

(2017) 01 BOM CK 0020
In the Bombay High Court
Case No : Criminal Appeal No.23 of 2017

The State of Maharashtra

APPELLANT

Vs

Varsha Shankarrao Phadke

RESPONDENT

Date of Decision : 10-01-2017

Acts Referred:

Arms Act, 1959 — Section 4

Penal Code, 1860 (IPC) — Section 307, Section 34, Section 384, Section 447, Section 504, Section 506 (2)

Citation : (2017) 1 AIRBomRCri 653 : (2017) ALLMRCri 712 : (2017) 1 BomCR(Cri) 843 : (2017) 1 Crimes 406 : (2017) 1 MhLJCrI 774

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

Bench : Single Bench

Advocate : Mr. A.P. Mundargi, Senior Counsel, a/w. Mr. Rohan Nahar, Advocate, for the Respondent; Ms. Pallavi Dabholkar, APP, for the Appellant - State

Final Decision : Allowed

Judgement

A.M. Badar, J. (Oral) - Heard.

Rule.

Rule made returnable forthwith. Heard by consent.

2. By this appeal, the State is challenging the order dated 6th December 2016 passed by the learned Special Judge under the Maharashtra Control of Organized Crime Act (MCOC Act for the sake of brevity) Pune, on Remand Application dated 6th December 2016 of Kondhwa Police Station, Pune, in C.R.No.477 of 2015, thereby rejecting the prayer for remand of respondent/accused to police custody and instead remanded her to judicial custody till 27th December 2016.

3. I have heard the learned APP appearing for the State. She vehemently argued that in Crime No.477 of 2015 in all 12 accused are implicated by now and the charge sheet against three of them was filed on 2nd June 2016. The learned APP further argued that two of absconding accused namely Rani Prabhakar Nair and

Jyoti wife of Bapu @ Kumar Prabhakar Nair were traced out on 21st November 2016. When the Investigating Officer sought permission of the learned Judicial Magistrate First Class (JMFC) for arresting those accused persons, the respondent/accused filed a false affidavit stating that proceedings are stayed by this court. The learned APP further argued that the impugned order refusing police custody remand is perverse. She pointed out the remand application and particularly grounds nos.1 to 7 raised in that application and contended that the learned Special Judge has failed to consider those grounds and rejected the application for police custody remand by holding that the respondent/accused is not at all booked for offences punishable under Sections 3(1)(i) or 3(1)(ii) of the Maharashtra Control of Organized Crime Act (MCOC Act). According to the learned APP, there was enough evidence to demonstrate that the respondent has committed the offence punishable under Section 3(3) of the MCOC Act, 1999, as she has harboured the offenders and got their release from police by filing false affidavit before the learned JMFC. The learned APP further drew my attention to statements of confidential witnesses nos.1 to 7 in order to demonstrate that respondent/accused is a member of an Organized Crime Syndicate. The learned APP further drew my attention to the transcript of the intercepted call between the respondent/accused and co-accused Bapu Nair to demonstrate that their conversation goes to show that the respondent/accused is a member of the Organized Crime Syndicate. It is further argued by the learned APP that there were about 24 calls by the respondent/accused to one of the confidential witnesses for extorting the amount and that witness had also called her for 32 times. In order to demonstrate that the Investigating Officer claimed police custody of the respondent/accused, even after the nature of the custody is changed to judicial custody, the learned APP placed reliance on judgments of this court in the matter of Iqbal Hasan Shaikh Ibrahim Kaskar v. State of Maharashtra reported in 2003 ALL MR (Cri) 1817. Reliance is also placed by the learned APP on confessional statements of co-accused Bapu Nair and Nilesh Basvant and that of Amit Jarande.

4. As against this, the learned senior counsel appearing on behalf of respondent/accused pointed out that the accusation against co-accused Rani Nair and Jyoti Nair are in respect of offences punishable under Section 4 of the MCOC Act which relates to possessing unaccountable wealth on behalf of members of Organized Crime Syndicate. To buttress this contention, reliance is placed on the remand application wherein it is mentioned that Section 4 of the said Act is added to the case diary of the crime as those co-accused have possessed unaccountable wealth on behalf of members of Organized Crime Syndicate. In this view of the matter, according to the learned senior counsel, prima facie, no offence punishable under Section 3(3) of the MCOC Act can be attracted against the respondent/accused as there is no harbouring of any "member" of the Organized Crime Syndicate. The learned senior counsel further argued that paragraph 9 of the impugned order clearly states that the respondent/accused was not booked for the offences punishable under Section 3(1)(i) or 3(1)(ii) of the MCOC Act and

confidential statements of witnesses may not be available on the date of passing the impugned order. Therefore, that material cannot be relied by the learned APP at this stage. It is further argued that chargesheets against the arrested accused were filed on 2nd June 2016 and 13th October 2016 and in those chargesheets, the respondent /accused was not shown as an absconding accused. Lastly, the learned senior counsel by drawing my attention to provisions of Section 21(7) of the MCOC Act, 1999, argued that if the investigator is having fresh material with him, then nothing prevented the investigator from approaching the learned Special court for changing the nature of custody by applying for police custody remand of the respondent/accused. With this, learned senior counsel supported the impugned order of the learned Special court and contended that as there is no perversity in the impugned order, the same needs to be upheld.

5. I have carefully considered the rival submissions and also perused the material placed on record. It is clear from the record made available that statements of confidential witnesses nos.1 to 7 were not available on the date of application for police custody remand of the respondent/accused. As such, these statements cannot be made use of, at this stage for deciding the legality of the impugned order. That material was not available with the investigator and as such, it cannot be said that the learned Special Judge ought to have applied mind to such nonexistent material at the time of passing the impugned order.

6. Be that as it may, on the basis of material placed on record of the learned Special Judge, Pune, let us examine whether the impugned order suffers from perversity, illegality or procedural irregularity warranting interference at the hands of this court.

7. At the outset, let us set out the prosecution case in brief. On 12th December 2015, the FIR came to be lodged at the instance of Nilesh Kuntal Botra wherein he alleged that Survey No.66/1/5/3 admeasuring 14 gunthas of land of Kondhwa area of Pune is owned by his wife Puja and his sisterinlaw Arti Hemant Lodha. The informant further alleged that accused persons forcibly took possession of that land and are attempting to extort an amount of Rs.5 Lakh from him for vacating that encroachment. It is further alleged by the informant that though he was present on the spot with his relatives, there was an attempt on his life by accused Deepak Kadam, Bapu Nair, Nilesh Basvant and Amol Basvant. Accordingly, Crime No.477 of 2015 for the offences punishable under Sections 307, 384, 447, 504, 506(2) read with Section 34 of the IPC, under Section 37(1) read with Section 135 of the Maharashtra Police Act, under Section 4(25) of the Arms Act and under Sections 3(1)(ii), 3(2), 3(3), 3(4), 3(5) and 4 of the MCOC Act came to be registered. Bapu @ Kumar Nair, Deepak Kadam, Nilesh Basvant, Amot Basvant and Amit Jarande were arrested. The investigator could not apprehend Dattatray Balu Mane, Tabrej Sutar, Nitesh Basvant, Rani Nair and Jyoti wife of Bapu @ Kumar Nair.

8. In the interregnum, accused Rani Nair, after rejection of her application for supratnama of the vehicle used in the crime, had preferred an application being

Criminal Application No.455 of 2016 before this court claiming supratnama of the Innova car allegedly used in the crime in question. It appears that, as accused Rani Nair and Jyoti Nair absconded, the prosecution had initiated proceedings for issuing proclamation against them for declaring them as proclaimed offenders by resorting to the provisions of Section 82 of the Code of Criminal Procedure (Cr.P.C.). That order passed by the learned Special Judge, Pune, came to be challenged by accused Rani Nair and Jyoti Nair by filing Criminal Application bearing No.986 of 2016 before this court. It is seen from order dated 29th August 2016 that the Division Bench of this court had stayed the order dated 6th August 2016 issuing proclamation against those accused persons, but no stay to their arrest was granted. This aspect came to be clarified by another order of the Division Bench of this court passed on 19th September 2016. It needs to mention here that the respondent is representing those two accused in this court in both these proceedings.

9. It is seen from the record that on 21st November 2016, police found accused Jyoti wife of Bapu @ Kumar Nair and Rani Nair in evening hours. Their arrest before sunset was not possible. Considering the exceptional circumstances warranting their arrest in terms of provisions of Section 46(4) of the Cr.P.C., the Investigating Officer had submitted written report to the learned JMFC seeking permission to cause arrest of those two lady accused after sunset. At that point of time, it is seen that the respondent / accused appeared before the learned JMFC, Cantonment Court, Pune, and submitted her own affidavit informing the learned JMFC that this court has stayed the proceedings and the interim relief is granted, that interim relief is extended till 25th November 2016 but that order is not uploaded. With this, respondent/accused made a statement on affidavit that those two accused persons will remain present with her before the learned JMFC on the very next day in the morning at 11.30 a.m., with the copy of that order. The learned JMFC, Cantonment Court, Pune, considered the argument advanced by the respondent/accused and had not granted permission to the Investigator to cause arrest of those two accused persons. Ultimately, on the next day, i.e. on 22nd November 2016, those two accused persons did not remain present before the learned JMFC, Cantonment Court, Pune. It is obvious from the record and particularly in the light of observations of the Division Bench of this court in the order dated 19th September 2016 passed in Criminal Application No.986 of 2016 that there was no stay on arrest of either Rani Nair or Jyoti Nair, by this court. This is undoubtedly a relevant circumstance for considering the prayer for police custody of the respondent.

10. During the course of investigation of the said crime, on 4th December 2016 the respondent/accused was arrested. On 6th December 2016, the Investigating Officer made an application for seeking her police custody remand for 7 days. Perusal of the remand application moved by the Investigating Officer disclosed reasons claiming police custody. According to the Investigating Officer, respondent/accused harboured co-accused by swearing a false affidavit and causing their release from custody of the police. It is further averred by the

Investigator that the respondent/accused had forged signatures of the absconding accused and filed several proceedings before this court on their behalf when those accused persons were absconding. The Investigator further claimed police custody with a reason that during investigation it transpired that the respondent/accused is a member of Organized Crime Syndicate and runs the crime syndicate. It is further averred that she helps accused persons in their illegal acts.

11. The Special Judge, after hearing both parties and after considering the material produced before him, was pleased to reject the prayer for police custody remand with a reason that the respondent/accused is not booked for offence punishable under Section 3(1)(i) and 3(1)(ii) of the MCOC Act. It is further held that there is no need for recovery of documents from the respondent/accused as those documents are already available on the record of the learned JMFC, Cantonment Court, Pune. The learned Special Judge further observed that after arrest of respondent/accused on 4th December 2016, presently she cannot be said to be giving shelter to absconding accused and it is the duty of the police to search for absconding accused. This order is sought to be challenged on the ground on perversity.

12. The learned APP on instructions from the Investigating Officer, has made a statement before this court that except statements of confidential witnesses no.1 to 7 recorded subsequent to passing the impugned order, rest all of material was with the learned Special Judge while passing the impugned order. The learned APP has also clarified that transcript of conversation of respondent/accused with co-accused Bapu Nair was not produced but the Compact Disk (CD) recording their conversation was very much produced before the learned Special court while passing the impugned order of rejection of police custody remand and taking the respondent/accused in judicial custody.

13. At this juncture, it is apposite to consider the need and requirement of grant of police custody to the Investigator. It is well settled that an application for police custody has to be considered strictly on the basis of material collected by the Investigator as it involves fundamental right and personal liberty of the accused. In this view of the matter, the law disfavours detention of an accused in police custody. Remand of an accused to police custody is normally asked by the Investigator when some substantial fact is to be recorded or investigated into, to establish nexus between the accused and the crime in question. Such request is granted only for furthering the investigation in proper direction and if no such remand is granted, there is further likelihood of the entire investigation being set at naught. On the other hand, it is also well settled that custodial interrogation of apprehended accused is qualitatively more elucidation oriented. In a serious crime, effective interrogation of the accused is of tremendous advantage in disinterring many useful information and also material which otherwise would have been concealed from the investigator. All these aspects are required to be kept in mind while deciding application for police custody remand of an accused

and a balance is required to be struck by the court, between the personal liberty of the accused and need of the Investigator for proper investigation of the crime.

14. Viewing from this context, it is seen prima facie from the material produced on record including the FIR as well as confessional statements of accused persons that accused persons have formed an Organized Crime Syndicate headed by main accused Bapu @ Kumar Nair who is indulging in continuing unlawful activities by using violence or threat of violence or intimidation or coercion with an objective of gaining pecuniary benefits or gaining undue economical advantage. It is seen from the record of crime registered against accused persons that they have adopted a modus operandi of taking illegal possession of vacant lands owned by others at Pune by erecting compound of tin sheets and then forcing owners of such lands to pay a huge amount for vacating possession of such lands taken illegally by members of Organized Crime Syndicate. It is seen that this exercise was used to be done even by calling owners of such lands to the office of main accused Bapu Nair. The FIR of Nilesh Botra also clarifies this position.

15. It is seen from the record that after registration of the crime in question, accused persons were not available for arrest and they absconded. It is seen that respondent/accused was appearing as an advocate for co-accused. She had filed several proceedings on their behalf. My attention is drawn to affidavit in Writ Petition No.284 of 2016 filed on behalf of co-accused Bapu Nair. Bapu Nair is affiant in this writ petition. Similarly, in another writ petition bearing no.548 of 2016, petitioner Bapu Nair (co-accused) had sworn an affidavit. Register of the notary is also pointed out bearing alleged forged signature of Bapu Nair. With this material, my attention is drawn to specimen signatures of co-accused Bapu Nair collected by the Investigator. Prima facie, it is seen from comparing that signatures of co-accused Bapu Nair on verification of Writ Petition No.284 of 2016, 548 of 2016 and Notary register are forged signatures. It is seen that affiant Bapu Nair is identified by none else than the present respondent / accused in those proceedings. Similarly is the case in respect of forged signatures of coaccused Nilesh Basvant on verification in the matter of writ petition. His specimen signature and the signature on verification in the said matter shows that signature of co-accused Nilesh Basvant is prima facie a forged signature. In that court matter also, identification of the co-accused Nilesh Basvant is by the respondent/accused. On this backdrop, confessional statement of co-accused Amit Jarande becomes relevant. He has stated that the respondent/accused was signing the court proceedings on behalf of co-accused. All this material was before the learned Special Judge for claiming police custody remand of the respondent as per reason given in the application. Bare perusal of the impugned order goes to show that the learned Special Judge has not taken any efforts to look into this aspect of the matter and passed the order remanding the respondent/accused to judicial custody instead of police custody remand. This material prima facie indicates that respondent/accused was not merely acting as an advocate of co-accused but she was active as the member of the Organized

Crime Syndicate and helping co-accused in their illegal activities. She has filed several proceedings on behalf of co-accused apart from tendering her own affidavit before the learned JMFC, Cantonment Court, Pune, when the Investigator sought permission of the court for arresting co-accused Rani Nair and Jyoti Nair. This cannot be termed an innocent act or merely a professional act of an advocate. This prima facie indicates active participation in affairs of the Organized Crime Syndicate and the matter needs to be viewed from this angle. Unfortunately, the learned Special Judge in a casual manner recorded the reason that after arrest of the respondent/accused, presently she cannot be said to be giving shelter to absconding accused, for rejecting the prayer for police custody remand of the respondent/accused.

16. Confessional statements of co-accused are also relevant for determining whether the respondent/accused was to be remanded to the police custody or judicial custody. Bapu Nair ? head of the Organized Crime Syndicate in his confessional statement has categorically stated that he was required to pay to respondent/accused her share from the extorted amount. Co-accused Nilesh Basvant has also stated in his confessional statement recorded as per provisions of Section 18 of MCOC Act that the respondent/accused was helping the Organized Crime Syndicate as its member. Coupled with other evidence produced by the Investigating Officer, this aspect assumes importance. However, the same is not at all considered by the learned Special Judge while considering the request of the police custody remand by the Investigator in a serious crime which is having large ramification. The crime in question was affecting societal interest and as such, it was expected of the Special Judge to be more cautious and sensitive while dealing with such application moved by the Investigator.

17. The Investigating Officer had placed on record of the Special Court the CD of recorded conversation between the respondent / accused and co-accused Bapu Nair. The learned Special Judge ought to have considered and examined the conversation between the respondent / accused and the co-accused Bapu Nair, prior to deciding the application for police custody remand in such serious crime. That recorded conversation submitted before the learned Special court in the form of CD seems to have been totally ignored by the learned Special Judge while rejecting the request for police custody remand. The very same conversation in the form of the transcript is produced before this court by the learned APP. Perusal of that transcript prima facie shows that respondent/accused was getting share from the earnings of the Organized Crime Syndicate and she was an active member of that Syndicate.

18. The foregoing discussion requires me to hold that the impugned order rejecting the request for police custody remand is totally perverse and depicting total non-application of mind and as such, is unsustainable. There was in fact voluminous material before the learned Special Judge as discussed in the foregoing paragraphs warranting grant of police custody remand of the respondent / accused. In this view of the matter, the following order :

i) The Appeal is allowed.

ii) The impugned order dated 6th December 2016 passed by the learned Special Judge under MCOC Act, Pune, rejecting the police custody remand claimed by the investigator for seven days is quashed and set aside.

iii) The application for police custody remand of the respondent / accused is allowed. She be given in custody of the appellant / Investigating Officer initially for a period of seven days. On expiry of the said period, it will be open for the Investigating Officer to move appropriate application before the learned Special Judge, Pune.

19. The appeal is disposed of accordingly.

20. Needless to mention here that the all these observations are prima facie in nature and shall not affect merits of the case and shall not be considered at the time of trial of the case.