

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

**INTERIM APPLICATION NO. 4281 OF 2024
IN
CRIMINAL APPEAL NO. 365 OF 2018
ALONGWITH
CRIMINAL APPEAL NO. 365 OF 2018**

Ganesh Suresh Wagh @
Ganyakawlya

.....Applicant/
Appellant

Versus
The State of Maharashtra

.....Respondent

Mr. Akshay Bankapur -Advocate for the Applicant
Smt. M. H. Mhatre - APP for the Respondent-State.

**CORAM : SARANG V. KOTWAL &
S.M. MODAK, JJ.**

DATE : 15th JANUARY 2025

P.C. :

1. This is an application for bail, pending criminal appeal no. 365 of 2018 preferred by the Appellant challenging the judgment and order dated 21.02.2018 passed by the Special Judge Nashik in Special (MCOC) Case No. 1 of 2013. There were twelve accused. The original accused nos. 7, 11 and 12 were acquitted. The other accused including the present Applicant were

convicted. The Applicant was the original accused no. 9. They were convicted and sentenced as under :-

- (a) Under Sections 109 and 120-B of the Indian Penal Code, they were sentenced to suffer rigorous imprisonment for 8 years each and to pay fine of Rs. 1,000/- each and in default to suffer further rigorous imprisonment for three months each.
- (b) Under Sections 395/392 of the Indian Penal Code, they were sentenced to suffer rigorous imprisonment for eight years each and to pay fine of Rs. 1,000/- each and in default to suffer further rigorous imprisonment for one month each.
- (c) Under Section 3(1)(ii) of the Maharashtra Control of Organized Crime Act, they were sentenced to suffer rigorous imprisonment for eight years each and to pay fine of Rs. 5,00,000/- each and in default to suffer further rigorous imprisonment for one year each.

(d) Under Section 3(2) of the Maharashtra Control of Organized Crime Act, they were sentenced to suffer rigorous imprisonment for eight years each and to pay fine of Rs. 5,00,000/- each and in default to suffer further rigorous imprisonment for one year each.

(e) Under Section 3(4) of the Maharashtra Control of Organized Crime Act, they were sentenced to suffer rigorous imprisonment for eight years each and to pay fine of Rs. 5,00,000/- each and in default to suffer further rigorous imprisonment for one year each.

(f) Under Sections 3 and 25 of the Arms Act, they were sentenced to suffer rigorous imprisonment for one year each and to pay fine of Rs. 1,000/- each and in default to suffer further rigorous imprisonment for one month each.

2. The substantive sentences were directed to run concurrently. They were acquitted from the offence under Section 135 of the Bombay Police Act.

3. The prosecution story is that on 27.09.2012, the Complainant and his partner were to execute a sale deed, they had withdrawn substantial amount from the bank. At about 9.55 a.m. on 27.09.2012, four unknown persons entered the Complainant's office. One of them pointed a pistol. They had covered their faces. One of them, threw chilly powder in the cabin. One of them fired on the ground and all of them took away the bag containing Rs. 1,03,50,000/-. They fled away. On this basis, the F.I.R. is lodged.

4. The prosecution case is that the present Applicant was the gang leader. However, on that particular day, he was in jail. During the investigation, the provisions of M.C.O.C. Act were applied. Confessional statement of the accused-Nagesh Sonawane, who is accused no. 1, was recorded under the provisions of M.C.O.C. Act. He explained how the plan was hatched and how it was executed. The only allegation against the Applicant is that the other accused had taken guidance from the Applicant.

5. Learned counsel for the Applicant submitted that Applicant was arrested on 11.10.2012. Thereafter, he was released on bail on 30.06.2014. Then he was re-arrested after his conviction on 21.02.2018. Thus, he has completed more than 10 years of actual imprisonment and only small portion which amounts to 'in default' sentence is yet to be completed. He submitted that his appeal is not likely to be decided within that period and more importantly, on merits, he has an excellent case as there is no admissible piece of evidence against the Applicant on which the conviction could have been based. He submitted that the only material against the Applicant is the alleged confession of the co-accused-Nagesh. He submitted that it is settled law that the confession of the co-accused though admissible, it cannot form the sole basis for conviction of the accused. He submitted that the confession of the co-accused can be used only to lend assurance to the conclusion of the guilt reached by the Court against that particular accused on the basis of the other prosecution evidence. He submitted that admittedly, on that date, the Applicant was in custody.

6. Learned APP opposed this submission. According to her, the Applicant was the master mind and he had many cases against him. In one of the cases, he was convicted under the M.C.O.C. Act. His conviction was upheld by this Court, but only the sentence in that case was reduced. She, therefore, submitted that bail may not be granted to the Applicant.

7. We have considered these submissions. As rightly submitted by learned counsel for the Applicant, on the date of the incident, he was in custody. The confessional statement of the co-accused Nagesh is recorded by PW No. 30- Additional Police Commissioner, Pune – Sahebrao Patil. Nagesh had narrated that one Sunil Khokale informed him that the Complainant was likely to get big amount for purchasing a land. Nagesh shared this information with co-accused Nitin Kale, Lalya Bhadange, Sameer Pathan. They decided to take guidance from the Applicant. They arranged a pistol, chilly powder, a chopper and motor cycles and this offence was committed.

8. Thus, it can be seen that the only evidence against the Applicant is about this confessional statement of the co-accused. The learned Judge has relied on this confession alone to base conviction as is reflected in para no. 41 of the judgment. In this context the learned counsel for the Applicant has rightly relied on the judgment of the Hon'ble Supreme Court in case of **Suresh Budharmal Kalani Vs. State of Maharashtra**¹ and in particular paragraph no. 7 of the said judgment which reads thus:-

“So far as the confession of Javawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then the question is: what would be its evidentiary value against the latter? The question was succinctly answered by this Court in Kashmira Singh v. State of M.P.² with the following words:

“The proper way to approach a case of this kind is, first, to marshal the evidence against the

1 (1998) 7 SCC 337

2 AIR 1952 SC 159 : 1952 SCR 526

accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The view so expressed has been consistently followed by this Court. Judged in the light of the above principle, the confession of Suryarao cannot be called in aid to frame charges against Kalani in the absence of any other evidence to do."

9. In this view of the matter, there is a strong case made out by the Applicant in his favour. Hence, there is scope to believe that the Applicant is not guilty of the offence and since he is in custody for a very long period and he is not likely to commit any offence as the live-link is broken. Apart from that, the Applicant is in custody for a very long period. His appeal is not likely to be decided within a reasonably short period. Therefore, we are inclined to grant bail to the Applicant pending his appeal. However, considering that the Applicant has at least 17 registered offences against him some conditions are required to be imposed on him. Hence the following Order:-

ORDER

- (i) During pendency and final disposal of the present appeal, the Applicant-Ganesh Suresh Wagh @ Ganyakawlya is directed to be released on bail on executing Personal bond in the sum of Rs. 30,000/- with one or two sureties in the like amount.

- (ii) The Applicant shall report to the concerned Police Station every alternate Sunday between 04.00 p.m. to 06.00 p.m. for a period of two years from today.
- (iii) Interim Application is disposed of.

(S.M. MODAK, J.)

(SARANG V. KOTWAL, J.)