

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

CRIMINAL BAIL APPLICATION NO. 3792 OF 2022

Eklakh Rahim Shaikh @ Peti

...Applicant

Versus

The State Of Maharashtra

...Respondent

....

Mr. Milan Desai, Advocate for the Applicant.

Mr. M.G. Patil, APP for the Respondent – State.

Mr. Shivaji N. Kanade, PSI, Mr. Satardekar, ASI, Crime Branch
Thane City.

CORAM : PRAKASH D. NAIK, J.
DATE : 27th March, 2023.

PER COURT:

1. The Applicant is seeking bail in CR No. I-316/2016 registered with Thane Central Police Station for the offences punishable under Sections 307, 387, 427, 452, 506 (II), 120 B r/w 34 of IPC.

2. The case of the prosecution is that the complainant is working with Heaven Construction and Developer, Ulhasnagar, District-Thane. On 11th July, 2016 at about 11:00 a.m., he opened the office. His employer had been to Mumbai for work. The other staff members were present in

the office. The son of the employer was in the office. At about 3:15 p.m., one unknown person entered in the office. He was wearing helmet and windcheater. He inquired about the whereabouts of the boss. He removed pistol tried to fire towards the complainant. However, there was no firing. The complainant tried to overpower the assailant. The helmet of the assailant fell down. Another person entered in the office. He was carrying pistol in his hand. It was pointed out at the complainant. While the complainant tried to push the assailant, he was assaulted with butt of the pistol on his head. The complainant pushed the accused and ran inside the office of his boss to save his life. The second person opened fire towards complainant and fired on the glass of his door. The Complainant did not sustain any firearm injury. It was alleged that gangster Suresh Pujari was calling his boss and his son for extortion of money and demanded ransom from his boss, and, threatened to kill them if the amount is not given to him. Complaint was lodged with the Central Police Station, District-Thane, hence Suresh Pujari had sent goons who had assaulted the complainant and others. The assailants left the office. From the CCTV footage it is

revealed that they fled on motorcycle. Subsequently the complainant learn that his colleague Sagar Tambe was also threatened by pistol. One of the assailants handed over one envelope to Sagar Tambe. It was containing a white paper on which number of Suresh Pujari was written. First Information Report ("FIR", for short) was registered. Subsequently, provisions of Section 3(1)(ii), 3(2), 3(4) of MCOC Act were invoked.

3. The Applicant had preferred the Application for bail before this Court viz Bail Application No. 3377 of 2018. The said Application was rejected vide order dated 24th August 2021. Trial was expedited.

4. This is the Second Application for bail pursuant to order dated 22nd February 2023 passed by the Coordinate Bench, the Application is listed before me.

5. Learned Advocate Mr. Desai submitted as under:

- i. The Applicant is not involved in the present case. He has been falsely implicated in this case. There is no evidence to show that the Applicant was present at the place of incident and had participated in incident of firing.
- ii. While rejecting the previous Application for bail, this Court had expedited the trial. However, the Trial has

proceeded at snail's pace.

- iii. The Applicant is in custody since 5th October 2016. Thus, the Applicant is under incarceration for a period of six and half years. The Applicant cannot be incarcerated in custody without trial for indefinite period.
- iv. Although charge is framed, the prosecution has not examined single witness. It is not clear as to when the trial would conclude.
- v. The prosecution is relying upon the list of 137 witnesses and assuming that the prosecution may not examine all the witnesses, the trial would not be over in near future.
- vi. The Applicant had not protracted the trial. On the contrary, the Applicant had preferred applications before the Trial Court requesting the Court to expedite the trial.
- vii. Long incarceration in custody affects the liberty of citizen enshrined under Article 21 of the Constitution of India.
- viii. The Hon'ble Supreme Court as well as this Court has granted bail to accused who were languishing in jail for substantial period of time on the ground that long incarceration in custody affects personal liberty guaranteed under Article 21 of the Constitution of India.
- ix. The previous Application for bail was rejected on merits vide order dated 24th August 2021. However,

there is no progress in the trial for more than year after rejection of previous Application for bail preferred by the applicant.

- x. While rejecting the Application for bail the prosecution had urged that the applicant was involved in the case under the MCOC, Act in the past and while on bail in that case, the applicant has committed the present crime. The prosecution had adverted to Section 21(5) of the MCOC Act. It is submitted that infringement of Article 21 of the Constitution of India would entitle, the applicant to be released on bail. The embargo of Section 21(5) of the Act cannot be impediment to grant bail in the event of violation of fundamental right under Article 21 of the Constitution of India.
- xi. This Court has granted bail to the accused facing prosecution under the MCOCA Act on the ground of long incarceration in custody.
- xii. Although Section 21 (5) restricts grant of bail to the accused who has committed the offence under MCOC Act while on bail in previous offence under MCOC Act, if there is no evidence against the accused in subsequent offence, he cannot be deprived of bail.
- xiii. The nature of evidence against the Applicant in the present case is weak. The confessional statements of the accused recorded under Section 18 of the MCOC Act are vague. Except the version of co-accused that the pistol used in the crime was handed over by the applicant to the co-accused, there is no evidence to

corroborate the said version.

6. Learned Advocate for the Applicant had relied upon the following decisions.

- i. Union of India V/s K.A. Najib (2021) 3 SCC 713
- ii. Akay Atmaram Rathod V/s State of Maharashtra decided by this Court vide Criminal Application No. 786/2022.
- iii. Ajit Bhagwan Tiwde V/s State of Maharashtra, dated 10/1/2022 passed in Bail Application No. 995/2022
- iv. Mrugank Kalwalkar @ Mickky V/s State of Maharashtra and other connected Applications. (Bail Application No. 2388/2022, Bail Application No. 2080/2022, Bail Application No. 2670/2022).
- v. Sachin Damodar Ekhtapure V/s State of Maharashtra. (Bail Application No. 2830/2022).
- vi. Musa Annu Sayyed Vs State of Maharashtra (Bail Application No. 172/2021)

7. Learned APP submitted that the previous application for bail was rejected on merits vide order dated 24th August 2021. The offence is of serious nature. There is evidence to show the involvement of the Applicant in crime. The confessional statement of the co-accused involved in the crime reveals that the pistol used in the crime were provided

by the Applicant. Although the prosecution has provided a list of 137 witnesses, on instruction it is submitted that the prosecution may examine about 45 witnesses. The Applicant was involved in the past in the case registered under the provisions under MCOC Act. While on bail, he has committed present crime. Section 21 (5) provides that the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act on the date of offence in question.

8. The factual matrix of this case would indicate that the victim was threatened by the accused. For not satisfying the demand of extortion amount some of the accused visited the office premises of the victim. The assailant fired at the complainant. The applicant was not present at the place of incident. Applicant is in jail for six and half years. There is no progress in the trial. Not a single witness have been examined. Assuming that the prosecution would examine 45 witnesses out of the list of 137 witnesses, it is not clear how long it would take to conclude the trial. This Court had expedited the trial vide order dated 24/8/2021.

9. In the case of *Union of India V/s K.A. Nazib (supra)* it

was observed that the presence of statutory restrictions like Section 43-D(5) of UAPA *per se* does not oust, the ability of the Constitutional Courts to grant bail on the ground of violation of part III of the Constitution. Indeed, both the restrictions under the statute as well as the powers exercisable under Constitutional jurisdiction can be well harmonized. Whereas, at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down whereas there is no likelihood of trial being completed within reasonable time and the period of incarceration already undergone has exceeded a substantial part of prescribed sentence. Such an approach would safeguard against the possibility of provisions like 43-D(5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of Constitutional Right to speedy trial. The charges against the accused therein are grave and a serious threat to social harmony. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed any time soon, the High Court appears to have been left with no other option except to grant bail. An

attempt has been made to strike a balance between Appellant's rights to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the Respondent's rights guaranteed under para III of Constitution have been well protected.

10. In the case of *Ajit Bhagwan Tiwade V/s State of Maharashtra* the principle enunciated in several decisions with regard to grant of bail on account of long incarceration in custody were noted and it was observed that Right to speedy trial flows from Right to life and liberty under Article 21 of the Constitution of India. It was also observed that prolonged custody affects Fundamental Right under Article 21 of the Constitution of India. Incarceration in custody for long period without trial affects personal liberty guaranteed under Article 21 of the Constitution of India. Embargo under the provisions of Special Acts shall not be an impediment in grant of bail by this Court on the ground of incarceration of accused in custody for a long time.

11. This Court in the case of *Mrugank Kalwallkar @ Mickky V/s State of Maharashtra* (Bail Application No. 2388 of 2022) and other connected matters referred to decision of

Apex Court in the Code of Union of India V/s K.A. Najeeb (supra) and it was observed that it is settled position of law that incarceration in custody for longer period pending conclusion of trial is violative of right guaranteed under Article 21 of the Constitution of India.

12. Sections 21(4) and 21 (5) of the MCOCA operates as restrictions for grant bail to the accused involved in commission of offence under the provisions of the Said Act. However, as noted in several decisions hereinabove, the restrictions enumerated under various Acts for grant of bail would not be impediment for grant of bail in the event accused is in custody for long period. Section 21 (4) and 21 (5) of MCOCA Act reads as follows:

21(4). Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act, shall if in custody, be released on bail or on his own bond, unless-

- (a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and
- (b) where the Public Prosecutor opposes the application, the Court is satisfied 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.

21(5). Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

The words 'or under any other Act' has been deleted by this Court in the decision of Bharat Shah Vs State of Maharashtra 2003 All MR (CRI) 1061 decided by this Court. The said decision was challenged before Apex Court viz. State of Maharashtra Vs Bharat Shantilal Shah and Others (2008) 13 SCC 5 wherein it was observed as follows:

“62. Having recorded our finding in the aforesaid manner, we now proceed to decide the issue as to whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act.

“63. As discussed above the object of the MCOCA is to prevent the organized crime and therefore, there could be reason to deny consideration of grant of bail if one has

committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commit an offence under some other Act would not be in any case in consonance with the object of the Act which is enacted in order to prevent only organized crime.”

13. Personal liberty enshrined under Article 21 of Constitution of India is supreme and the statutory embargo on grant of bail would not override the fundamental Right guaranteed under Article 21 of Constitution.

14. The Division Bench of this Court in the case of ***Akshay Atmaram Rathod V/s The State of Maharashtra (supra)*** considered the effect of Section 21(5) of MCOC Act. In the light of observations of Supreme Court in the case of ***State of Maharashtra V/s Bharat Shah (supra)*** It was submitted before this Court that the rider of sub-clause (5) would come into play if subsequently the accused commits a similar offence and not in a case where there is no material at all in a latter crime. The Division Bench observed that the provisions of sub-clause (5) are to be read alongwith the condition embodied in clause 4 (b) of Section 21 of the MCOCA. The prima facie requirement for grant of bail is

about satisfaction of the Court that there are reasonable grounds for believing that the accused is guilty of such offence. The provision is to be read on the canvass of earlier requirement. In the decision of State of Maharashtra V/s Bharat Shah (supra) the Supreme Court has explained that the object of MCOCA is to prevent the organized crime, and there can be reason to deny bail if one has committed a similar offence once again, after being released on bail. The legislative intention is to desist a person from repeating the similar offence once again after his release on bail, therefore, one has to prima facie record a finding that in existing crime, the accused has committed similar offence once again. Liberty of a person shall not ordinarily interfered with unless there exists convincing grounds. Sub-clause (5) of Section 21 of MCOC Act has to be interpreted keeping in mind the legislative object. The Court is not expected to mechanically reject the bail only because the accused was arrested under MCOCA, while on bail. Harmonious reading of the provision would achieve the legislative intent by maintaining right balance

15. The main ground urged in this case is long

incarceration in custody. The applicant is not responsible in protracting the trial and on the contrary he had preferred applications before the Trial Court for expeditious hearing of case. Considering the nature of evidence against him and the fact that he is in custody for a period of six and half years from the date of his arrest and since trial is the proceeding with slow pace case for grant of bail is made out. On this ground the restrictions under Section 21(4) or 21(5) of the MCOC Act would not deprive the accused being released on bail.

ORDER

- i. Bail Application No. is allowed.
- ii. The Applicant is directed to be released on bail in connection with CR No. R-316 of 2016 registered with Thane Central Police Station, on executing P.R. Bond in the sum of Rs. 25,000/- with one or more sureties in the like amount.
- iii. The applicant is permitted to furnish cash bail in the sum of Rs.25,000/- for a period of 6 weeks in lieu of surety.
- iv. The applicant shall report concerned Police Station once in a month on first Saturday of the month between 11:00

a.m. to 1:00 p.m. for a period of six months and thereafter, once in three months on first Saturday of the month between 11:00 a.m. to 1:00 p.m till further order;

v. The applicant shall attend Trial Court regularly on the date of hearing of the case unless exempted by the Court for some reason.

vi. The applicant shall not tamper with the evidence in any manner.

vii. Bail Application stands disposed of.

(PRAKASH D. NAIK, J.)