

**ORDER BELOW EXH.32**

1. The Advocate of accused Naim Khan alias Tamatar Gulab Nabi has filed second bail application under section 439 read with section 437 of the Code of Criminal Procedure, 1973 in C.R.No.590/2022 registered at Yavatmal City Police Station, Dist.Yavatmal for offence punishable under section 143, 147, 148, 149, 307, 384, 506, 120B of Indian Penal Code, 1860, section 3, 25, 27, 35 of the Arms Act, 1959, section 135 of the Maharashtra Police Act, 1951, section 3(1), (ii), 3(2), 3(4) of the Maharashtra Control of Organized Crime Act, 1999. Say of Learned APP and I.O. was called for. Learned APP and I.O. filed say at Exh.40 and Exh.43 respectively resisting the application. The complainant has filed his say at Exh.47 resisting the application.

2. Heard Advocate Shri S.M.Ali for accused, Learned APP Shri C.R.Dahe for State and Advocate Shri A.J. Tagale for the complainant. It is the contention of Advocate of accused that prior to invoking MCOCA by police the applicant was moved Cri.Bail Application No.433/2022. It was rejected. Charge sheet was not filed at that time. Now after invoking MCOCA charge sheet is filed. 2 other accused in this matter are released by Court on bail. As there is change in circumstances second bail application is maintainable. The informant is discharged from the hospital after taking first aid. The police have deliberately registered the offence under section 307 of the Indian Penal Code, 1860 against the present accused. The police have filed CCTV footage on record. In the CCTV footage it is seen that the present accused is taking bill from the counter. But in the FIR it is mentioned that the present accused threw glass bottle on complainant. The timing of incident mentioned in the FIR is different and timing as seen in

CCTV footage is different. The sanctioned order dated 30/11/2022 of MCOCA is arbitrary and contrary to the facts on record. There is nothing on record to show that the accused is prima facie guilty of commission of offences under MCOCA except approval and sanction order. The accused is in jail for more than 9 months. The custodial interrogation of the accused is not required. The accused has no previous record of committing crime together with other accused. Proof of past charge sheet is not enough to invoke MCOCA. No charge sheet is pending against the present accused. There is no material on record to show that the present accused is member of organized gang. In the present case the accused Aslam Khan alias Mari Akbar Khan and accused Sajid alias Rijju Salim Sayani are released on bail by this Court. He further submitted that the accused is ready to abide all terms and conditions imposed by the Court. He has prayed for release the present accused on the ground of parity.

3. It is the contention of Learned A.P.P. that the accused No.01 to 08 under criminal conspiracy formed organized crime syndicate, committed organized crime and continued unlawful activities in the Yavatmal district. There are many offences registered against the members of the syndicate acting either singly or collectively for and on behalf of Gang. The accused is a member of the organized crime syndicate. There is similarity between the present and pending crimes and cases. The offence committed by the present accused are against the human body. There are 4 cases are pending against the present accused as per the chart submitted by the police authority. Crime No.390/2022 under section 3/25 of the Arms Act, 1959 registered with Police Station Yavatmal City show similarities between the two offences. The provision of MCOCA were applied to the crime on 30/11/2022 after receipt of permission and sanction. Pritesh Jaiswal is the

owner of Jaiswal Wine Bar. On 04/09/2022 at about 10:30 p.m. when the informant went to the accused for demanding bill of Rs.6,000/- in his Bar, all accused raised assaulted by saying - 'तु मुझे पैसे क्यों मांग रहा है, मुझे पहचानता नहीं क्या, तु आम्हाला पैसे का मागतो आता तुला जिवाने मारुन टाकतो, दर महिण्याला सा ५,०००/- रु. द्यावा लागेल, नहीं तो तेरेको जान से मार डालेंगे'. The assault was made with knife, stick, glasses and pistol. The weapons stick, country pistol alongwith 3 live cartridges came to be seized. The C.A. report/ballistic report clearly shows that the pistol was a country made and was or is in working condition and while examination residue of the fire ammunition was detected. During investigation the involvement of present accused is found in the commission of offence. The CCTV footage seized shows the commission of the offence by the accused. That the extortion money was demanded by the accused, therefore, organized crime was committed by the accused.

4. The Learned APP filed his additional say at Exh.52 that the present accused had filed Cri.Bail Application No.433/2022 and it was rejected by the Court. He further submitted that the present application filed by the accused is not tenable as there is no material change in circumstances. He further submitted that if the accused is released on bail he might pressurize the informant and other witnesses, he might tamper with the prosecution and witnesses. He has prayed for rejection of application.

5. Perused record. The Cri.Bail Application No.433/2022 of the present accused was rejected on the ground of investigation in progress, other accused are absconded, effectual investigation with all accused is decisive. Now the investigation is complete, the informant is discharged

from the hospital, charge sheet is filed, the charge is also framed against the accused on 06/10/2023. Thus, the second bail application of the accused is maintainable.

6. FIR mentions that on 03/09/2022 accused No.01 Sheikh Alim alias Kavtya Sheikh Kalim, accused No.02 Rohit Jadhav, accused No.03 Nayan Soudagar, accused No.04 Adesh Khairkar, accused No.05 Sheikh Imran alias Kangaroo, accused No.06 Naim Khan alias Naim Tamatar accused No.07 Aslam Khan alias Mari Akbar Khan and accused No.08 Sajid alias Rijju Sayani was sitting in the M.P. Jaiswal Wine Bar of the complainant. The manager Shaym Narayan Dhamndev told him that the accused used to drink alcohol, create ruckus in the Bar and not pay the bill amount. The complainant demanded the bill amount to the accused. All the accused quarreled with the complainant and said that 'तु बिल के पैसे कैसे मांग रहा' and accused No.03 Nayan Soudagar assaulted the complainant by slapping below his ear and they threatened to kill him. Accused No.03 Nayan Soudagar and accused No.05 Sheikh Imran assaulted the complainant by knife on his nose and face, accused No.04 Adesh Khairkar assaulted the complainant by stick and present accused No.06 Naim Khan and accused No.08 Sajid Sayani assaulted the complainant by throwing glass on his head. They sabotaged the Bar. Accused No.01 Sheikh Alim alias Kavtya Sheikh Kalim fired Pistol in air. Accused No.01 Sheikh Alim alias Kavtya Sheikh Kalim and accused No.02 Rohit Jadhav asked the complainant to pay Rs.5,000/- per month towards protection money, otherwise they will kill him. The investigation was done by the Local Crime Branch and it was found during investigation that accused No.01 to No.08 are members of gang. The provisions of MCOCA were added.

7. As per section 21(5) of the Maharashtra Control of Organized Crime Act, 1999 - Notwithstanding anything contained in the Court, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question. It is not the contention of the Learned APP that present accused Naim Khan alias Naim Tamatar was on bail in any case registered under the provisions of MCOCA when this offence was committed. Thus, there is no bar of section 21(5) of the Maharashtra Control of Organized Crime Act, 1999.

8. To release any accused on bail, as per section 21(4)(b) of the Maharashtra Control of Organized Crime Act, 1999 the Court has to be 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. If these two conditions are fulfilled then only bail can be granted for offence under MCOCA.

9. Firstly, it has to be seen whether the present accused is a part of 'organized crime syndicate' as defined under section 2(1)(f) of MCOCA. Upon perusal of the crime register extract, it is seen that no offence is registered against the present accused i.e. Naim Khan alias Tamatar Gulab Nabi prior to this offence. In fact, in the say filed by Learned APP it is wrongly mentioned that 4 cases are pending against the present accused. The Learned APP has not shown any similarity between any pending case and the present offence. The Learned APP has not shown any nexus between any past crime and present case. The Learned APP has not shown any case by which it can be seen that the present accused is a member of organized crime syndicate.

10. Secondly, it has to be seen whether the offence committed falls under the definition of 'organized crime' as defined under section 2(1)(e) of MCOCA. In the present case, the complainant asked the accused to pay the bill for the liquor drank by them. This lead to the dispute and consequent assault. It is crystal clear that the incident had happened on the spur of the moment and there was no pre mediation. It is alleged that the accused No.01 Sheikh Alim alias Kavtya Sheikh Kalim and accused No.02 Rohit Jadhav demanded the amount of Rs.5,000/- as protection money. The protection amount was demanded after the dispute for payment of bill arose. Said extortion can not be held to be pecuniary gain as contemplated under 'organized crime'. It is simpliciter extortion.

11. Thirdly, it has to be seen whether the present accused has committed continuing unlawful activity as defined under section 2(1)(d) of MCOCA. No offence is registered against present accused except present offence. The Learned APP has not shown any nexus between any past offence and the present offence. The Learned APP has not shown any similarity between the modus operandi of any offence and present offence. The present accused is not convicted of any offence so far.

12. For the aforesaid reasoning, it is not established prima facie by the prosecution that the present accused is a member of organized crime syndicate and he committed organized crime with the objective of gaining pecuniary benefit and he continued indulging in unlawful activities. Prima facie provisions of MCOCA are not attracted. Thus, there are reasonable grounds for believing that the present accused is not guilty of such offence and that he is not likely to commit any offence while on bail.

13. Learned APP has relied upon *Hon'ble Supreme Court, Abhishek vs. State of Maharashtra & Ors.* wherein it was held that the value attached to the confessional statement, while overriding the provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 in terms of section 18 of MCOCA can not be gainsaid and can not be ignore. In the present case, upon perusal of the confessional statement of the co-accused Sajid alias Rijju Salim Sayani it is seen that the role attributed to the present accused is calling on phone. Similarly, upon perusal of the confessional statement of the co-accused Aslam Khan alias Mari Akbar Khan it is seen that there is no mention of the name of present accused. Thus, in the confessional statement of the co-accused no serious role or overt act in the commission of the offence is attributed to the present accused. As the fact of the two cases are different, the above ratio is not applicable.

14. The role attributed to the present accused is seen from the CCTV footage panchanama. At 9:17:05 p.m. present accused is seen to be taking bill from Manager and leaving, at 9:28:42 p.m. present accused is seen to have verbal spat with Shaym Dhamande and Manish Jaiswal, at 9:30:23 p.m. the present accused is seen to be taking bill from the counter. Apart from the above scenes there is no other role attributed to the present accused. CCTV footage prima facie clearly shows the presence of the present accused at the spot of incident but no overt act in complicity in the commission of the offence. The role attributed to the co-accused Aslam Khan alias Mari Akbar Khan is breaking glasses and other articles in the Bar by a big wooden stick. The role attributed to the co-accused Sajid alias Rijju Salim Sayani is going inside the counter and having verbal spat with the complainant, assaulting the complainant on head by the steel '*Katora*'

kept on the counter with his left hand. Both the accused are already released on bail. To protect the complainant and witnesses certain terms and conditions can be imposed on the accused. For the aforesaid reasoning, it is held that prima facie the provisions of MCOCA are not attracted but only the provisions of Indian Penal Code, 1860 and other Acts are attracted. Accordingly, the present accused is entitled to be released on bail. Hence, the order-

ORDER

1. The criminal bail application is allowed.
2. The accused Naim Khan alias Tamatar Gulab Nabi be released on bail on his P.R. bond of Rs.50,000/- with one solvent surety in like amount on the following conditions-
 - (i) He shall not enter into the territorial jurisdiction of entire Yavatmal District, (except for attending Court proceedings), for a period of one year from the date of his actual release.
 - (ii) He shall furnish his cell number and intended address of his residence to the concerned investigating officer.
 - (iii) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of the case, and also shall not tamper with the prosecution evidence.

Date : 25/10/2023
Place : Yavatmal

Sd/-
(Dr. Gauri Kawdikar)
Additional Sessions Judge,
Yavatmal