat on the motorcycles. They parked their motorcycles on the roadside near Sahil Computers. They barged into Hotel Shriram Bhojnalaya. Sandip (A6), Onkar (A11), Digambar (A21), Bablu (A27) were armed with pistols. They shot at the deceased. Akshay

(A1), Manoj (A3), Rais Khan (A14), Dada @ Piraji (A20) and Sagar (A24) gave blows by means of the scythes on the head, face, hands, chest and ears of the deceased in quick succession. In a broad daylight, by creating a sense of terror, the accused thus brutally assaulted the deceased. After the assailants fled away, the deceased was initially shifted to Apex Hospital, Pandharpur and therefrom he was taken to Ashwini Hospital, Solapur. The deceased succumbed to the injuries.

3. The first informant approached Pandharpur Police Station and lodged the report leading to registration of CR No.244 of 2018. Investigation commenced. During the course of investigation, the accused came to be arrested. The applicant was arrested on 20th July, 2018 as the investigation revealed that the applicant was also a member of the organized crime syndicate of which Gopal (A18) was the leader, and the applicant was also a confederate in the conspiracy to eliminate the deceased: had kept a watch on the movements of the deceased and had informed the co-accused about the location at hotel Shriram Bhojnalaya, on the day of occurrence.

4. As it transpired during the course of investigation that Gopal (A18) was the kingpin of Sirji gang, an organized crime syndicate, and offences were committed with impunity by the members of the said organized crime syndicate, with the prior approval of the competent authority under Section 23(1) (a) the offences punishable under Section 3 of the MCOC Act were added. Post completion of investigation, with the previous sanction of the competent authority under Section 23(2), the Special Court took cognizance of the offences punishable under MCOC Act, 1999.

5. The applicant has preferred this application asserting, *inter alia*, that he is neither the assailant nor any overt act has been attributed to the applicant. The prosecution has not also attributed any motive to the applicant. The only role attributed to the applicant, of keeping a watch on the deceased is also not, *prima facie*, borne out by the material on record. None of the eye witnesses have stated about the presence of the applicant either before or at the time or after the occurrence. The statements of the two witnesses, who stated to have seen the applicant keeping a watch on the deceased, and that on the day of occurrence they had also seen the applicant at the place of occurrence, were recorded

under Section 164 of the Code of Criminal Procedure after about two years of the occurrence and arrest of the applicant. Thus, no reliance can be placed on such statements.

6. The prosecution has resisted the application by filing an affidavit-in-reply. It is contended that the co-accused Gopal (A18) is a dreaded gangster. As many as six crimes have been registered against Gopal (A18), apart from the case at hand. In one of the cases, the said gang-leader was convicted by the trial Court. However, the conviction was reversed by the High Court. Rest of the cases are awaiting trial. The gang led by Gopal (A18) has created a reign of terror in and around Pandharpur city. The applicant is a new entrant in the organized crime syndicate, run by Gopal (A18). The applicant shares a close relationship with Gopal (A18) and Sandip (A6), as they belong to the same community.

7. It is contended that the applicant and co-accused had a recce of the places, the deceased often frequented. On the day of occurrence, the applicant allegedly gave information about the location of the deceased at hotel Shriram Bhojnalaya and thereupon the co-accused came thereat and assaulted the deceased. A mobile phone handset and the motorcycle used in the commission of the offences have been seized at the

instance of the applicant. Call detail records of sim No.7249590607, which was used by the applicant reveal that the applicant was in constant touch with co-accused Akshay (A1), Rupesh (A8), Sandip (A6) and Shital (A5). Moreover, two of the protected witnesses, whose statements have been recorded under Section 164 of the Code, have stated that prior to the occurrence, the applicant and co-accused Rupesh (A8) were roaming in the vicinity of Bhadule Chowk and Arihant Optical and, on the day of occurrence, they had followed the deceased. Banking upon the aforesaid statements and call detail record, the prosecution alleges that the complicity of the applicant is squarely made out.

8. I have heard Mr. Nikam, the learned Counsel for the applicant and Ms. Dabholkar, the learned APP for the State, at length. With the assistance of the learned Counsels for the parties, I have perused the report under Section 173 of the Code, the documents annexed with it, averments in the application and contentions in the affidavit-in-reply.

9. Mr. Nikam, the learned Counsel for the applicant, submitted that the implication of the applicant for the alleged murder of the deceased is sans credible material. Invocation of the provisions contained in MCOC Act, 1999 against the

applicant stands on an even weaker foundation. Apart from the offence in question, there is not a single antecedent to the credit of the applicant. Thus, the allegation of the prosecution that the applicant is a member of the organized crime syndicate is wholly unsustainable. In the circumstances, according to Mr. Nikam, the interdict contained in Section 21(4) of the MCOC Act is not at all attracted qua the applicant.

10. On the aspect of the complicity for the subject offence, Mr. Nikam would urge that the prosecution does not allege that the applicant was one of the assailants. None of the alleged eye witnesses named the applicant. In the alleged conspiracy, the role attributed to the applicant is that of keeping a watch on the deceased. However, there is no material in support of the said allegation. Thus, in order to bolster up its case, the prosecution has belatedly resorted to the device of recording statements of two witnesses, under Section 164 of the Code, who were not at all interrogated by the Investigating Officer during the course of the investigation. The statements recorded after about two years of the occurrence are of inherently weak character. Even the Call detail record, pressed into service by the prosecution,

according to Mr. Nikam, is of little assistance to the prosecution as it does not indicate that on the day of occurrence there was such an exchange of calls that would suggest the complicity of the applicant.

11. Since the applicant is in custody for almost four years and having regard to the number of the accused and the number of the witnesses the prosecution proposes to examine, the prospect of conclusion of the trial, within a reasonable time is very bleak. Thus, the further detention of the applicant is wholly unwarranted, submitted Mr. Nikam.

12. Per contra Ms. Dabholkar, the learned APP, stoutly submitted that specific role of keeping a watch on the movements of the deceased and apprising the assailants about the location of the deceased has been attributed to the applicant. In the light of the brutal assault perpetrated on the deceased in a broad day light in pursuance of the criminal conspiracy, wherein more than 20 accused were the confederates, the aforesaid role attributed to the applicant cannot be said to be inconsequential. Apart from the statements of two witnesses that they had seen the applicant and co-accused Rupesh (A8) roaming in the vicinity of the scene of occurrence, there is material in the form of the call

detail record to show that in proximity to the time of occurrence the applicant had received a call from co-accused Rupesh (A8).

13. Thus, having regard to the totality of the circumstance, especially the reign of terror created by the organized crime syndicate led by Gopal (A18), the applicant does not deserve the exercise of discretion. There is a strong possibility of applicant reviving the activity of the Sirji gang by joining hands with the absconding accused. Thus, the application be rejected, urged the learned APP.

14. I have given anxious consideration to the rival submissions canvassed across the bar. First and foremost, it may be apposite to consider the invocation of the provisions contained in MCOC Act, 1999 qua the applicant. The prosecution alleges that Gopal (A18) is the leader of the organized crime syndicate, "Sirji". As many as six crimes for grave offences have been registered against Gopal (A18), apart from the offences in question. In all the six cases, which are punishable with imprisonment for more than three years, cognizance has been taken by the jurisdictional Court. In two cases Gopal (A18) has been acquitted. However four cases are subjudice.

15. As regards the antecedents of the applicant, the prosecution asserts that the applicant is a new entrant to the said organized crime syndicate. Apart from the offense in question, no other crime is registered against the applicant. Thus, there are no antecedents to the credit of the applicant. Undoubtedly, it is not the requirement of law that two charge-sheets for the offences punishable with more than three years imprisonment must have been lodged against each member of the organized crime syndicate. If it could be shown that the members of the organized crime syndicate indulged in continuing unlawful activity, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, with the object of gaining pecuniary benefits or undue economic or other advantage, the offence of “organized crime”, as envisaged by MCOC Act, 1999, can be said to have been made out. Nonetheless, the fact that there are no antecedents against a person, who is alleged to be a member of the organized crime syndicate, cannot be said to be wholly immaterial or inconsequential. In the absence of criminal antecedent, the element of existence of sufficient material to show that such person is a member of the organized crime syndicate warrants careful consideration.

16. Reverting to the facts of the case, it is pertinent to note that the prosecution does not allege that the applicant was either the assailant or a member of the unlawful assembly in prosecution of the common object of which the deceased was done to death. At this stage, *prima facie*, it appears that none of the alleged eye witnesses to the occurrence have stated that the applicant either participated in the assault upon the deceased or otherwise present in or around hotel Shriram Bhojnalaya at the time of the alleged assault. The role attributed to the applicant, in general, is that of being a confederate in the conspiracy to eliminate the deceased, and, in particular, of keeping a watch on the movements of the deceased. To this end, primarily, two circumstances are banked upon by the prosecution. One, the statements of two confidential witnesses recorded under Section 164 of the Code, before the learned Magistrate. Two, the call detail record in respect of the cell-phone allegedly used by the applicant.

17. The first of the two confidential witnesses informed the learned Magistrate that prior to the day of incident, the applicant and co-accused Rupesh (A8) were seen roaming around Bhadule Chowk and Arihant Optical. On the day of

occurrence, the applicant and co-accused had followed the deceased. The second of the confidential witnesses informed the learned Magistrate that he learned from one Rahul Kaulge that the applicant and co-accused Rupesh (A8) were keeping a vigil on the movements of the deceased. On the day of occurrence, they had kept watch on the deceased since 8.00 am. in the morning. The said witness further claimed that a couple of days prior to the occurrence he had sounded of the deceased that few boys were following whom, to which the deceased paid no heed. Immediately preceding the occurrence, according to the second witness, he had seen the applicant and co-accused Rupesh (A8) following the deceased to hotel Shriram Bhojnalaya.

18. The submission on behalf of the applicant that the veracity of the claim of the aforesaid confidential witnesses become suspect as their statements came to be recorded belatedly cannot be lightly brushed aside. The statements of both confidential witnesses came to be recorded on 24th January, 2020. The incident occurred on 18th March, 2018. The applicant came to be arrested on 20th July, 2018. There is a time-lag of almost 22 months in recording the statements of the confidential witnesses from the date of the

occurrence. In fact, the second confidential witness, who professes to throw light on the details of the alleged surveillance by the applicant and Rupesh (A8) claimed that he was working in the office of the deceased. The delay, in such circumstances, cannot be said to be immaterial or inconsequential.

19. The second circumstance of being in constant touch with the co-accused now deserves consideration. If the second confidential witness is to be believed, on the day of occurrence, the applicant and co-accused Rupesh (A8) were seen continuously talking on phone with 2 to 3 other persons in the vicinity of the scene of occurrence. The prosecution has relied upon the record of the call details.

20. I have perused the said record. Indeed, the record indicates that the applicant had telephonic conversation with co-accused Akshay (A1), Rupesh (A8), Sandip (A6) and Shital (A5) over a period of time. What is of critical significance is the record of the conversation on the day of occurrence, especially in the light of the role attributed to the applicant. On the night intervening 17th and 18th March, 2018, at about 00.40 am. the applicant had an incoming SMS from Akshay (A1) and on the day of occurrence at about 1.08 pm. the

applicant had an incoming call from Rupesh (A8). The incident allegedly occurred at about 1.00 pm. on 18th March, 2018. The aforesaid call detail record, in the facts and circumstances of the case, *prima facie*, cannot be said to be of such frequency, duration or proximity as to lend support to the statement of the second confidential witness that the applicant and co-accused Rupesh (A8) were seen continuously speaking on their phones with 2 to 3 persons, after they allegedly followed the deceased to hotel Shriram Bhojnalaya.

21. I find substance in the submission of Mr. Nikam that in the facts and circumstances of the case, the fact that the applicant had received a single call from co-accused Rupesh (A8) in proximity to the time of occurrence, by itself, may not form a strong incriminating circumstance. The further submission of Mr. Nikam that the applicant had telephonic conversation, at different points of time, with four of the co-accused, who also happened to be the residents of Pandharpur, *prima facie*, does not lead to the only hypothesis of the applicant being a confederate in alleged conspiracy, cannot be said to be without substance, especially in the absence of any overt act or other strong incriminating

circumstance to connect the applicant with the alleged offences.

22. The last circumstance of the recovery of the mobile phone handset and Bajaj Pulser motorcycle bearing No.MH-13/CL-2350, in the house search of the applicant on 24th July, 2018, *prima facie*, seems to be a case of direct seizure. It is not the case of the prosecution that the mobile phone handset and the motorcycle were recovered pursuant to a discovery made by the applicant. The aspect as to whether the Bajaj Pulser motorcycle was used by the applicant in the commission of the offences, as alleged by the prosecution, is a matter for trial.

23. In the backdrop of the aforesaid nature of the material relied upon by the prosecution to implicate the applicant, the absence of any criminal antecedent of the applicant assumes significance. Indisputably, the prosecution case reveals that the deceased was done to death in a broad day light by the assailants armed with deadly weapons. The involvement of multiple accused is, *prima facie*, borne out by the nature of the occurrence and the injuries found on the person of the deceased. However, qua the applicant, the

material relied upon by the prosecution is of such nature that the prayer for bail becomes sustainable.

24. In the totality of the circumstances, qua the applicant, the interdict contained in Section 21(4) of the MCOC Act, 1999 does not seem to operate.

25. In any event, the applicant has been in custody for more than four years. Having regard to the number of accused as well as the witnesses which the prosecution proposes to examine, there does not seem to be a realistic prospect of conclusion of the trial within a reasonable period. In the context of the nature of the accusation against the applicant and the material in support thereof, further detention of the applicant as an undertrial prisoner does not seem to be warranted.

26. I am, therefore, persuaded to exercise the discretion in favour of the applicant.

27. Hence, the following order:

: O R D E R :

(i) The application stands allowed.

(ii) The applicant – Pawan Anil Adhatrao be released on bail in CR No.244 of 2018, registered with

Pandharpur City Police Station, District Solapur, on furnishing a P. R. Bond in the sum of Rs.50,000/-, with one or two sureties in the like amount, to the satisfaction of the learned Special Judge.

- (iii) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to any of the prosecution witnesses.
- (iv) The applicant shall not contact any of the co-accused and indulge in the activities identical to one for which he has been arraigned in this case.
- (v) The applicant shall furnish his permanent residential address and contact details to the Police Inspector, Pandharpur City Police Station, within a period of one week of his release from the prison, and intimate the change, if any.
- (vi) The applicant shall mark his presence at Pandharpur City Police Station on the first Monday of every Month in between 10.00 am. to 12.00 noon., for the period of one year, from the date of his release and, thereafter, on the first

Monday of January, April, July and October of each year, till the conclusion of trial.

(vii) The applicant shall regularly attend the proceedings before the Special Court.

(viii) By way of abundant caution, it is clarified that the observations made hereinabove are confined to the consideration of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant or the co-accused and the learned Special Judge shall not be influenced by any of the observations in further proceedings in the Special Case arising out of CR No.244 of 2018.

(ix) All concerned to act on an authenticated copy of this order.

[N. J. JAMADAR, J.]