

(2014) 07 BOM CK 0070

In the Bombay High Court

Case No : Criminal Bail Application No. 716 of 2014

Saquib Abdul Hamid Nachan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-07-2014

Acts Referred:

Unlawful Activities (Prevention) Act, 1967 — Section 15, 16, 18, 43D

Criminal Procedure Code, 1973 (CrPC) — Section 437, 95

Maharashtra Control of Organised Crime Act, 1999 — Section 21(4), 3(1)(ii), 3(2), 3(4)

Penal Code, 1860 (IPC) — Section 120B, 153A, 307

Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 3(3)

Citation : (2014) ALLMR(Cri) 3481

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Mubin Solkar, Tahera Qureshi, Subhash Jha, Advocate for the Appellant; V.S. Mhaispurkar, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—The applicant is accused no. 1 in M.C.O.C. Special Case No. 10 of 2012, pending before the Special court under the Maharashtra Control of Organized Crime Act (hereinafter referred to as "M.C.O.C. Act"), Thane. There are totally six accused-including the applicant- in the said case, which is in respect of offences punishable under Sections 120B, 153A, 307 of the Indian Penal Code (IPC), offences punishable under the Arms Act, apart from the offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the M.C.O.C. Act. Additionally, the applicant and the other accused are alleged to have committed offences punishable under Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967, as amended till 2008 (hereinafter referred to as U.A.P. Act). By the present application, the applicant seeks bail.

2. I have heard Mr. Mubin Solkar, learned counsel for the applicant and Mrs. V.S. Mhaispurkar, learned APP for the State. I have also heard Mr. Subhash Jha, learned counsel who sought intervention in the matter on behalf of the First

Informant to oppose the grant of bail.

3. Two other accused in this case-Accused no. 3 Shamil Nachan and Accused no. 4-Aakif Ateef Nachan-have already been released on bail by me (Criminal Bail Application No. 512/13 decided on 6th May 2013 and Criminal Bail Application No. 1157/13 decided on 13th August 2013). The facts of the case were noticed and mentioned in details while dealing with the said Bail Applications. The facts, which were taken from Column no. 16 of Form 5E of the printed prescribed proforma, were properly and sufficiently described in those orders, and as such, they may be described in the same manner here as follows:-

(a) The first informant Manoj Raicha, Advocate, is an active member of the Vishwa Hindu Parishad, and Gowvansh Saurakshan Samiti. He had, in the past, got the cattle brought in Bhiwandi for Qurbani on the occasions of Muslim religious festivals, taken charge of and sent to Gowshala. The applicant Saquib Nachan, therefore, formed a belief that Mohan Raicha was doing injustice to Muslims and entertained grudge against him. He had given threats to Manoj Raicha in the year 2011 in the court campus itself. Because of this grudge, the applicant conspired with other accused, namely, accused no. 2 Guddu alias Mohammad Hafiz Khan, accused no. 3 Shamil Saquib Nachan, accused no. 4 Aakif Ateek Nachan, accused no. 5 Tanveer Abdul Majid Zamindar and accused no. 6 Abu Bakar Rashid Shaikh. In pursuance of the conspiracy, the accused no. 6 Abu Bakar, fired at Manoj Raicha on 3.8.2012, causing injury to his shoulder, by a bullet.

(b) How the incident which gave rise to this case, took place and how the investigation commenced, can be ascertained from the First Information Report (FIR). The facts, as narrated by Manoj Raicha, in FIR, are to the effect that on 3.8.2012, while he was travelling by his car, with his armed police bodyguard Achrekar-Police Constable No. 3901- three shots were fired at him from a fire arm. One bullet grazed his right upper arm. His bodyguard got down from the car, but could not see any one. Thereafter, Manoj and his bodyguard Achrekar, came to the police station and lodged a report on the basis of which, a case was registered in respect of offences punishable under Sections 307, & 120B of the IPC and offences punishable under the Arms Act, at Nizampur Police Station, Bhiwandi. The investigation was then transferred to Crime Branch Bhiwandi, under the orders of Commissioner of Police, Bhiwandi, Thane, and thereafter, the provisions of Section 153A of IPC were added to the original FIR. In the course of investigation, it was revealed to the Investigating Officer that the attack on Manoj Raicha was a "part of larger conspiracy" and that the same was carried out at the instance of the applicant. It was also revealed to be an act of an organized crimes syndicate. In the course of further investigation, it was also revealed that it was a "terrorist act" as contemplated u/s 15 of the U.A.P. Act, 1967.

4. After considering all the relevant aspects of the matter, the said co-accused Shamil Nachan and Aakif Nachan were released on bail. The applicability of the provisions of the M.C.O.C. Act and the U.A.P. Act was felt highly doubtful while

deciding the said bail application. How far the rigours of the provisions of Section 21(4) of the M.C.O.C. Act would go and how the restrictive phrase therein should be interpreted was also considered and discussed while granting bail to the co-accused Shamil Nachan. These aspects are common with respect to the case of applicant, and that of the said co-accused, who as aforesaid, have been released on bail.

5. Mr. Jha, learned counsel for the First Informant initially submitted that the present Bail Application ought not to be heard for the time being, as the orders passed by this Court granting bail to the co-accused have been challenged by the State of Maharashtra by filing two separate Special Leave Petitions, which are pending before the Supreme Court of India. He submitted that with respect to the SLP challenging the bail granted to co-accused Shamil Nachan, a notice has been issued to the said co-accused, and in the other SLP which relates to grant of bail to co-accused Akif Nachan, the operation of the bail order granted by this Court has been stayed by Their Lordships of the Supreme Court of India. Mr. Jha further submitted that since the Special Leave Petitions were likely to be heard by the Supreme Court of India on 15th July 2014, the consideration of the present Bail Application be deferred, till the outcome of the Special Leave Petitions. A similar submission was raised by Mr. Jha when the Bail Application filed by accused no. 4 Aakif Nachan (BA No. 1157/13) was to be heard (at that time the challenge to that order granting bail to Accused no. 3 Shamil Nachan was pending before the Apex Court), but the said submission was rejected. Mr. Jha now advanced a contention that the position then was different, as merely a notice had been issued in the Special Leave Petition, but now the operation of the bail order has been stayed. Since the contention that a bail application filed by an accused should not be heard till the challenge to order releasing a co-accused in the same case is decided by the Supreme Court of India, was elaborately dealt with while dealing with the Bail Application filed by Accused no. 4 Aakif Nachan, I do not wish to discuss the merits of such a contention in details, except by observing that since the Bail Applications involve a question of liberty of the individual, the hearing thereof cannot be delayed on the ground of the pendency of an application for cancellation of bail granted to a co-accused in the same case, before a superior Court. This would be more so because the case of every accused in the same case could be quite different for the purposes of bail. After it was made clear that the hearing of the Bail Application could not be deferred till the decision of the Special Leave Petitions filed by the State, Mr. Jha has argued the matter on merits.

6. The Bail Application has been opposed with some vehemence by the State, and with much more vehemence by the First Informant, apparently because a peculiar colour has been given to the matter. The material in the charge-sheet indicates that the applicant is said to be inimical towards the First Informant Manoj Raicha because Manoj Raicha is a Hindu, and an active member of Vishwa Hindu Parishad and Gowvansh Saurakshan Samiti. The applicant is alleged to be a person who projects himself as the savior of the Muslim Community, creates a

feeling of injustice among the muslims and intends that there should be communal riots between these two communities. The facts of the case are presented in the charge-sheet as if the incident of firing is only a small part of the prosecution case. In fact, while dealing with the Bail Application of the co-accused, this aspect was noticed and described as follows.

The emphasis (in the chargesheet) is not on the incident of firing but the emphasis is on the activities of Manoj Raicha, as a member of the Vishwa Hindu Parishad and Gowvansh Saurakshan Samiti. The emphasis is on the criminal background of the accused no. 1 Saquib Nachan (the present applicant), on his gang, on his alleged anti-national activities, on his having committed a number of serious offences such as bomb blasts etc. in the past, on it having been established that he has connections with Kashmiri and Khalistani terrorists, etc. That, the accused no. 1 (present applicant) had committed offences with the object of creating a rift between Hindus and Muslims and "to cause communal riots, so that the sovereignty of the nation would be affected", that the intention of accused no. 1 Saquib Nachan (present applicant) was "to create anarchy and disorder in the country" and he desired that there should be outrage amongst the Muslims as well as the Hindus, etc. That, accused no. 1 Saquib Nachan has written a book in which the government and the judiciary are criticized, suggesting that injustice is being done to Muslims. Thus the firing at Manoj Raicha, on the showing of the prosecution, is only an entirely small and an incidental-so to say-action of the accused no. 1 Saquib Nachan, whose aims, ambitions and objects are quite different, and as mentioned above.

7. It is in this background that the material against the applicant as found in the charge-sheet needs to be evaluated--although to a limited extent and only for ascertaining the existence or otherwise of a prima facie case.

8. While deciding the Bail Applications of the co-accused Saqib Nachan and Akif Nachan, a number of aspects of the prosecution case creating some doubt about the truth of the prosecution version on taking a prima facie view of the matter, were noticed. The general weaknesses in the case of the prosecution as put forth would be significant for the purpose of deciding the Bail Application filed by the present applicant also, but for the present, I do not wish to go into those aspects.

9. Coming to the role attributed to the applicant, he is supposed to be the person at whose instance the conspiracy to attack and kill Manoj Raicha was hatched. Admittedly, he is not the person who actually fired at Manoj Raicha. It is nobody's case that he was present on the spot or near it at the time of the incident of firing.

10. The material in the charge-sheet against the applicant can be classified broadly in two categories. The first would be the material tending to show that the applicant had grudge against Manoj Raicha, and had threatened to kill on a previous occasion. The second would be the material tending to show the existence of a conspiracy between all the accused to commit murder of the First

Informant.

11. It may be recalled that the First Informant-Manoj Raicha is an Advocate. According to him, in the month of September 2011, when he was entering in the campus of Bhiwandi Court, the applicant and one Mulla were already present in the court campus. When Manoj Raicha entered in the Court, the applicant looked at him and threatened (Lalit Jain had been killed. He also should be killed). Manoj Raicha had then reported the matter to the Commissioner of Police, Thane whereafter one armed police guard was provided for the protection of Raicha, since September 2011. It is this threat-given in September 2011-that has been sought to be brought in support of the claim that the firing that allegedly took place on 3rd August 2012 had a direct nexus with this threat given by the applicant to the First Informant.

12. Apart from emphasizing the time gap between these two incidents, in the context of an attempt to connect them together, the learned counsel for the applicant has advanced a contention that the material in support of the alleged threat is not at all reliable. He submitted that the version in respect of the incident of the applicant giving threat to the First Informant differs in the record of the case. He submitted that there is a variation in what the applicant allegedly said, when the version in the FIR, and in the noting made by the applicant in his Court diary regarding the incident are compared. There is a variation in the communication made by the applicant to the police regarding the incident in which the name of the person who was with the applicant at that time has not been given, and he has been described only as a person having beard and a black mark on his forehead. The learned counsel for the applicant pointed that in the further statement of the First Informant recorded on 4th August 2012 also, there is a variation when compared to the version as reflected in the FIR, and the First Informant's own noting in his court diary. The learned counsel also contended that the statement of one Keval Thacker gives a different version in the alleged incident.

13. Though there are some variations, I am not inclined to give much importance to these variations, and to conclude, either on the basis of such variations, or because of the fact that in spite of such a threat, Manoj Raicha did not approach the local police and lodge a report against the applicant, and/or did not point out this threat to the Court, that the theory of threat is required to be discarded. However, without going into the reliability of this material, and taking it as it is, it would be difficult to connect the alleged threat with the firing which has taken place after more than an year from the date of the alleged threat. In any case, even if because of such threat having been given, initially it was proper on the part of the First Informant to have suspected the applicant to be behind the incident of firing, this suspicion by itself would not be sufficient to connect the applicant with the incident of firing after investigation has been carried out and an attempt to collect material supporting the suspicion has been made. This suspicion would be justified in directing the investigation in that direction, but if

the suspicion could not be taken at a higher level by discovery of some further material showing connection of the applicant with the incident of firing, it would be a matter about which a reasonable doubt can be entertained.

14. The material showing the existence of a conspiracy to commit murder of Manoj Raicha may now be examined. The theory of conspiracy is sought to be established on the basis of a meeting allegedly held between the accused nos. 2 Guddu @ Mohammed Khan, accused no. 3 Shamil Nachan, accused no. 4 Aakif Ateek Nachan and accused no. 5 Tanvir Abdul Majid Zamindar in one Oye Punjabi Dhaba. There are four witnesses who speak about this meeting. The statements of these witnesses recorded during investigation have been truncated suitably to prevent the disclosure of the identity of the said persons. This has been done on the ground that the case is in respect of the offences under the MCOC Act, and that there would be a danger to the life of the witnesses if their identity is revealed. These persons are therefore, referred to as "A", "B", "C" and "D".

15. While dealing with the bail applications filed by the co-accused, the material in support of this meeting was discussed and the theory of meeting was felt doubtful, for the reasons mentioned in the order releasing the said co-accused (Aakif Nachan and Shamil Nachan) on bail. Among other things, it was noted that the tower locations of the mobile telephones allegedly held by the accused persons who were supposedly present during such a meeting did not match to show their presence at the said Oye Punjabi Dhaba. In spite of there being clear observations made by this Court, with respect to the reasons for which the theory of the Investigating Agency was felt doubtful, no attempt has been made in the course of the hearing of the present application to reply to or deal with the observations made by this Court in those two orders. No attempt to explain the discrepancies in the material in that regard as found in the charge-sheet itself has been made, and a plea has been taken that "the orders passed by this Court have been challenged before the Supreme Court of India", and "the Special Leave Petitions filed in that regard are pending before the Apex Court". "Whether the fact that the tower locations of the mobile telephones held by the accused persons said to be present during a meeting held at Oye Punjabi Dhaba did not match, would not be sufficient to create a reasonable doubt - to say the least - about such a meeting having taken place" is not even attempted to be answered. It was also observed by this Court while dealing with the Bail Applications filed by the aforesaid co-accused that the only statements showing their involvement in the alleged offences, were of the persons "A", "B", "C" & "D" which interestingly, had been recorded after the arrest of those accused. The question as to the basis on which those accused came to be arrested when the only material against them, as found in the charge-sheet was not available to the Investigating Agency on the date of their arrest, that legitimately arose in the course of hearing of those bail applications, could not be answered then and has not been attempted to be answered even now. That the meeting took place, was sought to be established by recording the statements of certain persons-(chance witnesses whose presence at the Oye Punjabi Dhaba at the material time could legitimately

be open to challenge), but not by recording the statements of the Manager and staff working at Oye Punjabi Dhaba whose presence there at the material time could not be challenged, was noticed in the order releasing the accused no. 3 Shamil Nachan (Bail Application No. 512/13 decided on 6/5/2013) Thus, there has been no attempt to change the opinion of this Court-based on the cumulative effect of all the weaknesses in the case of investigating agency-about there being a reasonable doubt in respect of the meeting between the accused persons having been held in Oye Punjabi Dhaba as projected by the Investigating Agency, and all the queries in that regard are answered by the only reply-"the challenge to the orders passed by this Court is pending before the Supreme Court". What are the contentions taken in that regard before Their Lordships of the Supreme Court of India is also not submitted or explained either by the learned APP, or the learned counsel for the First Informant. Reflecting over the entire material in the charge-sheet, I see no reason to take a different view of the matter with respect to the existence of reasonable grounds for doubting the theory of a meeting between the said accused persons having taken place in Oye Punjabi Dhaba.

16. Since the theory of conspiracy if sought to be supported by showing that some of the accused persons had met at a given point of time in Oye Punjabi Dhaba, and had some discussions between them and that these discussions prove the existence of a conspiracy, once the theory of such a meeting is doubted, there arises a reasonable doubt about the theory of conspiracy. However, so far as the applicant is concerned, even that is not very material. What is material is that the conversations which allegedly took place between the accused persons in Oye Punjabi Dhaba are not sufficient to show the applicant to be a conspirator with respect to any conspiracy to attack and kill Manoj Raicha.

17. Apart from this, the learned counsel for the applicant submitted that there was sufficient material collected by the applicant under the provisions of Right to Information Act, which would prove the falsity of the prosecution case. He submits that this would be in addition to the doubts felt by the Court about various aspects of the prosecution case while dealing with the applications of bail filed by the co-accused. For instance, it is submitted that the spot panchnama dated 4th August 2012 cannot be a true and proper record of what had happened. The spot panchnama is said to have commenced at 1.30 a.m. (on 4th August 2012) and concluded at about 2.25 a.m. during which two empties of bullets (out of three allegedly fired) were seized. It is submitted that the panchnama has been drawn by Police Inspector S.B. Nighot, but the information obtained by the applicant under the Right to Information Act shows that the said police officer was not on duty at the material time i.e. between 10.00 p.m. of 3rd August 2012 to 10.00 p.m. on 4th August 2012. When this was argued, the only reply of the learned APP- and the Investigating Officer who was present-was that this would be explained during the trial, and cannot be considered at this stage. Such a submission obviously means that the prosecution cannot-atleast for the time being-think of any satisfactory reply to this contention.

18. It is also pointed out that as per the station diary entry no. 18, the investigation of the present crime was transferred to the Crime Branch, Bhiwandi at 11.00 a.m. on 4th August 2012. The Sr. Inspector of Police of Crime Branch, Bhiwandi-one Wadekar-has recorded the supplementary statement of Manoj Raicha at 2.30 a.m. on 4th August 2012. The question that was raised on behalf of the applicant was how could Wadekar record the supplementary statement of Manoj Raicha at 2.30 a.m. on 4th August 2012, when the investigation had not been transferred to the Crime Branch at all by that time, and when it was transferred only at 11.00 a.m. on 4th August 2012. This contention has also been replied by the learned APP by saying that these are the matters that would be explained during the trial. Clearly, this indicates that as on today, the Investigating Agency is not able to think of a suitable reply to these contentions.

19. Considering the manner in which the incident of firing has been projected, and the communal colour that is given to the case, the possibility of the applicant being suspected and implicated in the case only on the basis of a belief that he is against the "Hindu Activists", cannot be ruled out. In fact, the learned counsel for the Intervenor also attempted to highlight the so-called background of the applicant by saying that the applicant is a person who is against the Hindu community, and more particularly its leaders. It was also emphasized that the applicant has written a book titled as "The Muslims charge-sheet against Government - the real face of Indian Judiciary" and that he holds serious grudge against the members of majority community. It was submitted that the applicant is against Manoj Raicha, because Manoj Raicha's activities relating to protection of cows, and that the applicant was an accused in the case of murder of Suresh Sherekar and Lalit Jain, who both were promoting the cause of protection of cows. I am not impressed by these statements. Admittedly, the applicant has been acquitted in those cases. So far as the publication of the said book by the applicant is concerned, admittedly, the book has not been banned under the provisions of section 95 of the Code of Criminal Procedure, or any other law. Simply because of the bias in the mind of the applicant about the "majority community", the applicant cannot be believed to have committed the offences which are the subject matter of the present case. The way the contention is advanced, it shows that the First Informant has, in fact, strong bias and prejudice against the applicant, but this bias and prejudice cannot be permitted to take place of the material which would be required to support the allegation against the applicant.

20. How the provisions curtailing the discretion of the Court in the matter of grant of bail, as found in section 21(4) of the MCOC Act and sub-section (5) of section 43D of the UAP Act need to be interpreted, has been discussed extensively by me in my orders releasing the co-accused in this case, on bail. These observations having been based on an analysis of the relevant provisions of law, and the observations made by the Apex Court in the case of Ranjitsingh Brahmajeetsing Sharma Vs. State of Maharashtra & Anr., (2005) 5 Supreme Court 294, and no attempt having been made in the course of hearing to point

out that the legal position as summarised in my said orders is incorrect or erroneous, I do not see any reason to take a different view in that regard.

21. In my opinion, there are reasonable grounds for believing that the applicant is not guilty of any of the alleged offences.

22. Mr. Jha submitted that the applicant cannot be released on bail in view of the fact that the applicant is a previous convict having undergone a sentence of Imprisonment for a period of 10 years on the charge of an offence punishable u/s 3(3) of the TADA Act.

23. I have carefully considered this aspect of the matter, and I have heard the learned counsel for the applicant in this regard. Indeed, section 437 of the Code treats a person who has been previously convicted of an offence punishable with death, Imprisonment for Life or Imprisonment for 7 years or more, differently from others, and provides that such person shall not be released on bail. However, the prohibition in that regard is not absolute, and the second proviso to sub-section (1) of section 437 of the Code retains the power of the Court to direct such a person to be released on bail if it is satisfied that it is just and proper, so to do for any special reason. In my opinion, that there is no prima facie case, would by itself be a special and sufficient reason for releasing an accused who has been previously convicted, on bail. Any other interpretation would mean that a previous convict of a category mentioned in section 437 of the Code can be booked for any and every offence, and would have to remain in custody till the conclusion of the trial irrespective of whether or not, there is substance in the accusation. In the instant case, coupled with the weaknesses on a number of aspects of the prosecution case, as observed in my orders granting bail to the co-accused Shamil Nachan and Aakif Nachan, the applicant has managed to bring out further weaknesses in the prosecution case on the basis of the information procured by him under the Right to Information Act. It is not as if for releasing the applicant on bail, a positive finding that he is not guilty of the alleged offences, is required to be reached or recorded. What would be required is satisfaction about existence of "reasonable grounds" for believing him to be not guilty. The phrase "reasonable grounds" imports lesser degree of satisfaction than "sufficient grounds". It is not that it is only if there would be no case for proceeding against an accused, that he can be released on bail. This has been specifically made clear by Their Lordships of the Supreme Court of India of Ranjitsingh Brahmajeetsing Sharma Vs. State of Maharashtra & Anr. (supra).

24. Considering all the relevant aspects of the matter, a serious doubt about the involvement of the applicant in the alleged offences indeed arises. The prosecution will have to remove these doubts during the trial, if it has to succeed. However, as the material stands today, it is difficult to ignore the doubts that arise about it. It would be proper, in the circumstances, to release the applicant on bail, notwithstanding that he has previously suffered a conviction in respect of an offence, and has undergone a sentence of Imprisonment for a period of 10 years.

25. Application is allowed.

26. Applicant is ordered to be released on bail in the sum of Rs. 15,000/- (Rupees Fifteen Thousand) with one surety in like amount.

27. Since the applicant has already been directed to report to Padgha Police Station twice everyday till the conclusion of the trial of POTA Special Case No. 2 of 2003 as per the order passed by the trial court in that case, no condition requiring him to attend the police station or the office of the Investigating Agency, is imposed.

28. At this stage, the learned APP and Mr. Jha, both pray for stay on the operation of this order. Mr. Solkar objects. It is true that ordinarily after having considered the matter on merits and after coming to the conclusion that the applicant deserves to be released on bail, this Court would not stay the operation of the bail order, but in the peculiar facts of the case where SLP challenging the bail orders passed by this Court in this very case are pending before the Apex Court, I am inclined to stay the operation of this order for a period of three weeks from today.

It is ordered accordingly.