IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

MONDAY, THE 13TH DAY OF AUGUST 2024 / 21ST SRAVANA, 1946

BAIL APPL. NO. 5927 OF 2024

CRIME NO.504/2024 OF KARIPUR POLICE STATION, Malappuram

PETITIONER/ACCUSED:

MUHAMMAD RASHEED,
AGED 62 YEARS
S/O MOHAMMED, PANIKKAVEETIL HOUSE, NEAR MOIDEEN MASJID,VADANAPALLI, THRISSUR, PIN - 680614

BY ADVS.
S.RAJEEV
V.VINAY
M.S.ANEER
SARATH K.P.
ANILKUMAR C.R.
PRERITH PHILIP JOSEPH
K.S.KIRAN KRISHNAN
NOURIN S. FATHIMA
K.K.SUBEESH

RESPONDENT/STATE:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, PIN – 682031
BY SR.P.P.SMT.PUSHPALATHA M.K

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 13.08.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

C.S.DIAS,J

Bail Application No.5927 of 2024

Dated this the 13th day of August, 2024

O R D E R

The collateral question that arises for consideration in this bail application is whether an offence of 'organised crime', defined under Section 111 (1) of the Bharatiya Nyaya Sanhita, 2023, can be attributed against an accused who has no criminal antecedents.

2. The 1st accused in Crime No.504/2024 of the Karipur Police Station, Malappuram, has filed the application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023.

3. The factual substratum of the prosecution case is that the Detecting Officer received information that the accused 1 to 3 had hatched a conspiracy to commit an organised crime to smuggle gold into the Country. Accordingly, on 02.07.2024, at around 07:30 hours, when the 1st accused arrived at the Calicut International Airport,

he was intercepted, and frisked. Then it was found 964.5 grams of liquid gold, having a value of Rs.68,00,000/-, was concealed in capsules in his body. The 1st accused was arrested on the spot. Subsequently, the accused 2 and 3 were also arrested. Thus, the accused have committed the offence punishable under Section 111 (7) of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as 'BNS', for brevity).

4. Heard; Sri.Sarath K.P., the learned counsel appearing for the petitioner and Smt.Pushpalatha M.K., the learned Senior Public Prosecutor.

5. The learned Counsel for the petitioner zealously argued that to attract the offence under sub-section (1) of Section 111 of the BNS, it is imperative that there should be more than one charge sheet filed against the accused before a competent Court within the preceding period of ten years, and the Court has taken cognizance of such offence. In the case on hand, the above offence is not attracted because the petitioner does not have criminal antecedents. In any given case, the petitioner was arrested on 02.07.2024, the

investigation is complete, recovery has been effected, and the 2nd accused has been enlarged on bail by the Court of Session, Manjeri. Hence, the petitioner is entitled to parity and may be enlarged on bail.

6. The learned Public Prosecutor strenuously opposed the application. She argued that the petitioner has committed a serious economic offence by smuggling contraband gold from abroad. Section 111(1) of BNS defines organised crime as any continuing unlawful activity, including economic offences. Explanation (iii) of sub-section (1) of Section 111 specifically defines economic offence, which includes hawala transactions. The act committed by the petitioner squarely falls within the purview of sub-section (1) of Section 111 of the BNS and is punishable under sub-section (7) of Section 111 of the BNS. There is no necessity for the accused to have criminal antecedents. If the petitioner is enlarged on bail, he is likely to intimidate the witnesses, tamper with the evidence and flee from justice. Moreover, the investigation is in progress. Nevertheless, she did not dispute the contention that no charge sheet has been

filed against the petitioner within the preceding ten years as per the prescription under explanation (ii) of sub-section (1) of Section 111 of the BNS.

7. The prosecution alleges that the petitioner smuggled 964.5 grams of liquid gold into the country, which was seized from his conscious possession.

8. The sheet anchor of the argument of the learned Counsel for the petitioner is that the offence under Section 111 (1) of the BNS is not attracted against the petitioner primarily because no charge sheet has been filed against him before any competent Court to date.

9. The Bharatiya Nyaya Sanhita Bill 2023, aimed to modernise and transform the criminal justice delivery system in India, was passed by the Parliament and received the assent of the President on 25.12.2023. The provisions of the Bharatiya Nyaya Sanhita (Act 45 of 2023), except sub-section (2) of Section 106, came into force on 1.07.2024. By virtue of Section 358 of the BNS, the Indian Penal Code, 1860, stands repealed. The BNS has introduced new offences, including the offence of organised crime as defined

under Section 111 (1).

10. In the above context it is apposite to analyse Section 111 of the BNS, which reads as follows:

"111. Organised Crime. —(1) Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offence, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom, **by any person or a group of persons acting in concert, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate,** by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit, shall constitute organized crime.

Explanation. —For the purposes of this sub-section,—

(i) "**organised crime syndicate" means a group of two or more persons who, acting either singly or jointly, as a syndicate or gang indulge in any continuing unlawful activity**;

(ii) "continuing unlawful activity" **means an activity prohibited by law which is a cognizable offence punishable with imprisonment of three years or more, undertaken by any person, either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence**, and includes economic offence;

(iii) "economic offence" includes criminal breach of trust, forgery, counterfeiting of currency-notes, bank-notes and Government stamps, hawala transaction, mass-marketing fraud or running any scheme to defraud several persons or doing any act in any manner with a view to defraud any bank or financial institution or any other institution organization for obtaining monetary benefits in any form.

(2) Whoever commits organized crime shall,—

(a) if such offence has resulted in the death of any person, be punished with death or imprisonment for life, and shall also be liable to fine which shall not be less than ten lakh rupees;

(b) in any other case, be punished with imprisonment for a term which shall not be less than five years but which may

extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(3) Whoever abets, attempts, conspires or knowingly facilitates the commission of an organised crime, or otherwise engages in any act preparatory to an organised crime, shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(4) Any person who is a member of an organised crime syndicate shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees.

(5) Whoever, intentionally, harbours or conceals any person who has committed the offence of an organised crime shall be punished with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees: Provided that this sub-Section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.

(6) Whoever possesses any property derived or obtained from the commission of an organised crime or proceeds of any organised crime or which has been acquired through the organised crime, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than two lakh rupees.

(7) If any person on behalf of a member of an organized crime syndicate is, or at any time has been in possession of movable or immovable property which he cannot satisfactorily account for, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for ten years and shall also be liable to fine which shall not be less than one lakh rupees".

(emphasis supplied)

11. Section 111 (1) explicitly stipulates that to attract the offence, there should be a continuing unlawful activity, by any person or group of persons acting in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate. The material ingredient to attract the above provision, so far as the present case is concerned, is that there should have been a continuing unlawful activity committed by a member of an organized crime syndicate or on behalf of such syndicate.

12. Explanation (i) and (ii) of sub-section (1) of Section 111 of BNS defines an organized crime syndicate and a continuing unlawful activity, respectively.

13. Continuing unlawful activity under explanation (ii) of Section 111(1) of the BNS means an activity prohibited by law, which is a cognizable offence punishable with imprisonment of three years or more, undertaken by any person, either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of

ten years and that Court has taken cognizance of such offence. Furthermore, an organised crime syndicate under Explanation (i) of sub-section (1) of Section 111 of the BNS means a group of two or more persons who, acting either singly or jointly as a syndicate or gang, indulge in any continuing unlawful activity.

14. While interpreting the analogous provisions of the Maharashtra Control of Organised Crime Act, 1999, which mandates the existence of at least two charge sheets in respect of a specified offence in the preceding ten years, the Honourable Supreme Court in **State of Maharashtra vs. Shiva alias Shivaji Ramaji Sonawane and others** [(2015) 14 SCC 272] has unequivocally held as follows:

> "9. It was in the above backdrop that the High Court held that once the respondents had been acquitted for the offence punishable under the IPC and Arms Act in Crimes No.37 and 38 of 2001 and once the Trial Court had recorded an acquittal even for the offence punishable under Section 4 read with Section 25 of the Arms Act in MCOCA Crimes No.1 and 2 of 2002 all that remained incriminating was the filing of charge sheets against the respondents in the past and taking of cognizance by the competent court over a period of ten years prior to the enforcement of the MCOCA. The filing of charge sheets or taking of the cognizance in the same did not, declared the High Court, by itself constitute an offence punishable under Section 3 of the MCOCA. That is because the involvement of respondents in previous offences was just about one requirement but by no means the only requirement which the prosecution has to satisfy to secure a conviction under MCOCA. **What was equally, if not, more important was the commission of an offence by the**

respondents that would constitute "continuing unlawful activity". So long as that requirement failed, as was the position in the instant case, there was no question of convicting the respondents under Section 3 of the MCOCA. That reasoning does not, in our opinion, suffer from any infirmity.

10. The very fact that more than one charge sheets had been filed against the respondents alleging offences punishable with more than three years imprisonment is not enough. **As rightly pointed out by the High Court commission of offences before the enactment of MCOCA does not constitute an offence under MCOCA. Registration of cases, filing of charge sheets and taking of cognizance by the competent court in relation to the offence alleged to have been committed by the respondents in the past is but one of the requirements for invocation of Section 3 of the MCOCA. Continuation of unlawful activities is the second and equally important requirement that ought to be satisfied. Only if an organised crime is committed by the accused after the promulgation of MCOCA, he may, seen in the light of the previous charge sheets and the cognizance taken by the competent court, be said to have committed an offence under Section 3** of the Act.

11. In the case at hand, the offences which the respondents are alleged to have committed after the promulgation of MCOCA were not proved against them. The acquittal of the respondents in Crimes No.37 and 38 of 2001 signified that they were not involved in the commission of the offences with which they were charged. Not only that the respondents were acquitted of the charge under the Arms Act even in Crimes Case No.1 and 2 of 2002. No appeal against that acquittal had been filed by the State. This implied that the prosecution had failed to prove the second ingredient required for completion of an offence under MCOCA. **The High Court was, therefore, right in holding that Section 3 of the MCOCA could not be invoked only on the basis of the previous charge sheets for Section 3 would come into play only if the respondents were proved to have committed an offence for gain or any pecuniary benefit or undue economic or other advantage after the promulgation of MCOCA.** Such being the case, the High Court was, in our opinion, justified in allowing the appeal and setting aside the order passed by the Trial Court".

15. Subsequently, the Honourable Supreme Court in

State of Gujarat vs. Sandip Omprakash Gupta [2022 SCC OnLine SC 1727], while interpreting the analogous provisions of the Gujarat Control of Terrorism and Organized Crime Act, 2015, clarified the ratio in Shivaji alias Shivaji Ramaji Sonawane (supra) by observing thus:

> "52. It is a sound rule of construction that the substantive law should be construed strictly so as to give effect and protection to the substantive rights unless the statute otherwise intends. Strict construction is one which limits the application of the statute by the words used. According to Sutherland, 'strict construction refuses to extend the import of words used in a statute so as to embrace cases or acts which the words do not clearly describe'.
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> 53. The rule as stated by Mahajan C.J. in Tolaram Relumal and Another v. State of Bombay reported in AIR 1954 SC 496, is that "if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes a penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature…." In State of Jharkhand and Others v. Ambay Cements and Another reported in (2005) 1 SCC 368, this Court held that it is a settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. The basic rule of strict construction of a penal statute is that a person cannot be penalised without a clear letter of the law. Presumptions or assumptions have no role in the interpretation of penal statutes. They are to be construed strictly in accordance with the provisions of law. Nothing can be implied. In such cases, the courts are not so much concerned with what might possibly have been intended. Instead, they are concerned with what has actually been said.
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> 54. **We are of the view and the same would be in tune with the dictum as laid in Shiva alias Shivaji Ramaji Sonawane (supra) that there would have to be some act or omission which amounts to organised crime after the 2015 Act came into force i.e., 01.12.2019 in respect of which, the accused is sought to be tried for the first time in the special court.**

55. We are in agreement with the view taken by the High Court of Judicature at Bombay in the case of Jaisingh (supra) that neither the definition of the term 'organised crime' nor of the term 'continuing unlawful activity' nor any other provision therein declares any activity performed prior to the enactment of the MCOCA to be an offence under the 1999 Act nor the provision relating to punishment relates to any offence prior to the date of enforcement of the 1999 Act, i.e., 24.02.1999. **However, by referring to the expression 'preceding period of ten years' in Section 2(1)(d), which is a definition clause of the term 'continuing unlawful activity' inference is sought to be drawn that in fact, it takes into its ambit the acts done prior to the enforcement of the 1999 Act as being an offence under the 1999 Act. The same analogy will apply to the 2015 Act.**

56. There is a vast difference between the act or activity, which is being termed or called as an offence under a statute and such act or activity being taken into consideration as one of the requisites for taking action under the statute. For the purpose of organised crime, there has to be a continuing unlawful activity. There cannot be continuing unlawful activity unless at least two chargesheets are found to have been lodged in relation to the offence punishable with three years' imprisonment during the period of ten years. Indisputably, the period of ten years may relate to the period prior to 01.12.2019 or thereafter. In other words, it provides that the activities, which were offences under the law in force at the relevant time and in respect of which two chargesheets have been filed and the Court has taken cognizance thereof, during the period of preceding ten years, then it will be considered as continuing unlawful activity on 01.12.2019 or thereafter. It nowhere by itself declares any activity to be an offence under the said 2015 Act prior to 01.12.2019. It also does not convert any activity done prior to 01.12.2019 to be an offence under the said 2015 Act. It merely considers two chargesheets in relation to the acts which were already declared as offences under the law in force to be one of the requisites for the purpose of identifying continuing unlawful activity and/or for the purpose of an action under the said 2015 Act.

57. If the decision of the coordinate Bench of this Court in the case of Shiva alias Shivaji Ramaji Sonawane (supra) is looked into closely along with other provisions of the Act, the same would indicate that the offence of 'organised crime' could be said to have been constituted by at least one instance of continuation, apart from continuing unlawful activity evidenced by more than one chargesheets in the preceding ten years. We say so keeping in mind the following:

(a) If 'organised crime' was synonymous with 'continuing unlawful activity', two separate definitions were not necessary.

(b) The definitions themselves indicate that the ingredients of use of violence in such activity with the objective of gaining pecuniary benefit are not included in the definition of 'continuing unlawful activity', but find place only in the definition of 'organised crime'.

(c) What is made punishable under Section 3 is 'organised crime' and not 'continuing unlawful activity'.

(d) If 'organised crime' were to refer to only more than one chargesheets filed, the classification of crime in Section 3(1)(i) and 3(1)(ii) resply on the basis of consequence of resulting in death or otherwise would have been phrased differently, namely, by providing that 'if any one of such offence has resulted in the death', since continuing unlawful activity requires more than one offence. Reference to 'such offence' in Section 3(1) implies a specific act or omission.

(e) As held by this Court in State of Maharashtra v. Bharat Shanti Lal Shah (supra) continuing unlawful activity evidenced by more than one chargesheets is one of the ingredients of the offence of organised crime and the purpose thereof is to see the antecedents and not to convict, without proof of other facts which constitute the ingredients of Section 2(1)(e) and Section 3, which respectively define commission of offence of organised crime and prescribe punishment.

(f) There would have to be some act or omission which amounts to organised crime after the Act came into force, in respect of which the accused is sought to be tried for the first time, in the Special Court (i.e. has not been or is not being tried elsewhere).

(g) However, we need to clarify something important. Shiva alias Shivaji Ramaji Sonawane (supra) dealt with the situation, where a person commits no unlawful activity after the invocation of the MCOCA. In such circumstances, the person cannot be arrested under the said Act on account of the offences committed by him before coming into force of the said Act, even if, he is found guilty of the same. <u>However, if the person continues with the unlawful activities and is arrested, after the promulgation of the said Act, then, such person can be tried for the offence under the said Act. If a person ceases to indulge in any unlawful act after the</u>

> **said Act, then, he is absolved of the prosecution under the said Act. But, if he continues with the unlawful activity, it cannot be said that the State has to wait till, he commits two acts of which cognizance is taken by the Court after coming into force. The same principle would apply, even in the case of the 2015 Act, with which we are concerned.**
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> 58. In the overall view of the matter, we are convinced that the dictum as laid by this Court in Shiva alias Shivaji Ramaji Sonawane (supra) does not require any relook. The dictum in Shiva alias Shivaji Ramaji Sonawane (supra) is the correct exposition of law".

16. Section 111 (1) of the BNS in respect of organised crime is, in essence analogous to the provisions of the Maharashtra Control of Organised Control Act and the Gujarat Control of Terrorism and Organised Crime Act. The legal principles laid down by the Honourable Supreme Court in its interpretation of organised crime as defined by the above two state legislations are applicable on all fours to Section 111 (1) of the BNS. Thus, it is not necessary to have a further interpretation of the above analogous provision.

17. In view of the above discussion, to attract an offence under Section 111 (1) of the BNS it is imperative that a group of two or more persons indulge in any continuing unlawful activity prohibited by law, which is a cognizable offence punishable with imprisonment of three years or more, undertaken by any person, either singly or

jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence.

18. In the present case, it is undisputed that no charge sheet has been filed against the petitioner in any court in the last ten years. Therefore, prima facie, the offence under Section 111(1) is not attracted. Nevertheless, these are matters to be investigated and ultimately decided at the time of trial. Additionally, the petitioner has been in judicial custody for the last 40 days and recovery has been effected.

In the above conspectus, the application is allowed, by ordering the petitioner to be enlarged on bail, on him executing a bond for Rs.1,00,000/- (Rupees One lakh only) with two solvent sureties each for the like sum, to the satisfaction of the court having jurisdiction, which shall be subject to the following conditions:

i. The petitioner shall appear before the Investigating Officer every Saturday between 9 a.m. and 11 a.m. until the final report is laid. He shall also appear before the Investigating Officer as and when directed;

ii. The petitioner shall not directly or indirectly make any inducement, threat or procure to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any Police Officer or tamper with the evidence in any manner, whatsoever;

iii. The petitioner shall not commit any offence while he is on bail;

iv. The petitioner shall surrender his passport, if any, before the jurisdictional court at the time of execution of the bond. If he has no passport, he shall file an affidavit to the effect before the court below on the date of execution of the bond;

v. In case of violation of any of the conditions mentioned above, the jurisdictional court shall be empowered to consider the application for cancellation of bail, if any is filed, and pass orders on the same in accordance with law.

vi. Application for deletion/modification of the bail conditions shall be moved and entertained by the court below.

Vii. Needless to mention, it would be well within the powers of the Investigating Officer to investigate the matter and, if necessary, to effect recoveries on the information, if any, given by the petitioner even while the petitioner is on bail as laid down by the Hon'ble Supreme Court in ***Sushila Aggarwal v. State (NCT of Delhi) and another*** *[2020 (1) KHC 663]*.

viii. The observations made in this order are only for the purpose of deciding the application, and the same shall not be construed as an expression on the merits of the case.

Sd/-C.S.DIAS, JUDGE

rkc/12.08.24

APPENDIX OF BAIL APPL. 5927/2024

PETITIONER ANNEXURES

Annexure-I	**A TRUE COPY OF THE ORDER DATED 05.07.2024 IN CMP NO. 1343/2024 BY THE JUDICIAL FIRST-CLASS MAGISTRATE-I, MANJERI**