

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2092 OF 2023

Rehan @ Rashid Hasan Kazi ...Applicant

vs.

The State of Maharashtra ...Respondent

VISHAL
SUBHASH
PAREKAR

Digitally signed by
VISHAL SUBHASH
PAREKAR
Date: 2024.02.29
17:59:07 +0530

Mr. Satyavrat Joshi a/w. Mr. Ashish Vernekar and Mr. Changdev Shingade , for the Applicant.

Mrs. G.P. Mulekar, APP, for the Respondent/State.

Mr. D.K. Tajane, PSI, Shil Daighar police station.

CORAM : N. J. JAMADAR, J.
RESERVED ON : FEBRUARY 21, 2024
PRONOUNCED ON : FEBRUARY 29, 2024

P.C.:

1. Heard the learned counsel for the applicant and the learned APP for the State.

2. The applicant who is arraigned in MCOC No. 1 of 2019 arising out of C.R. No. 174 of 2018 registered with Shil Daighar police station for the offences punishable under sections 392 and 411 read with 34 of Indian Penal Code, 1860 and sections 3(1)(ii), 3(2), 3(4) and 3(5) of Maharashtra Control of Organised Crime Act, 1999 (MCOCA) seeks to be enlarged on bail.

3. On 5th October, 2018 the first informant then 17 years of age was on his way back to home from tuition class. He alighted from

auto rickshaw. While he was speaking on his Note 4 mobile phone, a red colour scooty came from behind. Two boys between 20 to 22 years of age were riding the said scooty. Pillion rider gave a hard slap on the right hand of the first informant and snatched away the mobile phone handset. The robbers sped away on the said scooty. The first informant lodged report on 9th October, 2018. The investigation revealed the complicity of the applicant. The applicant came to be arrested on 13th October, 2018.

4. During the course of investigation, it transpired that the applicant and the co-accused were indulging in the offence of chain snatching and robbery in similar fashion. A number of crimes were registered against the applicant and the co-accused. They were indulging in continuous unlawful activities. Mustafa Shaikh (accused No. 1) was the leader of the organized crime syndicate, of which Yasin Shah (accused No. 2), Reha Kazi (the applicant), and Arbaz Shaikh (accused No. 4) and the absconding accused, were the members. As many as 10 offences were registered against the gang leader Mustafa Shaikh (accused No. 1). Qua the applicant apart from the instant crime, 3 crimes for offences punishable under section 392 read with 34 and 411 were registered at Shil Daighar police station. Thus, provisions contained in MCOC were invoked.

5. Mr. Joshi, the learned counsel for the applicant, submitted that the applicant had been roped in on the basis of antecedents only. The FIR was lodged against unknown persons. The first informant had not named the applicant.

6. In any event, Mr. Joshi, would urge the applicant has been in custody since 31st October, 2018. More than 5 years period has elapsed. It is unlikely that the trial can be concluded within a reasonable period. The applicant, therefore, deserves to be enlarged on bail.

7. The learned APP resisted the prayer for bail. It was submitted that there is overwhelming evidence to show the complicity of the applicant. Attention of the Court was invited to the statement of a witness who claimed to have seen the applicant and the co-accused robbing the first informant of the mobile phone handset. In addition, the applicant in his statement recorded under section 18 of the MCOCA confessed the guilt in unequivocal terms. Inviting the attention of the Court to the statement of the applicant before the learned Magistrate dated 13th December, 2018, Ms. Mulekar submitted that it can not be said that the applicant has categorically retracted the confessional statement.

8. Learned APP laid emphasis on the fact that in 3 of the crimes registered against the applicant, the gang leader is also a co-accused. Thus, there is adequate material to show that the applicant has been indulging in continuous unlawful activities as a member of organized crime syndicate. Therefore, the rigor contained in section 21(4) of the MCOCA applies with full force. Thus, the applicant does not deserve to be enlarged on bail.

9. I have perused the material on record including the affidavit in reply filed on behalf of the prosecution, in opposition to the prayer for bail.

10. It is true the first informant had lodged FIR against two unknown persons. However, there is material to show that apart from the applicant and the co-accused, who were riding the scooty, two more persons followed the scooty on another motor cycle. One of the eye witness has categorically asserted that he had seen the applicant and the co-accused robbing the first informant of the mobile phone handset. Though the said witness claimed to have known the applicant and the co-accused as habitual offender who indulged in the chain snatching and mobile lifting, at this stage, the said assertion may not detract materially from the prosecution.

11. However, the aspect which warrants consideration is the long period of incarceration. The applicant has been in custody since 13th October, 2018. A period of almost 5 and half years has elapsed. It is unlikely that the trial can be concluded within a reasonable period. This long period of incarceration without a real prospect of expeditious conclusion of trial is a factor which has been considered to dilute the rigor of the provisions which contain additional restrictions in the matter of grant of bail.

12. The statutory restrictions in the matter of grant of bail like the one under section 21(4) are justified on the premise that the trial in such cases, shall be concluded expeditiously. In the event, the trial is not concluded within a reasonable period, then the said statutory restrictions melt down as the competing interest of the right of the accused to speedy trial which is a facet of right to life guaranteed under Article 21 of the Constitution of India, comes into play.

13. A useful reference in this context can be made to the decision of the Supreme Court in the case of **Shaheen Welfare Association v/s. Union of India and Ors.**¹. The Supreme Court enunciated that the stringent provisions can be justified on the presumption that

1 (1996) 2 SCC 616

the trial of the accused will take place without undue delay. The observations in paragraph No.10 read as under :

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh case², on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

14. Following the aforesaid judgment, in the case of **Shaheen** (supra), another three Judge Bench of the Supreme Court enunciated the legal position in **Union of India V/s. K.A.Najeeb³** as under:-

“12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“NDPS”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252, Babba v/s. State of Maharashtra, (2005) 11 SCC 569 and Umarmia v/s. State of Gujarat, (2017) 2 SCC 731 enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid

2 (1994) 3 SCC 569

3 AIR 2021 Supreme Court 712

Committee (Representing Undertrial Prisoners) v/s. Union of India, (1994) 6 SCC 731, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of UAPA per se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. 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 where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 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.

15. In the case at hand, as noted above, the applicant has been in custody for more than five years. The offence under section 392 of the Penal Code entails imprisonment which may extend to ten years. The applicant has already undergone more than half of the punishment prescribed for the offence punishable under section 392 of the Penal Code. Offences under sections 3(1)(ii), 3(2) and 3(4) of the MCOCA entail punishment which may extend to

imprisonment for life, with a minimum sentence of five years. The applicant has already undergone incarceration for the minimum term prescribed under section 3(1)(ii), 3(2) and 3(4) of the MCOCA.

16. In the totality of the circumstances, having regard to the period of incarceration and the nature of the offences punishable under the Penal Code and the offences for which the applicant has been arraigned in other crimes, the further detention of the applicant may not be justifiable. I am, therefore, impelled to exercise the discretion in favour of the applicant and release him on bail.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 174 of 2018 registered with Shil Digbar police station, on furnishing a P.R. Bond of Rs. 1,00,000/- with one or more sureties in the like amount.

3] The applicant shall mark his presence at Shil Daighar police on the first Monday of every month in between 11 am to

1 pm for a period of three years or till conclusion of the trial whichever is earlier.

4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.

5] The applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

6] The applicant shall regularly attend the proceedings before the jurisdictional Court.

7] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)