

(2019) 01 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No. 58 Of 2018

Kawalnayan Wazirchand Pathreja

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 17-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 109, 120B, 302, 307, 324, 325, 326, 379
Explosive Substances Act, 1908 — Section 5, 9
Prevention of Damage to Public Property Act, 1984 — Section 3, 4
Unlawful Activities (Prevention) Act, 1967 — Section 13, 16, 18, 20
Maharashtra Control of Organised Crime Act, 1999 — Section 3, 3(1)(i)(ii), 3(2), 3(4), 22, 22(2)
Code of Criminal Procedure, 1973 — Section 169, 227

Citation : (2019) AIIMR(Cri) 748

Hon'ble Judges : Sarang V. Kotwal, J;Indrajit Mahanty, J

Bench : Division Bench

Advocate : A.P. Mundargi, Ram D. Pawade, Ajay Patil

Final Decision : Dismissed

Judgement

SARANG V. KOTWAL, J.

1. This is an Appeal preferred by the Appellant challenging the order dated 05/01/2018 passed by the learned Additional Sessions Judge & Special Judge under MCOC / TADA / POTA / NIA / SUSCA Act, Greater Mumbai in Discharge Application Exh.301 in MCOC Special Case No.12 of 2011. By the impugned order, the learned trial Judge has rejected the application for discharge preferred by the Appellant.

2. The Appellant is accused no.3. The investigating agency has filed charge-sheet against him for commission of offences punishable under Sections 302, 307, 326, 325, 324, 379, 109 and 120B of the IPC, Sections 5 and 9 of the Explosive Substances Act, Sections 3 and 4 of the Prevention of Damages to Public Properties Act, Sections 13, 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 amended in 2008 (for short, 'UAPA') and Sections 3(1)(i) (ii), 3(2),

3(4) of the Maharashtra Control of Organised Crime Act, 1999 (for short, 'MCOC Act').

3. The case arises out of the investigation into the offences registered vide C.R.Nos.28/2011, 29/2011 and 30/2011 with ATS Police Station, Kalachowki, Mumbai. These offences were registered in respect of three bomb-blasts which occurred on 13/07/2011 in Zaveri Bazar, Opera House and Dadar. Initially, the offences were registered at Dr.D.B.Marg Police Station, L.T.Marg Police Station and Shivaji Park Police Station. Initial investigation was carried out by the officers of these police stations and on 18/07/2011 all these 3 cases were taken over by the Anti-Terrorism Squad, Mumbai. In these 3 bomb-blasts, in all 27 persons were killed and 127 persons sustained injuries. The bombs were placed in vehicles near the vicinity of crowded localities causing such large scale destruction.

4. During investigation, it was revealed that Rs.10 Lakhs were transferred from abroad through Hawala transactions. The amount of Rs.10 Lakhs was delivered through Hawala Operator from Dubai on the instructions of one Haroon Rashid Abdul Hameed Naik of 'Indian Mujahidin'. It is the case of the prosecution that the present Appellant was a Hawala Operator based in Delhi and on his instructions, his servant handed over the amount to one Shivanand. The said Shivanand was actually one of the main accused Yasin Bhatkal and he had used that name to conceal his identity. At the conclusion of the investigation, charge-sheet was filed in respect of a large scale conspiracy and different offences committed in the process.

5. The Applicant is the accused no.3 in MCOC Special Case No.11 of 2012 pending before the learned Special Judge. He preferred an application for discharge under Section 227 of the Cr.P.C. vide discharge application at Exh.301 in the said case. As mentioned earlier, the said application was rejected and therefore, the Appellant has preferred the present Appeal.

6. We have heard Mr. A. P. Mundargi, learned Senior Counsel for the Appellant and Mr. Ajay Patil, learned APP for State of Maharashtra. With their assistance, we have perused the relevant documents annexed to the appeal memo as well as those produced by the Respondent - State.

7. Mr. Mundargi vehemently submitted that there is no sufficient material in the entire charge-sheet enabling the Court to frame charges against the Appellant. He submitted that the allegations and the charges cannot travel beyond the material produced in the charge-sheet. He submitted that the material, even at this stage, was so inadequate against the Appellant that framing of any charge against the Appellant was not possible and he was entitled to be discharged from the case.

8. Mr. Mundargi submitted that even as per the prosecution case, the money was to come through Hawala transactions initially through a Hawala Operator based in Mumbai. Only on his inability to complete the transactions; according to the

prosecution case, the present Appellant was contacted by the accused. Mr. Mundargi submitted that, at the highest, the material shows that the Appellant paid Rs.10 Lakhs to one Shivanand through his servant. Mr. Mundargi submitted that there is absolutely no material in the entire charge- sheet to show that the Appellant was aware of the real identity of the said Shivanand or that the Appellant was aware of the evil design of the said Shivanand to carry out or facilitate the bomb-blasts in Mumbai. The money was handed over on 31/03/2011 and the bomb- blasts had taken place on 13/07/2011. Mr. Mundargi submitted that the prosecution has failed to bring on record any material to show any connection between these two events.

9. On the other hand, Mr. Ajay Patil, learned APP appearing for the State of Maharashtra, submitted that there was enough material to frame charges against the Appellant. He submitted that this is a very serious offence in which many lives were lost and many suffered serious injuries. He submitted that the investigating agency had painstakingly collected the evidence which was sufficient for the Appellant's conviction during trial. Mr. Patil submitted that the Appellant was not entitled for discharge. He submitted that the confessional statement of the said Shivanand shows that the money received by him was actually used for the purposes of committing these offences and in particular for causing bomb-blasts at these 3 places.

9. Mr. Mundargi invited our attention to the statement of Hawala Operator based in Mumbai. This statement dated 05/01/2012 mentions that the said Hawala Operator at Mumbai was acquainted with one Muzzafar Kola @ Bhola who operated his Hawala racket from Dubai. According to this witness, one Farooq @ Mateen who was brother-in-law of the said Muzzafar, was working for Muzzafar and this witness used to pay money at his instance. This statement further reveals that on 30/03/2011, Farooq @ Mateen had told this witness telephonically to make payment of Rs.10 Lakhs to one Shivanand. However, since the said Shivanand was in Delhi, this witness had expressed his inability to make such payment and therefore, the said Mateen had decided to make the payment at Delhi through a different Hawala Operator. Mr. Mundargi also invited our attention to the statement of a servant of this Hawala Operator at Mumbai who had given a similar statement.

10. Mr. Mundargi further invited our attention to a statement dated 31/01/2012 given by one Anujkumar Pandey. According to this witness, he was working with the present Appellant and had acted as per his instructions. He has stated that, on 31/03/2011, he had made payment to one Shivanand between 8.30 to 9.00 p.m. near Town Hall, Chandani Chowk, Old Delhi. This witness has mentioned a mobile phone number used by the said Shivanand. Mr. Mundargi submitted that this is the only relevant material against the present Appellant. This material only shows that Rs.10 Lakhs were paid by the present Appellant to the said Shivanand which does not show that the Appellant had any knowledge about the offences which were committed by the other accused.

11. Mr. Mundargi also pointed out the statement of one Mohammed Musa which was recorded on 01/06/2012. The said witness has given some information regarding the business of the afore-mentioned Muzzafar Kola. According to this statement, Muzzafar's business at Dubai was looked after by his son Ubed. The said Muzzafar was based in India. He further submitted that this statement shows that the afore-mentioned Mateen was not concerned with Muzaffar's business.

12. Mr. Mundargi as well as Mr. Patil showed us the confessional statement of Yasin Bhatkal. Both the learned Counsel relied on this statement for different reasons. Mr. Mundargi wanted to emphasize that the money was accepted by Yasin Bhatkal under a fictitious name as Shivanand; which means his identity was kept concealed from the present Appellant's servant. On the other hand, Mr. Patil relied on the same confessional statement to point out that the money was used for procuring and using the material for causing the actual bomb-blasts. Mr. Patil submitted that after it was disclosed to the public that the offence was committed by the accused including Yasin Bhatkal, the Appellant had closed his shop and had absconded; and therefore, the subsequent conduct of the Appellant also be taken into consideration in examining his role and involvement in the offence.

13. Mr. Mundargi further invited our attention to the observations made in the order dated 20/06/2014 passed by a learned Single Judge of this Court in Bail Application No.476 of 2013 whereby bail was granted to this Appellant. During the arguments in that matter on behalf of this Appellant, various Judgments were cited and the learned Single Judge had specially referred to the case of one Mulchand Shah decided by the Hon'ble Supreme Court in Criminal Appeal No.919 of 2008. In the said case, the Appeal was allowed on the ground that there was no evidence tendered at trial that the Appellant Mulchand Shah had any knowledge that the main accused had been indulging in terrorist activities. The said Mulchand Shah was alleged to have provided financial assistance to the main accused. Mainly on such reasoning, the learned Single Judge had granted bail to the present Appellant.

14. We have carefully considered the rival submissions as well as the reasoning given in the impugned order. The main plank of the argument of Mr. Mundargi is that there is no material to show that the Appellant had any knowledge about the plan of other accused to cause the bomb-blasts. However, we are unable to agree with the submissions of Mr. Mundargi on this count. In this connection, it is necessary to refer to certain relevant provisions of the MCOC Act and in particular it is necessary to refer to Section 22 of the said Act which raises the presumption in respect of the offences under Section 3 of the said Act. Section 22 reads thus :-

"22. Presumption as to offences under section 3..-

(1) In a prosecution for an offence of organised crime punishable under section

3, if it is proved -

(a) that unlawful arms and other material including documents or papers were recovered from the possession of the accused and there is reason to believe that such unlawful arms and other materials including documents or papers were used in the commission of such offence; or

(b) that by the evidence of an expert, the finger prints of the accused were found at the site of the offence or on anything including unlawful arms and other material including documents or papers and vehicle used in connection with the commission of such offence,

the Special court shall presume, unless the contrary is proved, that the accused had committed such offence.

(2) In a prosecution for an offence of organised crime punishable under sub-section (2) of section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonable suspected of, an offence of organised crime, the Special Court shall presume, unless the contrary is proved, that such person has committed the offence under the said sub-section (2)."

15. In the context of the case, sub-section (2) of Section 22 assumes more importance. Sub-section (2) of Section 3 of the MCOC Act reads thus :

"3. Punishment for organised crime..-

(1)

(i)

(ii)

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(3)

(4)

(5)"

16. Thus, reading these two Sections, it is quite clear that at this stage, there is a presumption running against the present Appellant which can be rebutted by the Appellant himself during trial only after the prosecution gets an opportunity to lead evidence in that behalf. At this stage, there is enough material to show that Rs.10 Lakhs were given by the Appellant to the main accused through his servant. It is for the Appellant to establish his innocence by explaining the source of such an amount or by pleading any other defence which is available to him to

rebut this presumption. However, we emphasize that, the stage for such rebuttal can only be during trial and not at the stage of consideration of discharge application. Mr. Patil, learned APP for State, has pointed out that the confessional statement of Yasin Bhatkal shows that the amount was indeed used for the purpose of committing the offence. Therefore, at this stage, it is not possible to record a finding for the purposes of discharging the Appellant to hold that the Appellant had not rendered any financial assistance to the main accused in respect of the present offences in question.

17. The scope of discharge application is entirely different than the scope for deciding the guilt of an accused at the end of any trial. In our opinion, reliance of Mr. Mundargi on the observations of a learned Single Judge in deciding the Appellant's bail application is misplaced. Firstly, the considerations for grant or denial of bail are entirely different from the considerations for deciding a discharge application. Secondly, the learned Single Judge has relied on the observations of the Hon'ble Supreme Court in the case arising in an appeal which arose out of a full-fledged trial wherein the prosecution had full opportunity to lead evidence. At this stage, we are not in a position to hold that the Appellant had no connection with the offences.

18. Mr. Mundargi also relied on the fact that the afore- mentioned Mateen was not made an accused and on the contrary, a report under Section 169 of the Cr.P.C. was filed in his favour. Mr. Mundargi submitted that since the prosecution case was that Rs.10 Lakhs were transferred through Hawala racket at the instance of Mateen, as can be seen from the statement of Hawala Operator and his servant at Mumbai and since the said Mateen was dropped from the list of accused, the present Appellant could not have been connected with the present crime. Again, we are unable to accept this submission because the fact still remains that the amount of Rs.10 Lakhs was given by the present Appellant through his servant to the main accused. This circumstance cannot be ignored only because the said Mateen was not made an accused.

19. The learned trial Judge has observed that the accused Muzzafar Kola was involved in the Hawala transactions even on earlier occasions to facilitate the criminal activities of the banned outfit. The present Appellant was shown to be in regular contact with the said Muzzafar Kola from 01/01/2011 to 27/02/2012. No submissions were made on behalf of the Appellant to challenge such observations of the learned trial Judge.

20. Thus, in view of the above discussion, we find that the learned trial Judge has not committed any error in rejecting the application for discharge preferred by the present Appellant before him. We do not find any infirmity in the impugned order dated 05/01/2018 passed by the learned trial Judge. Hence, the Appeal is dismissed.