

Sayali Upasani

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

BAIL APPLICATION NO. 2938 OF 2023

Ayub Alimuddin Shaikh @ Ayub @ Chikhna ...Applicant

Vs.

The State of Maharashtra ...Respondent

**SAYALI
DEEPAK
UPASANI**

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UPASANI
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Mr. Darshit Rakesh Jain i/b AID Legal, for Applicant.

Mrs. G. P. Mulekar, APP for State-Respondent.

CORAM:- N. J. JAMADAR, J.

DATED:- 4th MARCH, 2024.

ORDER:-

1) The applicant, who is arraigned in CR No.70 of 2019, registered with Kalachowki Police Station, Mumbai, for the offences punishable under Sections 120-B, 395, 397, 412, 341 and 201 of the Indian Penal Code, 1860, Sections 3 (1) (ii), 3 (2) and 3 (4) of Maharashtra Control of Organized Crime Act, 1999 (MCOCA, 1999), Section 4 read with Section 25 of Arms Act, 1959 and Section 37 (1) (A) read with Section 135 of the Maharashtra Police Act, 1951, has preferred this application to enlarge him on bail.

2) The first informant is a jeweller. On 6th April, 2019, the first informant had been to Panvel to sell gold ornaments weighing about 1800 grams. At about 9.50 pm, the first informant alighted at Chinchpokali Railway Station. While the first informant was on his way to home along with gold ornaments, two unknown persons accosted him near the pendal of Chinchpokali Ganesh Mandal. They tried to snatch away the bag containing gold ornaments, which the first informant was carrying. As the first informant resisted, one of the robbers, who was wearing a red cap, assaulted the first informant by means of a chopper on his right hand. The first informant raised alarm. Thereupon, another robber unleashed blows on the left shoulder, biceps, wrist and forehead of the first informant. The robbers snatched away the bag containing the gold ornaments. When the nearby persons attempted to rescue the first informant, those robbers threatened to kill anybody who intervened. The first informant had noticed that two of the associates of those robbers were standing at the platform of the Chinchpokali bridge and exhorted the robbers to hurry up.

3) During the course of investigation on the basis of the leads obtained through to the CCTV footages, CDR, location and other technical evidence, the investigating agency could identify the suspects.

4) The applicant came to be arrested on 12th April, 2019. The applicant made a number of discoveries. Pursuant to the first discovery made by the applicant, the motorcycles which were used in the commission of the crime by the robbers were recovered. In another discovery, a chopper was recovered. The applicant also made a disclosure statement leading to the recovery of gold ornaments weighing 146 grams which had fallen to the share of the applicant. In the meanwhile, the co-accused were also arrested. The co-accused also made discovery. A jeweller - co-accused to whom the applicant and his wife had allegedly sold the gold ornaments, of which the first informant was robbed, made a discovery leading to the recovery of two yellow metal ingots weighing 475 and 555 grams.

5) It further transpired that the applicant was the leader of the organised crime syndicate. The applicant had been indulging in continuous unlawful activity and as many as 39 crimes were registered against the applicant. The applicant resorted to the

modus operandi of hiring new members for carrying out unlawful activities for the organised crime syndicate. The rest of the accused were allegedly the members of the said syndicate. Thus, with the prior approval of the competent authority, the provisions contained in the MCOC Act, 1999 were invoked. Post completion of investigation, with the previous sanction of the competent authority, the learned Special Judge took cognizance of the offences indicated above. Test-identification parades were conducted. The applicant was allegedly identified by the witnesses in the test identification parade.

6) An affidavit-in-reply is filed on behalf of the respondent. It is contended that there is a strong prima facie case against the applicant. Pursuant to the discovery made by the applicant, gold ornaments weighing 145 grams have been recovered. Jeweller-co-accused has also made discovery leading to the recovery of the yellow metal ingots into which the gold ornaments, of which the first informant was robbed, were converted. There is material to indicate that the applicant had sold huge quantity of the stolen ornaments to the co-accused jeweller. In addition, there are CCTV footage, CDR and further discoveries made by the applicant which squarely incriminate the applicant. Moreover,

in as many as 39 crimes, the applicant has been arraigned. The antecedents of the applicant are such that he does not deserve to be released on bail.

7) I have heard Mr. Darshit Jain, the learned Counsel for the applicant and Mrs. G. P. Mulekar, the learned APP for the State.

8) Mr. Jain submitted that the applicant was admittedly not the person, who had allegedly robbed the first informant. The role of being one of the robbers who decamped along with the gold ornaments, after unleashing blows by means of a chopper, has not been attributed to the applicant. Nor there is any material to show that the applicant was present at the time and place of the alleged occurrence. The entire prosecution case rests on evidence of discovery allegedly made by the applicant. There is no confessional statement recorded under Section 18 of the MCOC Act, 1999. Nor the witnesses have identified the applicant as one of the persons, who was seen along with the alleged robbers. In the circumstances, it cannot be said that a prima facie case is made against the applicant.

9) As a second limb, Mr. Jain would urge, de hors the merits of the matter, the applicant deserves to be enlarged on bail on the count of long period of incarceration. The applicant was

arrested on 6th April, 2019. Almost five years have elapsed and, yet, charge has not been framed. It is extremely unlikely that the trial can commence and conclude within a reasonable period. This long period of incarceration furnishes a justifiable ground to release the accused on bail notwithstanding the interdict contained in Section 21 (4) of the MCOC Act, 1999.

10) To lend support to this submission, Mr. Jain placed reliance on the judgment of the Supreme Court in the case of **Union Of India vs K.A. Najeeb¹** and an order passed by this Court in **Mrugank Kalwalkar @ Miccky Vs. State of Maharashtra in BA 2388 of 2022 dated 13th October, 2022.**

11) In opposition to this, Mrs. Mulekar stoutly submitted that the applicant cannot be heard to urge the ground of delay in trial as the applicant and the co-accused are themselves responsible for dragging the trial in Special Case No. 14 of 2019. It is on account of dilatory tactics on the part of the applicant and the co-accused, the trial could not be commenced and concluded expeditiously.

12) Mrs. Mulekar invited the attention of the Court to an order dated 10th August, 2023, passed by a Co-ordinate Bench in the Bail Application of the co-accused Mohd. Shahtaj Jamal Khan in

1 (2021) 3 SCC 713

BA 32 of 2022, whereby this Court had already expedited the trial by directing the learned Special Judge to frame the charge and conclude the trial as expeditiously as possible, and, in any event, within a period of one year thereof.

13) The learned APP would urge the said period is yet to expire and thus the applicant cannot seek bail on the ground of delay in trial.

14) To begin with, the injury certificate of the first informant indicates that the first informant had sustained multiple lacerations by means of a sharp weapon. There is prima facie material to show that the first informant was robbed of a huge amount of gold ornaments and in committing the robbery the robbers caused grievous hurt to the first informant.

15) The submission on behalf of the applicant that the applicant had no role in the alleged robbery as he was not the person who allegedly assaulted the first informant while committing the robbery, at this stage, does not advance the cause of the applicant. The applicant has been roped in as the gang leader of an organised crime syndicate.

16) To constitute a continuous unlawful activity within the meaning of Section 2 (d) of the MCOC Act, 1999, the activity

must have been undertaken either singly or jointly as a member of the organised crime syndicate or on behalf of such syndicate. "Organised crimes syndicate" under Section 2 (f) of the MCOC Act, 1999 means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. The material on record prima facie indicates that the alleged robbery was committed by the co-accused for the organised crime syndicate.

17) Mr. Jain laid emphasis on the fact that the co-accused have not been arraigned along with the gang leader in any other crime. Therefore, it cannot be said that there is any organised crime syndicate of which the applicant is the gang leader and, the co-accused the members. This submission is required to be appreciated in the light of the fact that the requirement is of two charge-sheets qua organised crime syndicate and not each of the persons who is alleged to be a member of such syndicate. Undoubtedly, there has to be a nexus between the person, who is sought to be implicated as a member and the organised crime syndicate. If such nexus is established, the fact that the said person is not implicated in any other crime or has not been implicated along with the co-accused/ member of the gang does

not detract materially, from the charge for the offences punishable under Sections 3 (1)(ii), 3(2) and 3 (4) of the MCOC Act, 1999.

18) In the instant case, the discoveries allegedly made by the applicant leading to the recovery of the chopper which were allegedly used by the robbers, and, more importantly, 145 grams of gold ornaments, in the totality of the circumstances, prima facie establish the nexus between the applicant and the co-accused-alleged assailants, who robbed the first informant.

19) Mr. Jain, the learned Counsel for the applicant submitted that the antecedents of the applicant sought to be relied upon by the prosecution do not merit consideration as apart from two crimes i.e. CR No. 14 of 2012 registered with Wakola police Station and CR No. 107 of 2021 registered with DCB CID, Mumbai, rest of the crimes registered against the applicant were in respect of the occurrences prior 10 years of the occurrence in question.

20) It was further submitted that in MCOCA Special Case No. 8 of 2012, arising out of CR No. 107 of 2021, DCB CID, Mumbai and (CR No. 241 of 2011, registered with Azad Maidan Police station), the accused No. 1 has been acquitted of the offences

punishable under MCOC Act and convicted for the offences punishable under Sections 392 and 342 read with Section 34 of the Penal Code, 1860 only.

21) The aspect of antecedents of the applicant, is required to be considered as a whole. As many as 39 crimes have been registered against the applicant and the majority of them are of theft and robbery armed with weapons. The antecedents of the applicant put the Court on guard. It would be hazardous to draw an inference that the applicant would not indulge in identical offences, if released on bail.

22) I am, therefore, impelled to hold that prima facie, the twin test envisaged by Sub Section (4) of Section 21 cannot be said to have been satisfied.

23) As regards long period of incarceration, it is now crystallized by a catena of judgments, including the judgment of the Supreme Court in the case of **K.A. Najeeb** (supra) that the statutory restrictions in the matter of grant of bail melt down on account of long period of incarceration as it impinges upon the constitutional guarantee of right to life and personal liberty under Article 21 of Constitution of India. In fact, the statutory restrictions on the grant of bail under special

enactments like UAPA, MCOC Act and NDPS Act, 1985 are considered to be justifiable on the premise that the trial in those cases would be completed expeditiously.

24) In the case of **K.A. Najeel** (supra) the Supreme Court enunciated that at the 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 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

25) In the case at hand, the applicant has been in custody since 12th April, 2019. A period of four years and 11 months has elapsed. It is necessary to note that the charge has yet not been framed despite the directions by this Court in BA No. 32 of 2022 preferred by the co-accused, to frame charge and conclude the trial as expeditiously as possible and, in any event, within a period of one year thereof.

26) The learned APP, however pointed out that there have been efforts to delay the trial on the part of the accused. Often adjournments are sought and applications for discharge have been preferred. Thus, the charge could not be framed.

27) Mr. Jain countered the submissions on behalf of the prosecution. It was urged that the accused have a statutory right to prefer an application for discharge and that cannot be arrayed against the applicant for not concluding the trial expeditiously.

28) I have perused the copies of the Roznama. The submission of Mrs. Mulekar that the accused have also contributed for the delay in framing the charge cannot be said to be wholly unfounded.

29) Undoubtedly the applicant has been in custody for almost 5 years. Offence punishable under Section 394 of the Penal Code, 1860 entails punishment which may extend to imprisonment for life. Since grievous hurt was caused to the first informant, Section 397 of the Penal Code, 1860, which provides for a minimum sentence of 7 years may come into play. Offences punishable under Section 3 (1)(ii), 3(2) and 3 (4) of the MCOC Act, 1999 entail punishment of imprisonment for life with a

minimum sentence of 5 years. Thus, a balance is required to be struck between right of the accused to speedy trial and the interest of society in having the accused tried for grave offences.

30) In my considered view since the Bail Application of the co-accused was disposed with a direction to the trial Court to conclude the trial prior August, 2024, it may be expedient to grant opportunity to the prosecution to make an effort to conduct the trial expeditiously within the said period.

31) To sum up, at this stage, the facts that the applicant is a history sheeter, the applicant has been identified by one of the eye witnesses and there has been the recovery of huge quantity of gold from the applicant and co-accused Pankaj Soni, which was allegedly sold by the applicant, incriminate the applicant.

32) Thus, in the totality of the circumstances, and having regard to the fact that the Court has already directed expeditious conclusion of the trial, I am inclined to reject the application with liberty to the applicant to revive the prayer for bail in the event the trial is not concluded by August, 2024.

33) Hence, the following order.

: O R D E R :

- (i) The application stands rejected.

(ii) The learned Judge is requested to make an endeavour to commence and conclude the trial in Sessions Case No. 14 of 2019 positively by end of August, 2024.

(iii) In the event trial is not concluded within the said period, the applicant shall have liberty to review the prayer for bail before this Court.

(iv) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of 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.

[N. J. JAMADAR, J.]