

(2009) 04 BOM CK 0135

In the Bombay High Court

Case No : Criminal Writ Petition No's. 408 and 409 of 2009

Dashrath Bapu Shinde, Kalyan @ Dalya Shiva Shinde and
Suresh Bapu Shinde

APPELLANT

Vs

The State of Maharashtra at the instance of Senior Inspector
of Police

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Arms Act, 1959 — Section 25, 4, 5
Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 164, 167
Maharashtra Control of Organised Crime Act, 1999 — Section 10, 21(4), 23(1), 5, 5(1)
Penal Code, 1860 (IPC) — Section 34, 342, 395, 397, 452
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 20(4), 20(8)

Citation : (2009) CriLJ 4708 : (2010) 1 Crimes 358 : (2010) 6 RCR(Criminal)
560

Hon'ble Judges : Ranjana Desai, J;R.G. Ketkar, J

Bench : Division Bench

Advocate : S.R. Chitnis, instructed by Nitin Sejpal and Pooja Bhojne, for the
Appellant; U.V. Kejariwal, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Ranjana Desai, J.—Rule. Rule made returnable forthwith. By consent of parties, taken up for hearing and final disposal.

2. These two writ petitions can be disposed of by a common judgment because the parties and the facts involved in both the petitions are the same.

3. It is necessary to begin with the facts of the case. It is the case of the prosecution that on 16/6/2007, the petitioners committed offences under Sections 395, 397, 342, 452, 457, 506(II), 34 of the Indian Penal Code (for short, "the IPC") read with Sections 4, 5, 25 of the Arms Act read with Section 135 of the Bombay Police Act within the jurisdiction of Pant Nagar Police Station, Mumbai.

4. The case was registered vide C.R. No. 155 of 2007. The investigation of the said CR was transferred to DCB, CID, Mumbai, and the case was numbered as CR No. 39 of 2007. During the course of investigation, the petitioners were arrested. The provisions of the Maharashtra Control of Organised Crime Act, 1999 (for short, "the MCOCA") came to be invoked and the chargesheet came to be filed against the petitioners before the designated Special Court (for short, "the Special Court") on 12/10/2007 and the said case was numbered as MCOC Special Case No. 23 of 2007.

5. On 17/6/2007, the petitioners committed offences under Sections 395, 397, 342, 452, 457, 459, 460 of the IPC read with Sections 4, 5 and 25 of the Arms Act read with Section 135 of the Bombay Police Act within the jurisdiction of Versova Police Station, Mumbai, and the case was registered vide CR No. 147 of 2007. The investigation of the said case was transferred to DCB, CID, Mumbai. The case was numbered as CR No. 60 of 2007. During the course of investigation of the said case, the petitioners were arrested and after completion of the investigation, charge-sheet came to be filed on 18/10/2007 before the Additional Chief Metropolitan Magistrate, 37th Court and the said case was committed to the Sessions Court, Mumbai, and it was numbered as Sessions Case No. 23 of 2008. The said case is pending trial.

6. On 19/6/2007, the petitioners committed offences under Sections 395, 397, 342, 452 and 457 of the IPC read with Sections 4, 5 and 25 of the Arms Act read with Section 135 of the Bombay Police Act within the jurisdiction of Tilak Nagar Police Station, Mumbai, and the case was registered vide C.R. No. 146 of 2007. The investigation of the said case was transferred to DCB, CID, Mumbai. The case was numbered as C.R. No. 37 of 2007. During the course of investigation of the said case, the petitioners were arrested and after completion of investigation, the charge-sheet was filed before the Additional Chief Metropolitan Magistrate, 37th Court, on 28/9/2007. The case was committed to the Sessions Court, Mumbai, and was numbered as Sessions Case No. 33 of 2008. The said case is pending trial.

7. On 16/6/2008, an application came to be filed before the Sessions Court, Mumbai, in Sessions Case No. 23 of 2008 and Sessions Case No. 33 of 2008 referring to Section 10 of the MCOCA and praying that trial of the said cases be kept in abeyance till conclusion of MCOC Special Case No. 23 of 2007. According to the prosecution, certain documents are common in all these cases and the original documents are deposited in MCOC Special Case No. 23 of 2007. The said documents are as under:

1. Weapon Recovery Panchnama dated 2/8/2007
2. Property Recovery Panchnama dated 1/9/2007
3. Panchnama of Identification of property dated 7/9/2007
4. Statement of witness Namdeo Hangarge recorded u/s 164 of the Code of

Criminal Procedure, 1973.

8. On the said application, the Sessions Court, Mumbai, passed an order on 11/7/2008, keeping the trial in Sessions Case No. 23 of 2008 and Sessions Case No. 33 of 2008 in abeyance till conclusion of trial of MCOC Special Case No. 23 of 2007. This order is under challenge in these petitions.

9. We have heard, at some length, Mr. Chitnis, learned senior counsel appearing for the petitioners. Mr. Chitnis submitted that Section 5 of the MCOCA provides for Special Courts. Section 8 thereof, provides for the appointment of public prosecutor for every Special Court. It also contemplates appointment of a special public prosecutor. Mr. Chitnis submitted that the prosecutor plays a very important role in the cases which are tried under the MCOCA. Mr. Chitnis submitted that an application u/s 10 of the MCOCA could not have been filed by the investigating officer as has been done in this case. It should have been filed by the public prosecutor. He submitted that the Sessions Court, Mumbai, therefore, should not have passed any order on the said application. In support of this submission, learned Counsel relied on the judgment of the Supreme Court in *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*, . Mr. Chitnis pointed out that in that case, the Supreme Court was considering the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "the TADA"). One of the points which it was considering was regarding report to be submitted u/s 20(4)(bb) of the TADA for extension of time to complete the investigation. Mr. Chitnis pointed out that in that case, the report contemplated u/s 20(4)(bb) for extension of time was submitted by the investigating officer and not by the public prosecutor. The Supreme Court expressed that a public prosecutor is neither a post office of the investigating agency nor its forwarding agency but is charged with a statutory duty. The Supreme Court further observed that the public prosecutor must apply his mind to the facts and circumstances of the case and his report must disclose that he had applied his mind to the twin conditions contained in Clause (bb) of Sub-section (4) of Section 20. The Supreme Court observed that in the absence of an appropriate report, the Designated Court has no jurisdiction to deny to an accused his indefeasible right to be released on bail.

10. Mr. Chitnis further pointed out that Section 20(8) of TADA states that no person accused of an offence punishable under TADA shall be released on bail unless the public prosecutor has been given an opportunity to oppose the application for bail and where the public prosecutor opposes the application and the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, the accused can be released on bail. Mr. Chitnis submitted that provisions of Section 21(4)(b) of the MCOCA are similar to the provisions of Section 20(8) of the TADA. Mr. Chitnis submitted that judgment of the Supreme Court in *Hitendra Thakur's* case (*supra*) is, therefore, clearly applicable to the present case. Mr. Chitnis submitted that in the circumstances, the investigating

officer could not have filed an application u/s 10 of the MCOCA.

11. Mr. Chitnis further submitted that the application filed in the Sessions Court by a police officer, who is not the investigating officer within the meaning of Section 23(1)(b) of the MCOCA, ought not to have been entertained by the Sessions Court. He submitted that the Sessions Court is not a Special Court within the meaning of Section 5 of the MCOCA and, therefore, the Sessions Court cannot invoke Section 10 of the MCOCA. Mr. Chitnis submitted that, therefore, the impugned order deserves to be set aside.

12. Ms. Kejariwal, learned A.P.P. appearing for the State, on the other hand, submitted that false statement is made in the petitions that in Sessions Case No. 23 of 2008 as also in Sessions Case No. 33 of 2008 in which the petitioners are the accused, charge has been framed and the matters have been kept for recording of evidence. She submitted that, in fact, charge has not been framed. Learned A.P.P. submitted that initially a prayer was made that proceedings in MCOC Special Case No. 23 of 2008 be stayed and, subsequently, a prayer is made on the basis of false averments that charge has already been framed in Sessions Cases and, hence, a direction be issued to the Sessions Court to dispose of the cases expeditiously. Learned A.P.P. submitted that after this was pointed out in the court, the petitions were amended and it is now urged that the said averments are a mistake. Learned A.P.P. submitted that the petitioners have tried to misguide this Court by making false averments and, therefore, notice may be taken of their conduct and on that ground alone the petitions be dismissed.

13. On facts, learned A.P.P. submitted that the judgment in Hitendra Thakur's case is not applicable to the present case. She submitted that Section 10 of the MCOCA mandates that the MCOC Case should have a precedence over all other cases and all other cases must be kept in abeyance till the disposal of the MCOC case. There is, therefore, no option for the Court but to follow this mandate and the Sessions Court has rightly followed it. She submitted that therefore the petitions have no substance and they may be dismissed.

14. Before we deal with the rival contentions, it is necessary to quote Section 10 of the MCOCA.

10. Trial by Special Courts to have precedence. The trial of any offence under this Act by a Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and shall be concluded in preference of the trial of such other case and accordingly the trial of such other cases shall remain in abeyance.

15. Section 10 of the MCOCA mandates that the trial of any offence under the MCOCA by a Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and it shall be concluded in preference to the trial of such other cases and, accordingly, the trial of such other cases shall remain in abeyance. In our opinion, the use of the word

"shall" in Section 10 of the MCOCA indicates its mandatory nature. No discretion is left to a court where an application is made u/s 10 of the MCOCA not to keep a case in abeyance till the disposal of the MCOC Case, which is pending against the accused. Undoubtedly, a public prosecutor has a very important role to play under the scheme of the MCOCA but there is no scope for the public prosecutor to exercise any discretion when it comes to Section 10 of the MCOCA.

16. We have no hesitation in rejecting Mr. Chitnis's argument that an application u/s 10 of the MCOCA has to be made in the Special Court. If we accept Mr. Chitnis's argument, it will lead to an absurd result of one coordinate court staying a case pending in another court. Surely the legislature never intended such a situation to occur. Apart from the principle based on judicial propriety that one coordinate court cannot stay case pending in another coordinate court, Sections 6 and 7 of the MCOCA make this position very clear. Section 6 states that notwithstanding anything contained in the Code, every offence punishable under MCOCA shall be triable only by the Special Court within whose local jurisdiction it was committed, or as the case may be, by the Special Court constituted for trying such offence under Sub-section (1) of Section 5. Section 7 talks about power of Special Courts with respect to other offences. It states that when trying any offence punishable under the MCOCA, the Special Court may also try any other offence with which the accused may, under the Code, be charged at the same trial, if the offence is connected with such other offence. Since this enabling provision is not invoked in this case, the cases pending before the Sessions Court will have to be kept in abeyance in view of Section 10 of the MCOCA and as such the application u/s 10 of the MCOCA could not have been made in the Special Court.

17. In our opinion, the judgment in Hitendra Thakur's case has no application to the present case. In Hitendra Thakur's case, the Supreme Court was considering Section 20(4)(bb) of the TADA. Section 20(4)(bb) of the TADA makes Section 167 of the Code applicable to a case involving offence punishable under the TADA with certain modification inter alia regarding time-frame. In short, it enables the prosecution to get the period for completing the investigation extended from the Designated Court if it is not possible for it to complete the investigation within the period of 180 days. The Designated Court can extend the period upto one year. Section 20(4)(bb) specifically refers to the report of the public prosecutor. It says that a report has to be submitted by the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the period of 180 days. Thus, this is a very drastic provision. If the prayer of the public prosecutor is granted, it entails extension of period of custody of an accused, and therefore, the legislature has specifically mentioned in Clause (bb) of Sub-section (4) of Section 20 of the TADA that the report has to be submitted by the public prosecutor. It is in this context that the Supreme Court in Hitendra Thakur's case observed that from a plain reading of Clause (bb) of Sub-section (4) of Section 20 of the TADA, it is apparent that the legislature has provided for seeking extension of time for completion of

investigation on a report of the public prosecutor. The Supreme Court observed that the legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. It was further observed that this provision is in tune with the legislative intent to have the investigation completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Supreme Court further observed that the legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking further custody of an accused. The Supreme Court further observed that the public prosecutor is an important officer of the State Government and is appointed by the State Government; he is not a part of the investigating agency; he is an independent statutory authority. The Supreme Court observed that he is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time. It is apparent that it is in the context of drastic provision of Section 20(4)(bb) which requires application of mind of the public prosecutor that the Supreme Court observed that the public prosecutor is neither a post office of the investigating agency nor he is a forwarding agency but is charged with a statutory duty. Surely, seeking extension for time to complete investigation resulting in keeping the accused in further custody is a very serious matter and while submitting such report, application of mind by the public prosecutor is a must.

18. Similarly, Section 20(8) of the TADA states that no person, who is charged with an offence under the MCOCA shall be released on bail unless the public prosecutor has been given an opportunity to oppose the bail application. Offences under the TADA being serious, release of an accused on bail has serious import and therefore, the legislature has purposely referred to the public prosecutor in this section. His application of mind to the prayer for bail is a must. The legislative intent is clear that while dealing with bail application, the view of the public prosecutor must be considered by the Special Court. The provisions concerning bail and, submission of report praying for extension of time to complete investigation resulting in extending the custody of the accused, cannot be equated with Section 10 of the MCOCA. As we have already said, Section 10 of the MCOCA contains a mandate. It does not refer to the public prosecutor. It confers no discretion on anyone. It says that other cases shall remain stayed and, therefore, in our opinion, the Sessions Court, Mumbai, committed no illegality in following the mandate of Section 10 of the MCOCA. It was duty bound to do so. In any case, we find from the copy of the application that it is also signed by the public prosecutor. It is not as if the police officer has made the application behind the back of the public prosecutor. For the purposes of carrying out the mandate of Section 10 of the MCOCA, nothing more is needed because it

is obvious that the public prosecutor has vetted the application. Besides, in grounds "j" and "m", the petitioners have admitted that the application is made by the public prosecutor.

19. Before closing, we must express our displeasure about the careless manner in which the petitions are drafted. Whenever the investigating agency shows non application of mind, we come down heavily upon it. It is also necessary for an accused when he is represented by a lawyer to make correct statements in the petition. In this case, incorrect statements are made that in Sessions Cases, the charge has already been framed and on that basis certain prayers are sought. After the public prosecutor pointed it out to us, amendments were carried out explaining away the said averments as mistakes. It is difficult for us to accept that the said averments are mistakes. Such wrong averments should not have been made in the petitions.

20. In the view that we have taken the petitions will have to be dismissed and are dismissed as such. Rule discharged.