

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.3790 OF 2023

Kalim Rauf Sayyed	...Applicant
vs.	
The State of Maharashtra	...Respondent

Mr. Gaurav Bhawnani, for the Applicant.
Mr. R.M. Pethe, APP, for the Respondent/State.
Mr. Mahesh Mugatrao, Santacruz Division, Mumbai.

CORAM :	N. J. JAMADAR, J.
RESERVED ON :	APRIL 25, 2024
PRONOUNCED ON :	MAY 09, 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 MCOCA Special Case No. 4 of 2014, arising out of FIR bearing C.R. No. 175 of 2014 registered with Santacruz police station for the offences punishable under sections 120-B, 143, 144, 145, 149, 450, 387, 452, 307 and 506(2) of Indian Penal Code, 1860; section 3(1)(2), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (MCOCA) and section 4 read with 25 of the Arms Act, 1959 has preferred this application for bail.
3. The genesis of the prosecution is in an incident which allegedly occurred on 1st March, 2014. The first informant was

working as a Site Manager with HDIL at its office at Daulat Nagar, Santacruz (w), Mumbai. Since, November, 2013 Zulfikar Behlim, the alleged gang leader, was visiting the said office to extort a sum of Rs. 8 lakhs purportedly to release his brother who was incarcerated in a prosecution.

4. On 1st March, 2014 at about 3.45 pm, 15-20 armed persons wearing scarfs, masks and caps barged into the said site office of HDIL. Trespassers broke the glass door. They ransacked the premises. A security guard fired a warning shot in the air. Thereupon, those persons fled away. It was alleged that few of the persons who were present at the said site office could be identified their masks had slipped of.

5. Eventually, 19 persons were tried in MCOCA Special Case No. 4 of 2014, 18 of 2015, 23 of 2015 and 5 of 2017. By a judgment and order dated 28th August, 2019, accused No. 13 Zulfikar Behlim was convicted for an offence under section 387 of the Penal Code. Accused No. 13 Zulfikar Behlim, accused No. 10 Mavia Khan, accused No. 11 Asif Jindaran and accused No. 12 Ajmal Khan were found guilty of the offences punishable under section 3 of the MCOCA. Rest of the accused were acquitted.

6. The applicant contended that he was unaware of being implicated as an accused in the said crime. Since the applicant was

incarcerated in another case and applicant came to know about the pendency of the instant prosecution, the applicant filed an application before the learned Special Judge. Thereafter, the applicant came to be arrested in this case on 21st April, 2022. Hence, this application for bail.

7. An affidavit in reply is filed on behalf of the State. It was contended that the applicant was shown as an absconding accused at Serial No. 20. The material on record, especially the confessional statement of the three co-accused, indicate the role of the applicant. The applicant is a habitual offender and in the event of release on bail, there is likelihood of the applicant absconding and fleeing away from justice.

8. Mr. Gaurav Bhawnani, the learned counsel for the applicant submitted that the first informant did not name the applicant as the person who attempted to commit extortion and barged into the premises of HDIL. Nor was the applicant named in the evidence of the first informant recorded before the Special Court. After a lapse of about 8 years, on 23rd April, 2024, after the arrest of the applicant, a supplementary statement (page 850) of the first informant came to be recorded and the applicant was sought to be implicated, on the basis of the built and gait of the applicant as it matched with one of the persons in the CCTV footage.

9. It was submitted that none of the eye witnesses named the applicant as one of the trespassers. Though the applicant has been named as an accomplice in the confessional statements of the co-accused yet, the same cannot be used as the applicant and the co-accused can not be said to be facing trial together. Mr. Bhawnani further submitted that though the applicant has antecedents, he cannot be roped in as member of the organized crime syndicate as the only commonality between the crimes registered against the applicant and the crimes registered against the organized crime syndicate was C.R. No. 294 of 2016, subsequent to the present offence. Therefore, the applicant deserves to be enlarged on bail.

10. Mr. Pethe, the learned APP, fairly submitted that the legal position that the confessional statement of the co-accused recorded under section 18 of the MCOCA can be used against the non-maker co-accused only when they are tried in the same case together can not be controverted. Mr. Pethe again fairly submitted that no test identification parade was conducted to confirm the identity of the applicant as one of the trespassers who had barged into the site office of HDIL.

11. I have carefully perused the material on record. Prima facie, it appears that the staff in the office of HDIL had not known the persons who had barged into the site office of HDIL. To add to this,

the question as to whether those witnesses had an opportunity to see the features of all the trespassers, when they were allegedly 20 in number, appears contentious. The witnesses have stated that those persons were wearing scarf and masks. The prosecution alleges that the witnesses could identify four of those persons as their masks had fallen off. The applicant was not one of those four persons. No test identification parade was held, even after arrest of the applicant, to establish his identity as one of the persons who had committed the house trespass.

12. The only material which the prosecution presses into service is the supplementary statement of the first informant recorded on 21st April, 2022, wherein the first informant states that the applicant was one of the persons who accompanied the other accused when they had visited the office of HDIL to demand extortion prior to 1st March, 2014. The identification of the applicant in the supplementary statement also appears to be prima facie infirm as the applicant was sought to be identified on the basis of the built and gait and comparing the same with the persons seen in the CCTV footages. Evidently, the applicant was shown to the first informant in the police station. Such identification, prima facie, is of no avail to the prosecution.

13. In the aforesaid view of the matter, though certain crimes

have been registered against the applicant and he is facing prosecution for the same, yet, prima facie, there is no material to establish the nexus of the applicant with the alleged offences. It also appears that whether the applicant was a member of organized crime syndicate led by accused No. 13 Zulfikar Behlim, the alleged gang leader, appears to be a matter for adjudication at the trial.

14. In the totality of the circumstances, the interdict contained in section 21 of the MCOCA may not be attracted. I am, therefore, inclined to allow the application.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant be released on bail in C.R. No. 175 of 2014 registered with Santacruz police station, on furnishing a P.R. Bond of Rs. 30,000/- with one or more sureties in the like amount.

3] The applicant shall mark his presence at Santacruz police station on the first Monday of every month between 11 am to 1 pm for a period of three years or till filing of the charge sheet 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.)