IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1942 OF 2022

Tariq Abdul Karim Merchant .... Applicant
Versus
The State of Maharashtra ...Respondent

Mr. B. B. Tiwari i/b. Adv. Waqar Pathan for the Applicant.
Mrs. S. D. Shinde, A.P.P. for the Respondent-State

CORAM : NITIN W. SAMBRE J

DATED : 8th AUGUST, 2023

ORDER:

1. Heard.

2. The Applicant/Accused No. 1 who was apprehended on 09/02/2020 in Crime No. 39 of 2020 punishable u/s 386 and 387 r/w. 34 of IPC and u/s. 3(1)(ii), 3(2), 3(4) of MCOCA is seeking regular bail.

3. The prosecution case against the Applicant is, the Applicant, a member of the organized crime syndicate by actively participating in the activity of such syndicate has committed or aided the main Accused, gangster Ejaz Lakdawala in committing offence of extortion.

4. The role attributed to the Applicant is, the Complainant was receiving threatening calls for satisfying the demand/extortion. As

a sequel of above, the Complainant was taken to one Salim Maharaj, a co-accused and upon satisfying the demand of extortion, it was assured that there will not be any threatening calls.

5. The Complainant at the relevant time was operating a dry fruit business in Crawford Market, Mumbai. The threatening calls were received on 01/07/2013 from the international number demanding Rs.2.00Crs which was allegedly by Accused No. 3-gangster Ejaz Lakdawala.

6. After lodging a complaint with the Superintendent of Police of Thane Gramin since the threat calls continued, he has requested Sayyed Bapu for intervention who was knowing Ejaz Lakdawala. The Sayyed Bapu accordingly introduced the Complainant to the present Applicant.

7. The Applicant/Accused No. 1 accordingly called the Accused No. 2-Salim Maharaj and after discussion, extortion/protection money was settled at Rs.10,00,000/- out of which Rs.3,00,000/- were collected by the Applicant through his driver, PW No. 3 whereas the remaining Rs.7,00,000/- were collected by the Accused No. 3.

8. Initially on the complaint of the Applicant, NC was registered

in the year 2013.

9. After having noticed that Ejaz Lakdawala was arrested the Complainant again approached the DCB CID, based on which the offence in question came to be registered invoking MCOCA.

10. Learned Counsel for the Applicant submits that the Applicant has suffered incarceration after his arrest for a period of more than 3 years. According to him, the provision of Section 21, sub-Section (4) of MCOCA, 1999 permits the Applicant to apply for bail as the Applicant is willing to satisfy that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

11. According to learned Counsel for the Applicant though the Applicant is already convicted for an offence under MCOCA, in Appeal he is already admitted to bail and the embargo under sub-section (5) of section 21 of the provisions of MCOCA will not operate against him.

12. According to learned Counsel for the Applicant, perusal of the FIR does not disclose the satisfaction of the necessary ingredients of the offences punishable u/s. 383 and 386. He would further claim that once the NC was registered in the year 2013, for very same offence cognizance ought not to have been taken by

the police authorities in view of bar under sub-section (2) of section 155 of the Cr.P.C.

13. According to learned Counsel for the Applicant, in absence of material to infer the involvement of the Applicant in crime in question. The Application is liable to be allowed.

14. While countering the aforesaid submissions, learned APP submits that even if NC was registered on the complaint preferred by the Complainant against the Applicant still the bar under sub-section (2) of section 155 of Cr.P.C. will not operate. According to learned APP the Special Court under the provisions of MCOCA has already taken cognizance and the trial has advanced. She would further claim that the complainant has entered into the witness box and has categorically deposed about the involvement of the Applicant in the offence in question. According to learned APP the CDR details and other materials on record sufficiently depict the *prima facie* involvement of the Applicant in the offence in question.

15. I have appreciated the aforesaid submissions.

16. Learned Counsel for the Applicant so as to substantiate his claim has invited my attention to the judgment of the Apex Court in the matter of ***Union of India vs K. A. Najeeb*** reported in

(2021) 3 SCC 713 so as to claim that the statutory restriction under sub-section (5) of section 21 of the MCOCA will not operate to be a bar on the powers to be exercised by the Constitutional Court like the present one.

17. He would claim that in the aforesaid judgment, the Apex Court has held that the statutory restrictions like the one under Sub-section (5) of Section 21 of the MCOCA *per se* does not oust the jurisdiction of the Constitutional Court in the matter of consideration and grant of bail on the ground of violation of Part (3) of the Constitution of India.

18. According to him, in the backdrop of the aforesaid observations this Court should ignore the provision of sub-section (5) of section 21 of the MCOCA which puts an embargo on the right of the Court to grant bail.

19. According to learned Counsel for the Applicant in the matter of ***Vivek Chandrakant Manjrekar vs. The State of Maharashtra*** the Apex Court has granted bail to the Accused on the ground that Accused has already spent two years in custody whereas the present Applicant has already spent three years in the custody.

20. Learned Counsel further urges that non-satisfaction of the

ingredients of the offence of extortion led to release of the Accused in view of the proposition of law laid down by the Apex Court in the matter of ***Dhananjay @ Dhananjaykumar Singh Vs State of Bihar*** reported in ***(2007) 14 SCC 762***

21. As such, I am required to appreciate the case of the Accused in the backdrop of the aforesaid legal proposition relied on.

22. At the outset, it is required to be noted that even though the complaint of the complainant was treated as NC under sub-section (1) of section 155 of Cr.P.C in 2013, the Complainant has stated that he was forced to migrate in view of the threats by closing his Bombay business to Gujarat. He has stated that in the year 2017, he having noticed that Ejaz Lakdawala, Accused No. 3 was arrested, he gathered the courage to give statement against the accused persons.

23. The Complainant has already entered into the witness box as the Trial has commenced and identified the present Accused, as a person who has not only demanded money but also collected the same.

24. The threats issued by the Applicant to the Complainant can be inferred from the partly recorded evidence by the Complainant. The reading of the evidence available on record of the

Complainant sufficiently establishes the ingredients of the offence of extortion which is punishable u/s 383 r/w 386 of IPC. As such, the judgment relied on in the matter of ***Dhananjay @ Dhananjaykumar Singh*** **(supra)** will be of hardly any assistance in the case in hand as from the testimony of the Complainant the satisfaction of the ingredient of the offence of extortion can be inferred.

25. The fact remains that even if there is an embargo under Sub-section (2) of section 155 to take cognizance without there being an order of the Magistrate, however, the present Trial will not vitiate for want of order of Magistrate to investigate the offence as the offence was registered, investigated into and the Applicant was charge-sheeted.

After the Applicant was charge-sheeted the Trial has advanced as the witness P.W. No 3 is already in the witness box and has till this date supported the case of the prosecution.

That being so, it cannot be said that the Trial gets vitiated because of the bar u/s. 155(2) of the Cr.P.C.

26. In support of the aforesaid observations, reliance can be placed on the judgment of the Apex Court in the matter of ***H. N.***

Rishbud and Inder Singh vs. State of Delhi reported in ***(1955) 1 SCR 1150*** with connected matters.

27. Paragraph No. 9 of the aforesaid judgment which reads thus:

> "9. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 of the Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e. Section 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or

(b) of Section 190(1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 of the Code of Criminal Procedure which is in the following terms is attracted:

"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, unless such error, omission or irregularity, has in fact occasioned a failure of justice".

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in Prabhu v. Emperor and Lumbhardar Zutshi v. The King. These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination., the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. .."

sufficiently addresses the issue which is sought to be canvassed by learned Counsel for the Applicant on the issue of illegal cognizance of the offence. The fact remain that the Applicant is unable to demonstrate any miscarriage of justice for not complying with the provision of Sub-section (2) of Section 155 of IPC. Merely because there is an illegality committed during the course of the investigation that by itself will not affect the competence and the jurisdiction of the Trial Court particularly when the Trial has advance.

28. The Apex Court in the aforesaid judgment has held that "a defect or illegality in investigation, howsoever serious, has no direct bearing on the competence or the procedure relating to cognizance or trial". Of course the illegality as has been claimed by learned Counsel for the Applicant, if brought to the notice of the Court at sufficiently early stage, the Trial Court could have looked at the same and address it at said stage and not after the Trial has commenced.

29. The Apex Court has held that in a non-cognizable case if the police report in breach of the statutory mandate is submitted thereby carrying out the investigation, such report cannot be set

aside unless it is demonstrated that such investigation or the police report has caused substantial injustice to the accused.

30. The investigation in a case is a statutory duty of the police officer provided the offence disclosed is cognizable one. Once the cognizance is taken on a report submitted, may be out of an illegality carried out in the investigation that by itself will not invalidate or vitiate the proceedings initiated against the accused based on such report of investigation.

31. The fact remains that the Applicant was already convicted for one offence punishable under MCOCA and is released on bail. Apart from above there are serious offences which are pending trial against the Applicant and list of such offences is already part of the record.

32. Apart from above, the observations herein does not satisfy the very requirements under Clause (b) of sub-section (4) of Section 21 of MCOCA so as to record satisfaction that there are reasonable grounds for believing that the Applicant is not guilty of such offence as has been alleged.

33. In this background, considering the strong evidence available against the Applicant of his involvement in an offence in question, the fact that the Applicant, if so, released is likely to

commit offence considering his criminal antecedents.

34. The present Application in my opinion is liable to be rejected.

35. In the aforesaid background, the Application lacks merits and accordingly stands rejected.

(NITIN W. SAMBRE, J.)