

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

**INTERIM APPLICATION NO. 1653 OF 2023
IN
CRIMINAL APPEAL NO. 502 of 2023**

1. Aji Sayyad @ Jafari Abbas @ Jafar
Sayyad @ Jafari
Age : 23 years, R/at Janu Patil Chawl,
Opp. Valmik School, Indira Nagar,
Ambivali, Kalyan (Presently lodged in
Aadharwadi Jail, Kalyan)

2. Jafar Sayyad Azam Sayyad
Age : 31 years, R/at Opp. Irani Masjid,
Near Ambivali Railway Station,
Indira Nagar, Ambivali, Kalyan,
(Presently lodged in Aadharwadi
Jail, Kalyan)

.. Applicants

Vs.

State of Maharashtra
(Through Kolsewadi Police Station)

.. Respondent

.....
Mr. V.V. Bambarde i/b Mr. Javed Shaikh, Mr. Anil Nile, Roohita
Shaikh, D.J. Shejul for the applicants

Mr. A.R. Kapadnis, APP for the respondent – State

Mr. Pawar, PSI, Kolsewadi Police Station, Kalyan present in Court

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 1st AUGUST, 2023

ORDER :-

1. By this application, the applicants have prayed for their release on bail, pending the hearing and final disposal of the appeal since they have been convicted and sentenced by the Special Judge (MCOC), Thane of the offences punishable under Section 394 of the Indian Penal Code and Section 3(1)(ii) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (for short “MCOC Act”). The applicants have been sentenced to suffer Rigorous Imprisonment for 10 years each for all the offences along with fine of Rs.5,00,000/- each and in default simple imprisonment for 3 years.

2. Facts are as follows.

3. On 2nd July, 2016 at about 4.00 p.m. the first informant along with her husband was proceeding to Kalyan in an autorickshaw for their personal work. They alighted from the autorickshaw in front of Metro Mall, Kolsewadi, Kalyan at about 4.30 p.m. While the couple was proceeding by the side of the road, the husband, in order to clean his footwear which were smeared with mud, stopped at the spot. When the first informant proceeded a little ahead of him, two persons riding on a motorcycle came in front of them and

asked the first informant not to proceed ahead as there was a murder. The first informant started walking ahead slowly, when suddenly the applicants came from behind who were also riding a motorcycle. The pillion rider hit the informant on her neck and snatched her golden Mangalsutra and necklace. Due to the jerk, her ornaments broke and she too fell down on the road. Upon making a hue and cry by the couple, the passerby alongwith one autorickshaw driver obstructed the motorcycle. As it was a rainy season, the motorcycle skidded and the applicants fell down. They attempted to flee away from the spot, however, the crowd managed to catch hold of them. At that time, one of the applicants took out a *fighter* from his pocket and assaulted the autorickshaw driver. By that time, somebody had called the police, who took the control of the situation and arrested both the applicants. Thereafter, the informant approached the Kolsewadi Police Station and lodged a report.

4. During investigation, it revealed that the applicants are indulged in organized crime as members of an organized crime syndicate. The Investigating Agency accordingly invoked the provisions of MCOC Act and after investigation, filed a chargesheet

in the Court of Special Judge, Thane. A charge was framed against the applicants as above.

5. The prosecution examined as many as 13 witnesses. The Special Judge had recorded the statements of the applicants under Section 313 of the Cr.P.C. After hearing the prosecution and the defence, the applicants have been convicted and sentenced as above.

6. At the outset, Mr. Bambarde, the learned Counsel for the applicants invited my attention to several lacunae in the evidence of prosecution witnesses. He has invited my attention to certain glaring discrepancies which, according to him, are so vital that the Special Judge ought not to have convicted the applicants in serious offences under the provisions of MCOC Act.

7. According to the learned Counsel for the applicants most of the important witnesses have not supported the prosecution case. He invited my attention to the testimonies of PW-3 Ravi Salvi and PW-4 Ravi Gupta, who are the two main independent eye-witnesses. They did not support the prosecution case. The first informant could not identify the applicants during trial. PW-6 Archana Khanvilkar is the victim in another crime, whose evidence

is not at all relevant in the instant crime.

8. The learned Counsel for the applicants also invited my attention to the evidence of an important witness namely PW-9 Param Bir Singh, the then Additional Director General of Police and sanctioning authority. It is vehemently argued by Mr. Bambarde, learned Counsel for the applicants that there was absolutely no material on record brought by the prosecution to establish that it was a continuing unlawful activity of the applicants as contemplated in Section 2(d) of the MCOC Act as well as there is nothing on record to show that the applicants are members of an organized crime syndicate.

9. *Per contra*, Mr. Kapadnis, learned APP emphasized on the aspect that there are more than 10 criminal cases pending against the applicants, who are habitual offenders and, therefore, it is not proper to release them on bail, pending the appeal, as according to the learned APP, the Special Judge has rightly convicted and sentenced the applicants for the offences with which they have been charged.

10. Section 23(1)(a) of the MCOC Act contemplates that no

information about the commission of an offence of organized crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police. PW-12 Vijaykumar Phulkar was Additional Commissioner of Police of Kolsewadi Division at the relevant time. In his short evidence before the Special Judge, he testified that he conducted investigation of C.R. No.215 of 2016 of Kolsewadi Police Station. Before him, PW-11 Shailendra Nagarkar, who was Senior Police Inspector at the relevant time testified that after receiving the documents such as FIR, panchanama, case-diary and muddemal receipt, he conducted investigation. From the evidence of this witness it seems that most of the investigation was conducted by him.

11. What has been testified by PW-12 Vijaykumar Phulkar is that he had received prior approval and the papers of investigation. However, there is nothing on record to show that the prior approval was granted by an Officer in the rank of Deputy Inspector General of Police. For that matter, even the evidence of PW-9 Param Bir Singh also does not reveal anything as to whether he had, before according sanction as per Section 23(2) of the MCOC Act,

meticulously examined all the documents and papers.

12. PW-9 Param Bir Singh was then posted as Additional Director General of Police. His short evidence reveals that he has accorded sanction after perusing the chargesheets which were previously filed against the applicants as well as the documents placed before him. The sanction was accorded by this witness on 26th November 2016 which is at Exh.150.

13. Astonishingly, there is nothing in his evidence by which it can be said that this witness had applied his mind before according the sanction. Neither he nor PW-11 Shailendra Nagarkar or PW-12 Vijaykumar Phulkar whispered anything as regards previous two chargesheets against the applicants. The sanction, *prima facie* appears to have been granted without application of mind by PW-9 Param Bir Singh.

14. In order to invoke Section 3(1)(ii) as well as Section 3(4) of the MCOC Act, the prosecution has to establish that the applicants are the members of an organized crime syndicate, who have indulged in continuing unlawful activities. The activity would be termed as continuing unlawful activity if more than one

chargesheets have been filed before a competent Court within the preceding period of 10 years. It is also required to be establish that such an offence or unlawful activity undertaken by a person with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person.

15. As already stated, there is no material to indicate any such activity *qua* the applicants. Merely saying that there are several criminal cases pending against the applicants, would not *ipso facto* mean that the provisions of MCOC Act could be invoked against them without any material in that regard.

16. The observations made hereinabove are *prima facie*, without going into the merits of the case, which are to be considered at the time of hearing the appeal finally. These are all *prima facie* observations in order to consider the prayer of the applicants for suspension of execution of the sentence, pending the appeal.

17. It is also pertinent to note that the applicants, ever since their arrest in this case on 2nd July, 2016, have undergone nearly 7 years of incarceration. Maximum sentence awarded by the Special Court is for 10 years. The appeal is unlikely to be heard early. By the

time the appeal will come on the board for final hearing, the entire sentence would have been undergone by the applicants.

18. Learned Counsel for the applicants submits that the fine amount has not been paid. In view of the dictum of the Supreme Court in case of **Satyendra Kumar Mehra alias Satendera Kumar Mehra Vs. State of Jharkhand**¹, there are no fetters on the powers of this Court while exercising jurisdiction under Section 389 of the Cr.P.C. This Court while suspending the sentence and fine both, can direct the applicants to deposit fine or part of fine.

19. Having considered the facts and circumstances of the case, without expression any opinion on merits and demerits, I do not see any reason not to suspend the execution of the sentence, pending the appeal and to release the applicants on bail. Hence, the following order is expedient :-

ORDER

- (i) Pending the appeal, the execution of sentence passed by the Special Judge under the MCOC Act in Special Case (MCOC) No. 8 of 2016 of the offences punishable under

¹ (2018) 15 SCC 139

Section 394 of the Indian Penal Code and Section 3(1)(ii) and 3(4) of the MCOC Act, 1999 is suspended.

(ii) The applicants be enlarged on bail upon furnishing a P.R. bond in the sum of Rs.30,000/- each with two independent sureties in the like amount to the satisfaction of the Registrar (Judicial) of this Court, subject to deposit of a fine amount of Rs.1,00,000/- (Rupees One Lacs only) by each of them.

(iii) The applicants shall attend the Kolsewadi Police Station on 1st day of each calendar month between 10.00 a.m. to 12.00 noon.

(iv) If there are two consecutive defaults in attending the police station, liberty to the prosecution to pray for cancellation of the bail. In case of such defaults, concern Police Station shall forthwith intimate the office of the Public Prosecutor of this Court.

(v) The applicants shall furnish their residential address as well as mobile numbers to the concerned police station.

(vi) The applicants shall surrender their passport, if any, in the Registry of this Court at the time of furnishing bail.

20. The application is disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)