IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (ABA) NO.191/2024
Kishor Pandurang Balpande
..vs..
State of Mah., thr.PSO Wathoda PS, Taluka and District Nagpur

Office Notes, Office Memoranda of Coram, appearances, Court orders or directions and Registrar's orders	Court's or Judge's Order

Shri S.P.Bhandarkar, Counsel for the Applicant.
Shri D.V.Chauhan, Public Prosecutor with Mrs.S.V.Kolhe, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 22/03/2024
PRONOUNCED ON : 28/03/2024

1. Heard.

2. Apprehending arrest at the hands of police in connection with Crime No.10/2024 registered with the non-applicant/police station for offences punishable under Sections 143, 147, 149, 332, 353, 405, and 406 of the Indian Penal Code and under Section 48(7) of the Maharashtra Land Revenue Code, 1966 and under Section 3(1)(ii), 3(2), and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (the MCOC Act), the applicant approached this court for grant of anticipatory bail.

3. The accusations are on the basis of report lodged by

Circle Officer Anil Bramhe. As per the report, on 14.1.2024, he and other staff were on patrolling duty. They intercepted a truck carrying sand. On enquiry with driver of the truck about royalty, the driver could not produce it. When the informant was taking photographs of the truck, 5-6 persons by two four-wheelers came there and started abusing them in a filthy language. The said persons and driver of the truck fled away from the spot of the incident. During the said incident, cell phone of the driver fell on the ground, which was seized. The accused persons threatened the informant and prevented him from discharging his duties and, therefore, First Information Report was lodged against the co-accused. During investigation, involvement of the applicant is also revealed and, therefore, apprehending his arrest, he preferred the application.

4. Learned counsel Shri S.P.Bhandarkar for the applicant submitted that on the basis of hollow and baseless allegations, the applicant is implicated. In fact, the applicant was not present at the spot. The prosecution is taking aid of order dated 19.1.2024 granting approval by the competent authority investigating the matter by applying provisions of the MCOC Act. However, the approval order does not reflect name of the applicant. There is

absolutely no role of the applicant. No single offence is registered against the applicant either in individual capacity or as a member of organized crime syndicate. The applicant has absolutely no concern with the crime or with the other co-accused. There is no nexus between the applicant and the other co-accused. As far as confessional statement of the co-accused is concerned, Section 18 of the MCOC Act would come into play only after sanction under Section 23(2) of the MCOC Act. There is absolutely no bar under Section 21(3) of the MCOC Act to entertain the application. Considering a fact that *prima facie* there is no material to connect the applicant with the co-accused, there is no prior approval showing name of the applicant and, therefore, the applicant be protected by granting his pre-arrest bail.

5. In support of his contentions, learned counsel for the applicant placed reliance on following decisions:

> 1. Writ Petition No.1959/2021 (**Shabhana Parveen Inayatullah Shaikh vs. The State of Maharashtra (at the instance of Trombay Police Station C.R.No.332 of 2002**) decided by this court at Principal Seat on 13.8.2021.
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> 2. Criminal Application (BA) No.843/2023 (**Shahrukh alias Kasal Shaikh Akram vs. State of Maharashtra, thr.PSO PS Nandanwan, Nagpur**) decided by this court on 22.12.2023.

6. *Per contra*, learned Public Prosecutor Shri D.V.Chauhan for the State strongly opposed the application on ground that the informant is Circle Officer at tahsil office and was working in flying squad. When he was on patrolling duty, he intercepted the truck carrying/transporting sand illegally. During investigation, two co-accused persons Ashraf Khan and Javed Khan, who were drivers of the truck, were arrested. During investigation it also revealed that co-accused Ashraf Khan is leader of organized crime syndicate and has committed various offences and, therefore, the Investigating Officer submitted a proposal to obtain approval to apply provisions of the MCOC Act. The said approval was granted as requirement under Section 2(1)(d) of the MCOC Act is fulfilled. He further submitted that as far as submission is concerned, that name of the applicant is not mentioned in approval order, prior approval is not for registering crime against individual offenders, but for recording information. He submitted that involvement of the applicant reveals from confessional statement of the co-accused under Section 18 of the MCOC Act. Call Data Reports (CDRs) show that between 13.12.2023 to 13.1.2024, there were 9 calls between the applicant and co-accused Ashraf Khan and 93 calls between the applicant and other co-accused Samim Ansari. The investigation is at initial

stage and if the applicant is protected, the entire investigation would hamper.

7. In support of his contentions, learned Public Prosecutor for the State placed reliance on following decisions:

> **1. Kavitha Lankesh vs. State of Karnataka and ors, reported in (2022)12 SCC 753;**
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> **2. Vinod G.Asrani vs. State of Maharashtra, reported in (2007)3 SCC 633, and**
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> **3. Zakir Abdul Mirajkar vs. State of Maharashtra and ors, reported in 2022 SCC OnLine SC 1092.**

8. Before going into the controversy involved in the present application, it is necessary to see certain provisions of the MCOC Act and its preamble. The preamble states that it is an Act to make special provisions for prevention and control of, and for coping with the criminal activity by organized crime syndicate or gang, and for matters connected therewith and incidental thereto. The MCOC Act, states the preamble, makes special provisions for prevention and control of, for coping with, criminal activity by organized crime syndicate or gang. Essentially, therefore, the MCOC Act targets the unlawful activities of the organized crime syndicate. The objects and statements of the MCOC Act show that

organized crime has for quite some years come up as a very serious threat to the society. It knows no national boundaries and is fueled by illegal wealth generated by contract, killing, extortion, smuggling in contrabands, illegal trade in narcotics kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organized crime being very huge, it has had serious adverse effect on our economy. It was seen that the organized criminal syndicates made a common cause with terrorist gangs and foster terrorism which extend beyond the national boundaries. There was reason to believe that organized criminal gangs have been operating in the State and, thus, there was immediate need to curb their activities.

9. The legislatures felt that The existing legal framework i. e. the penal and procedural laws and the adjudicatory system was found to be rather inadequate to curb or control the menace of organised crime. Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime. It is the purpose of this Act to achieve these objects.

10. Section 2(1)(f) of the MCOC Act defines “organized crime syndicate’ to mean a group of two or more persons who, acting singly or collectively, as a syndicate or gang indulged in activities of organized crime.

11. Section 2(1)(e) of the MCOC Act defines “organised crime“ means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.

12. The definition of continuing unlawful activity within meaning of Section 2(1)(d) states an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three or more, undertaken either singly or jointly, as a member of organized crime syndicate or on behalf of such syndicate in respect of which more than one chargesheets have been filed before a competent court within the preceding the period of ten years and that court has taken cognizance of such offence.

13. Thus, for an activity to be a `continuing unlawful activity', a) the activity must be prohibited by law; b) it must be a cognizable offence punishable with imprisonment of three years or more; c) it must be undertaken singly or jointly; d) it must be undertaken as a member of an organized crime syndicate or on behalf of such syndicate, and e) in respect of which more than one charge- sheet have been filed before a competent court. Therefore, the MCOC Act contemplates a situation where a group of persons as members of organized crime syndicate indulge in organized crime. That is, they indulge in use of violence, threats of violence, intimidation, etc. to gain pecuniary benefit or undue economic or other advantage for themselves or any other person. These activities as per the definition of organized crime are continuing unlawful activity prohibited by law.

14. This Court in the case of **Govind Sakharam Ubhe vs. State of Maharashtra, reported in 2009(3) Mh.L.J. (Cri.) 131** in paragraph No.37 defines “continuing unlawful activity”. This court observed that The members of the crime syndicate operate either singly or jointly in commission of organized crime. They operate in different modules. A person may be a part of the module which jointly undertakes an organized crime or he may

singly as a member of the organized crime syndicate or on behalf of such syndicate undertake an organized crime. In both the situations, the MCOC Act can be applied. It is the membership of organized crime syndicate which makes a person liable under the MCOC Act. This is evident from section 3(4) of the MCOC Act which states that any person who is a member of an organized crime syndicate shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum of fine of Rs.5 lacks. It is further held that what is important is the nexus or the link of the person with organized crime syndicate. The link with the 'organized crime syndicate' is the crux of the term `continuing unlawful activity'. If this link is not established, that person cannot be roped in.

15. Thus, for an activity to be a `continuing unlawful activity', a) the activity must be prohibited by law; b) it must be a cognizable offence punishable with imprisonment of three years or more; c) it must be undertaken singly or jointly; d) it must be undertaken as a member of an organized crime syndicate or on behalf of such syndicate, and e) in respect of which more than one charge- sheet have been filed before a competent court.

16. The Honourable Apex Court, in the case of **Zakir Abdul Mirajkar vs. State of Maharashtra and ors** *supra,* analyzed provisions of the MCOC Act. While analyzing provisions of the MCOC Act, the Honourable Apex Court laid down an overview of the MCOC Act by observing, as follows:

> "The Maharashtra Control of Organized Crime Act 1999, as its long title indicates, is "an Act to make special provisions for the prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang and for matters connected therewith or incidental thereto". The statement of objects and reasons contains the reasons which constituted the foundation for the legislature to step in:
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> Firstly, organized crime which is in existence for some years poses a serious threat to society;
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> Secondly, organized crime is not confined by national boundaries;
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> Thirdly, organized crime is fuelled by illegal wealth generated by contract killing, extortion, smuggling and contraband, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, and other activities;
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> Fourthly, the illegal wealth and black money generated by organized crime pose adverse effects on the economy;
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> Fifthly, organized crime syndicates make common cause with terrorists fostering narcoterrorism which extends beyond national boundaries;

> Sixthly, the existing legal framework in terms of penal and procedural laws and the adjudicatory system were found inadequate to curb and control organized crime; and
>
> Seventhly, the special law was enacted with "stringent and deterrent provisions" including in certain circumstances, the power to intercept wire, electronic or oral communication."

17. In the light of the well settled legal provisions enumerated therein, if facts and investigation papers of the present case are perused, it would show that during investigation, on the basis of confessional statement of the co-accused and CDRs, involvement and connection of the applicant with the co-accused is revealed. CDRs collected during investigation show that between 13.12.2023 to 13.1.2024, there were 9 calls between the applicant and co-accused Ashraf Khan i.e. till one day prior to the incident and 93 calls between the applicant and other co-accused Samim Ansari. The crime chart shows that two chargesheets are filed vide Crime Nos.90 and 2022 and 8/2022 against co-accused Ashraf and Javed. The confessional statement of co-accused Ashraf shows involvement of the applicant and his role. It is not disputed that the confessional statement of the co-accused under Section 18 of the MCOC Act is admissible in evidence. The submission of learned counsel for the applicant, that Section 18 of the MCOC Act

would come into play after sanction under Section 23(2) of the MCOC Act, is not sustainable for a simple reason that Section 18 of the MCOC Act deals with certain confession made to police officer to be taken into consideration.

18. For reference, Section 18 of the MCOC Act is reproduced:

> **“18. Certain confessions made to police officer to be taken into consideration.--**
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> (1) Notwithstanding anything in the Code or in the Indian Evidence Act 1872, but subject to the provisions of this section, a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator:
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> Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
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> (2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.
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> (3) The Police Officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such

> confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession, putting the date and time of the same.
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> (4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so receive to the Special Court which may take cognizance of the offence.
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> (5) The person from whom a confession has been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) alongwith the original statement of confession, written or recorded on mechanical device without unreasonable delay.
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> (6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon.

19. Thus, Section 18 of the MCOC Act deals with recording of confession during investigation and procedure which is to be followed. There is no bar to record statement under

Section 18 of the MCOC Act prior to sanction under Section 23(2) of the MCOC Act.

20. Section 23 of the MCOC Act deals with cognizance of, and investigation into, an offence, which states that notwithstanding anything contained in the Code, (a) no information about the commission of an offence of organized crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police; (b) no investigation of an offence under the provisions of this Act shall be carried out by police officer below rank of the Deputy Superintendent of Police.

21. Thus, for recording information about the commission of offence of organized crime under this Act, prior approval under Section 23(1)(a) of the MCOC Act is required and in view of Section 23(1)(b), investigation is to be conduced by police officer below the rank of the Deputy Superintendent of Police and above.

22. As per Section 23(2) of the MCOC Act, no Special Court shall take cognizance of any offence under this Act without previous sanction of police officer not below the rank of Additional Director General of Police.

23. Thus, prior taking cognizance a previous sanction is required.

24. Confessions under Section 18 of the MCOC Act are admissible against accused as a substantive evidence. Substantive evidence would not mean that it should be treated automatically as substantive evidence. The quality of the evidence is important. If confessional statement made voluntarily and while recording the same, post confessional statement and formalities are complied. Such evidence in the nature of confessional statements is acceptable.

25. In the present case, admittedly, investigation is at primary stage.

26. At this stage, whether there is a *prima facie* evidence showing connection of the applicant or not is to be seen.

27. Learned counsel for the applicant submitted that no single offence is registered against the applicant to show his nexus with the organized crime syndicate either in individual capacity or as a member of the organized crime syndicate either in individual capacity or as a member of organized crime. The members of the organized crime syndicate operate either singly or jointly in

commission of the organized crime. They operate in different modules. It is the membership of organized syndicate which makes a person liable under the MCOC Act.

28. In the case of **Shabhana Parveen Inayatullah Shaikh vs. The State of Maharashtra** *supra,* on which learned counsel for the applicant placed reliance, this Court at Principal Seat observed that it is the membership of the organized crime syndicate which makes a person liable under the MCOC Act. What is of significance is the nexus or the link of the person with organized crime syndicate. The linchpin of the offence of organized crime is the nexus with the organized crime syndicate. It is not the requirement of law that two charge-sheets for the cognizable offences punishable with imprisonment for three years or more need be filed against each of the members of such syndicate.

29. Thus, to attract provisions under the special enactment, it is not requirement of law that two chargesheets for cognizable offences punishable with imprisonment for three years or more need to be filed against each of members. It is membership of organized crime syndicate which makes a person liable under the MCOC Act. What is of significance is the nexus or link of the person with organized crime syndicate.

30. The decision in the case of **Shabhana Parveen Inayatullah Shaikh vs. The State of Maharashtra** *supra* is not helpful to the applicant for a reason that observation of the Division Bench shows that material is not forthcoming either in the form of antecedents of petitioner or subject FIR and statements of witnesses recorded during course of investigation. Whereas, in the present case, the investigation is at primary stage and confessional statement of the co-accused and CDRs show connection between the applicant and other co-accused.

31. Another limb of submissions of learned counsel for the applicant was that in the approval there is no mention of name of the applicant.

32. Learned Public Prosecutor for the State submitted that it is not at all requirement of Section 23(1) of the MCOC Act that in approval name of accused or his role should to be mentioned. He submitted that the Honourable Apex Court in the case of **Kavitha Lankesh vs. State of Karnataka and ors** *supra* in paragraph No.26 observed, thus:

> "Concededly, the original FIR registered in the present case was for an ordinary crime of murder against unknown persons. At the relevant time, the material regarding offence

> having been committed by an organized crime syndicate was not known. That information came to the fore only after investigation of the offence by the SIT, as has been mentioned in the report submitted to the Commissioner of Police, Bengaluru City for seeking his prior approval to invoke Section 3 of the 2000 Act. Once again, at this stage, the Commissioner of Police had focused only on the *factum* of information regarding the commission of organized crime by an organized crime syndicate and on being prima facie satisfied about the presence of material on record in that regard, rightly proceeded to accord prior approval for invoking Section 3 of the 2000 Act. The prior approval was not for registering crime against individual offenders as such, but for recording of information regarding commission of an offence of organized crime under the 2000 Act. Therefore, the specific role of the concerned accused is not required to be and is not so mentioned in the stated prior approval. That aspect would be unravelled during the investigation, after registration of offence of organized crime. The High Court, thus, examined the matter by applying erroneous scale. The observations made by the High Court in the impugned judgment clearly reveal that it has glossed over the core and tangible facts.

The Honourable Apex Court further held, that what is crucial in this provision is the *factum* of recording of offence of organized crime and not of recording of a crime against an offender as such.

33. Thus, what is required is, that prior approval was not

for registering crime against individual offenders, but for recording of information regarding commission of an offence or organized crime under the 2000 Act.

34. Thus, the contention of learned counsel for the applicant, that prior approval is not reflecting name of the applicant, in view of the above observations, is not sustainable.

35. Thus, what is contemplated under Section 2(1)(d) of the MCOC Act is that activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one chargesheets have been filed. Stress is on the unlawful activities committed by the organized crime syndicate. Requirement of one or more chargesheets is *qua* unlawful activities of the unlawful crime syndicate.

36. Thus, material on record, as discussed above, especially confessional statement of the accused and CDRs, discloses involvement of the applicant in the alleged offence. There is a specific bar under Section 21(3) of the MCOC Act,

according to which, nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act.

37. Thus, in view of bar under Section 21(3) of the MCOC Act and considering the entire material on record, *prima facie,* the present case stands against the applicant showing his involvement and connection with the other co-accused. There are reasonable grounds to believe that the applicant is involved in the said crime.

38. In the light of the above, the application for grant of anticipatory bail deserves to be rejected and the same is **rejected**.

The application stands **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!