

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2530 OF 2014

Dr.Mohammed Sharif Shabbir

Ahmed

.. Applicant

Versus

The State of Maharashtra

.. Respondent

Mr.Sharif Shaikh, Advocate for the applicant.

Mr.Vaibhav Bagade, Special PP with Mr.Abhijiti Mantri, Assistant Public Prosecutor.

Mr.Deepak Thakre, APP for the Respondent State.

Mr.Prashant Mohite, API from ATS present.

CORAM : ABHAY M. THIPSAY, J.

ORDER RESERVED : 27th APRIL 2015ORDER PRONOUNCED : 10th JUNE, 2015

ORAL ORDER :

1 The applicant is the accused No.9 in MCOC Special Case No. 16 of 2006, pending before the Special Court constituted under the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as “the M.C.O.C. Act”). Totally 22 accused have been arrested in the said case so far and the some others are stated to be ‘*wanted*’. The allegation against the applicant and the other accused in the said case is in respect of offences punishable

under Section 120B of the Indian Penal Code (IPC), Section 201 of IPC, Sections 4 and 5 of the Explosive Substances Act, Sections 5, 6 and 9(b) of the Indian Explosives Act, 1884, Section 25 of the Arms Act and Sections 10, 13, 16, 18, 20 and 23 of the Unlawful Activities (Prevention) Act (UAP Act), as also the offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the M.C.O.C. Act. The applicant, who has been arrested on 13.05.2006, and is in custody since then, is by the present application, seeking bail.

2 The applicant's prayer for bail was turned down by the learned Judge of the Special Court by an order dated 10th March 2014. The applicant had, thereafter, approached this Court for bail, but since it was stated by the learned Special Public Prosecutor at that time that the trial was expected to be concluded within a period of three months, the said application was not pressed, and was allowed to be withdrawn (BA No.1074 of 2014 withdrawn on 13th August 2014). Now, the present application has been made on the ground that though the period of three months from the date of the said order had elapsed, the trial had not concluded, and that, actually, the prosecution had been delaying the matter.

3 Even this Bail Application, which was filed on 28th November 2014, could not be heard immediately. It was initially placed before another Bench, but as the previous application filed by the applicant had been dealt with by me, this one was also directed to be placed before me. When it appeared before me on 16th January 2015, some time was taken by the learned Special Public Prosecutor to file an affidavit in reply in the matter. During the pendency of the present application, some of the co-accused in the said case came to be released on bail by the Special Court. The fact of the release of certain other accused in the very case on bail by the Special Court itself, was brought to my notice from time to time by filing the relevant bail orders. Thereafter, a necessity of having before the Court the 'brief facts of the case' as mentioned in the charge-sheet was felt, and as such, the relevant part of the charge-sheet, which had not been annexed to the application, was called for. After hearing arguments, the orders were reserved on 20th March 2015. However, at the instance of the applicant, the application was again taken on board for directions as the learned counsel for the applicant wanted to submit the copies of the orders passed by the trial court, releasing the co-accused Afzal (accused no.7), Zuber (Accused no.2) and

Samad (accused no.15) on bail. These orders were taken on record. An opportunity was given to the Special Public Prosecutor to make additional submissions, if so desired. Accordingly, additional submissions have been made by the learned Special Public Prosecutor. The written submissions filed by him, were taken on record on 29th April 2015, and the matter was closed for orders.

4 In order to understand the role attributed to the applicant in the alleged offences, reference to the facts of the case, would be necessary. The same can be best taken from the column No.16 of the printed prescribed proforma of the charge-sheet. In brief, they are as follows :-

6 The Anti Terrorism Squad (A.T.S.), Mumbai, while conducting enquires in the incidents of Bomb Blast at Nanded, explosives seized at Buldhana and the Bomb Blast that had taken place in Marathwada, gathered some intelligence that some explosives and weapons were likely to be transported in a vehicle in the Marathwada region. On certain information, teams of A.T.S. were deputed to keep a watch on Manmad-Yeola-Aurangabad road. At about 16 hours, the Officers of the A.T.S. noticed one

white colour Sumo Motor Jeep bearing No. MH-14 X - 4380 coming from Manmad side and speeding away towards Aurangabad by jumping police signals. On suspicion, the said Sumo Motor Jeep was chased, and was successfully intercepted on Verul-Arangabad road, near *Ghrushneshwar* Temple, Taluka Khulthabad, District Aurangabad. There were three persons sitting in the said Sumo Motor Jeep, who came out of it and started running. The police could apprehend only one of them i.e. Mohmad Amir Shakil Ahmed Shaikh (accused no.1) and the other two managed to escape. The other two, who were later on arrested, are said to be the accused no.4 Abdul Azeem and accused no.2 Mohd. Juber Sayyed Anwar.

6 The search of the said Sumo Jeep was taken in presence of the panchas. The Jeep was found containing 10 Khaki Carton boxes, each containing a Computer Server Cabinet; and each Computer Server Cabinet was found containing one AK 47 Rifle, a packet of four magazines, a packet of 200 live cartridges and explosive substance, etc. A huge stock of AK Rifles, magazines, live cartridges and explosive substance was, thus, found in the said Sumo Jeep.

7 A report was lodged by Shri Shengal, Assistant Commissioner of Police attached to A.T.S. (Investigating Officer) with the Local Police Station. In the investigation, it transpired that one more Car had been used for transporting the arms, ammunitions and explosives. That Car was a Tata India, which was allegedly driven by Mohd. Mujaffar Mohd. Tanveer (accused No.3) and was following the said Tata Sumo Jeep. It is the case of the Investigating Agency that as the Tata Sumo Jeep was chased by the police, the Tata Indica Car was diverted to Malegaon. On 12.05.2006, the said Indica Car was traced, without number plate, abandoned in the jurisdiction of Malegaon Taluka Police Station.

8 Investigation revealed that there were five boxes in the said Indica car which also contained arms, ammunitions and explosives. Investigation also revealed that five persons had removed and concealed the said five boxes, and had also attempted to conceal and dispose of the said Indica car in Malegaon. The applicant is alleged to be one of them. The others are Mushtaq Ahmed Mohd Issak (accused no.5), Afzal Khan Nabi Khan (accused no.7), Riyaz Ahmed Mohd.Ramjan (accused no.8) and Javed Ahmed Abdul Majeed Ansari (accused no.6).

9 Javed has been released on bail by this Court (Criminal Bail Application No.1147 of 2013 decided on 20th October 2013. Thereafter, Riyaz (accused no.8) and Mushtaq (accused no.5) were released on bail by the Special Court itself by the orders dated 23rd December 2013 and 7th February 2014, respectively. Afzal Khan Nabi Khan (accused no.7) has been released on bail by the Special Court by an order dated 1st April 2015 i.e. during the pendency of the present application.

10 The contention advanced by the learned counsel for the applicant is that the case of the applicant is in noway different from that of the other accused who have been released on bail, and more particularly, from that of Afzal Khan Nabi Khan (accused no.7).

11 While arguing the aforesaid application for bail filed by co-accused Javed (accused no.6) (Bail Application No.1147/13), what was mainly contended was that, that accused had no knowledge as to the contents of the boxes in question. The main contention was that, that as per the prosecution case itself, Tata Indica car was not to go to Malegaon at all, and that it had reached there accidentally because the Tata Sumo vehicle was

chased by the police. The argument that was advanced was that *obviously, therefore, the said applicant i.e. Javed (accused no.6) could not be attributed with the knowledge that such a vehicle was to arrive, and consequently that accused could not be said to be a conspirator in respect of the conspiracy to transport the arms, ammunitions and explosives.* It was contended that the said Javed had come in picture subsequently, and that too accidentally, and as such, could not be said to have abetted the alleged offences in the absence of the requisite *mens rea* on his part. Substance was found in these contentions and for the reasons recorded in the aforesaid order dated 21st October 2013, the said Javed was released on bail.

12 Dr.Yug Choudhary, the learned counsel for the applicant submitted that while releasing the said co-accused Javed on bail, this Court had observed that *even the involvement of the present applicant in the alleged incident, appeared to be accidental.* The contention that is put forth is that, therefore, the applicant cannot be said to be a part of the larger conspiracy to import and use arms and ammunitions which makes the case much more serious than a case of merely possessing and handling arms, ammunitions and explosives. He submitted that even while

rejecting the bail application filed by the applicant, the learned Judge of the Special Court came to the same conclusion i.e. *that the material before the Court did not disclose that the applicant was a party to the conspiracy to wage a war against the State.*

13 Though this appears to be correct, it is difficult to hold that the case of the present applicant is on par with the said Javed. In the view that I am taking, I do not find it desirable to discuss the facts of the case in depth, but what needs to be observed is that when the Tata Indica car was being chased, one of the inmates telephoned to Bilal (accused no.10), and Bilal then contacted the applicant telephonically for seeking his help. That,thereafter, the applicant contacted Riyaz (accused no.8) and sought his help, and Riyaz then contacted Afzal Khan (accused no.7) and Mushtaq (accused no.5), and then Mushtaq called Javed (accused no.6).

15 True, it is not the case of the prosecution that all this was pre-planned, but there is a subtle distinction between the case of the applicant and that of the other four accused who are also alleged to have assisted in concealing the boxes containing arms, ammunitions and explosives and the car. This distinction lies in

the fact that when in trouble, the accused no.1 (against whom a *prima facie* case of his being involved in respect of the conspiracy to procure the arms, ammunitions and explosives in huge quantity, exists) thought of contacting the applicant. This would *prima facie* indicate that full reliance, faith and trust was placed in the applicant by Bilal (accused no.10). It is true that simply because of this, one may not come to the conclusion that the applicant was involved in the 'larger conspiracy', but certainly, if a deeper examination of the role of the applicant in the alleged offences is felt necessary or desirable on that count, it would not be improper. In any case, this would render the case of the applicant being treated differently from that of the other four accused who are said to have assisted in removing the boxes containing arms, ammunitions and explosives and hiding the Indica car.

16 The question then arises is whether, therefore, the applicant's case should be treated so differently from that of the said other accused so as to hold releasing them on bail proper, but releasing the applicant on bail, improper. The answer to this question is not easy. It is because the role of the applicant and the nature of incident of his involvement in the matter has to be decided on the basis of the entire material as is before the Court.

As aforesaid, the entire evidence of the prosecution has already been adduced. The evidence adduced might have strengthened or weakened the case against the applicant as could be originally perceived from the police report and accompanying documents. It is not desirable – and also not practical – to assess or evaluate the evidence even for the limited purpose of considering the release of the applicant on bail *at this stage*, i.e. when the trial is expected to be over shortly.

17 Indeed, there are atleast two factors which weigh strongly in favour of the applicant. The first is that the applicant is in custody for a period of more than nine years. Even after the earlier application for bail filed by the applicant was withdrawn, the trial has not progressed *with the expected speed*. The second factor in favour of the applicant is that though the evidence of prosecution has been fully recorded, the trial is not expected to be over, shortly, as the Presiding Judge would now be changed. I am informed that the learned Judge of the Special Court has now retired, and some other Judge would be appointed to preside over the Special Court. Naturally, it would take some time for the new Judge to have the examination of the accused persons as contemplated under section 313 of the Code done, to hear the arguments and to deliver a judgment.

18 At the same time, it cannot be seriously debated that the case of the applicant cannot be treated on par with that of Javed (accused no.6) who was released on bail by this Court. As aforesaid, it is different from the other accused i.e. Afzal, Riyaz and Mushtaq also, *though how far it is different and whether the difference is of such a degree that it requires the applicant to be detained in custody further, inspite of the said other accused being on bail, would be an arguable point.* However, for deciding this aspect satisfactorily, it would be necessary to consider the evidence that has been adduced during the trial. As aforesaid, such an exercise would be impractical, undesirable and rather improper, considering that the trial is coming to an end.

19 The learned Judge of the Special Court, while rejecting the Bail Application filed by the applicant observed that he did not think that there was material to indicate that the applicant was a party to the conspiracy to wage a war against the State. He, however, held that there were reasonable grounds for believing that the applicant might have committed offences punishable under section 5, 6, 9(B) of the Indian Explosives Act, and offences punishable under sections 4 and 5 of the Indian

Explosives Substances Act, in addition to the offences punishable under the Arms Act, section 13 of the Unlawful Activities Prevention Act and section 3(2) of the MCOC Act.

20 In the light of the fact that as per the confessional statement of the applicant, he took an active part in concealing the boxes containing the contraband and the Indica car, the view of the learned Judge of the Special Court that the applicant might have committed the aforesaid offences, does not seem to be unreasonable. The correctness of the contention of the learned counsel for the applicant that as per the confession of the applicant he did so due to the threat that was given to him, cannot be examined without considering the entire evidence adduced during the trial, and other matters as are before the trial court.

21 At the cost of repetition, it may be observed that, it would not be desirable to attempt to evaluate the voluminous evidence adduced during the trial and decide whether a *prima facie* case of the alleged offences is made out against the applicant or not. When the case of the applicant is to be finally assessed by the trial court, an exercise by this Court – on the basis of the same evidence and material – to find out whether there exists a *prima*

facie case, would be rather improper. This is more so because the grant of bail is to be determined by keeping the restrictive provisions contained in the MCOCA Act and UAPA Act in the matter of grant of bail in mind, and as such, a rather deeper and detailed discussion would be unavoidable.

22 There are a number of conflicting factors – some weighing in favour of grant of bail and some weighing against. In the peculiar circumstances, all that can be done in the present case is to direct that the trial should be held expeditiously on day to day basis, and the judgment should be pronounced as early as possible. When the period that would be required for completing the trial is compared with the period already spent by the applicant in custody as an under-trial, the same cannot be said to be much, and therefore, when the applicant has already undergone unduly long period pre-trial detention, his release on bail at the fag end of the trial, on the ground of delay in completing the trial, is not advisable.

23 In this view of the matter, though I am not inclined to allow the application, two things must be clarified.

a) The first is that the observations about the undesirability, impropriety or impracticability of the examination of the whole matter, - including the whole evidence – for the purpose of finding out the existence or otherwise of a *prima facie* case against the applicant at a stage when the trial is coming to an end, have been made in the context of the decision regarding bail being taken by this Court; and shall not be construed as applicable to the trial court undertaking the same exercise. It is because the trial court which has the entire evidence before it – and which is expected to give its decision about the guilt or innocence of the accused persons – will not face the embarrassment which this Court would feel in doing the same exercise. The impropriety of this Court judging the existence of a *prima facie* case against the applicant lies in the real and genuine possibility of either the accused or the prosecution being prejudiced on account of the observations, which this Court would be compelled to make in the process. Though termed as '*prima facie*' such observations would have a tendency and be

capable of influencing the final decision of the trial court.

b) The second is that this Court has **not** decided whether the applicant needs to be treated differently from Afzal (accused no.7), Riyaz (accused no.8), and Mushtaq (accused no.5) (or any of them), and even if he needs to be treated differently, **for how long**. Surely, if further delay occurs, the trial court is expected to and shall reconsider the question of bail.

24 Therefore, the applicant shall not be precluded from making a fresh application for bail before the trial court itself on the ground of his case being similar to that of Afzal, Riyaz and Mushtaq. It would be for the trial court to examine the correctness of this contention in the light of the evidence that has been adduced, and to decide the application for bail, if filed by the applicant, on merits, and in accordance with law, without being influenced in any manner, by the rejection of the applicant's application for bail by this court.

25 It is also necessary to stipulate – and is hereby directed - that the trial court shall proceed with the trial on day to day basis, and endeavour to complete it at the earliest.

26 The Application is rejected with the above observations.

(ABHAY M.THIPSAY, J)