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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL BAIL APPLICATION NO.695 OF 2016
WITH
CRIMINAL APPLICATION NO.307 OF 2016**

Samir Vishnu Gaikwad	..Applicant.
V/s.	
State of Maharashtra	..Respondent.
AND	
Ms.Megha Pansare	..Intervenor.

Mr.Sanjiv Punalekar with Mr.Virendra Ichalkaranjekar for the applicant.

Mr.Harshad Nimbalkar, Special PP with Ms.M.Deshmukh, APP for respondent-State.

Mr.Sandesh Shukla with Ms. Purna Patil i/b. Abhya Nevagi & Associates for the Intervenor.

CORAM : A.M.BADAR, J.

DATED : 11TH JULY, 2016

P.C. :-

1. The applicant / accused in Crime No.39/2015 for the offences punishable under section 302 and 307 read with 34 of the Indian Penal Code and under sections 3/25 and 5/27 of the Arms Act by this application is seeking his release on bail during the pendency of the trial.

2. Heard the learned counsel appearing for the applicant / accused. The applicant / accused mainly relies on the delay in disposal of trial for seeking his release on bail. The learned counsel for the applicant / accused vehemently argued that detention of the applicant / accused is not supposed to be punitive or preventive. The learned counsel submitted that none else but the prosecution agency had approached this Court by filing Criminal petition No.2005 of 2016 and has obtained stay on further proceedings of Sessions Case No.3/2016 resulting in continued pre-trial detention of the present applicant. The learned counsel submitted that delay in commencement and conclusion of the trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if the trial is not likely to be concluded within a reasonable time.

3. The learned counsel for the applicant / accused further submitted that one Dr.Virendra Tawade came to be arrested on 10th June, 2016 by the CBI in the case of murder of Narendra Dabholkar. According to the prosecution, there is a link between the murder of Comrade Govind Pansare and

Narendra Dabholkar. Therefore, in the submission of the learned counsel for the applicant, it was incumbent on the part of the investigator to seek custody of said Dr.Virendra Tawade. However, that has not been done deliberately in order to keep the applicant behind bars.

4. The learned counsel for the applicant / accused further argued that there are contradictions in the reports of the Forensic Laboratory.

5. The learned counsel for the applicant / accused further argued that there are in all four eye witnesses to the incident in question. They all had opportunity to witness the murderous assault on Uma Pansare and murder of Comrade Govind Pansare. The learned counsel further argued that the prosecution has taken test identification parade on 7th October, 2015. In that test identification parade, three of the witnesses namely Uma Pansare, Meena Jadhav and Sachin Oswal failed to identify the applicant / accused as the assailant. The learned counsel further argued that only child witness Atharva Shrikant Shinde has identified the present applicant / accused. By taking me through the statement of

the said child witness recorded under section 161 of the Criminal Procedure Code, the learned counsel for the applicant argued that bare reading of his statement would show that same is artificial as this witness has vividly described even the minor details of the incident. Therefore, in submission of the learned counsel for the applicant, the statement of the child witness and his identification of the applicant is of no consequence as a child witness is susceptible to tutoring.

6. The learned counsel further argued that evidence regarding motive as well as conversation between the applicant and his colleague cannot be of overbearing importance warranting pre-trial detention of the applicant after the filing of charge-sheet.

7. As against this, the learned Special PP has vehemently argued that murder of Comrade Govind Pansare is a murder of democracy by the applicant / accused. The applicant / accused was a member of Sanatan Sanstha and as such, he was harbouring motive to eliminate the deceased. The learned Special PP further argued that the prosecution has collecting enough evidence to show that the present

applicant / accused is involved in an offence punishable either with death or life imprisonment. By taking me through the charge-sheet, the learned Special PP has submitted that the conversation of the applicant / accused with his colleague reflects extra judicial confession of the applicant / accused. The learned Special PP further argued that evidence in the form of statements under section 161 of the Criminal Procedure Code of Attarva Shinde goes to show that it was the applicant / accused who had murdered Comrade Govind Pansare and had attempted to commit murder of Uma Pansare.

8. With the assistance of the learned counsel appearing for the parties, I have carefully perused the charge-sheet. Let us deal with the first and foremost contention of the learned counsel for the applicant regarding delay in commencement and conclusion of trial. True it is that in the matter of ¹**Kalyan Chandrashekar Sarkar V/s. Rajesh Ranjan**, the Hon'ble Supreme Court has held that detention of the accused cannot be supposed to be punitive or preventive and the delay in commencement and conclusion of the trial is a factor to be reckoned with for granting bail but in

¹ (2005) 2 SCC 42

the case in hand, we will have to scrutinise whether detention of the applicant is justified in law or not. It is seen that on 20th May, 2016 the prosecution had filed an application for deferring the hearing of Sessions Case No.3/2016 on the ground that five empty cartridges and one bullet lead has been sent by the CBI to the Forensic Laboratory at New Scotland Yard Police, United Kingdom for examination. The learned trial Judge was pleased to reject that application. It is seen that the State Government has approached this Court by filing Criminal Writ Petition No.2005 of 2016 challenging that order of the trial Judge dated 20th May, 2016. It is seen that on 9th June, 2016 this Court has been pleased to stay the effect and operation of the order dated 20th May, 2016 and the learned Sessions Judge is directed to defer framing of the charge against the applicant until further orders.

9. Mr.Nimbalkar, the learned Special PP during the course of the arguments has submitted that as soon as the prosecution agency gets back the muddemal i.e. five empty cartridges and one bullet lead along with forensic report, there shall be no hurdle in commencing the trial at the instance of the prosecuting agency.

10. On this factual backdrop, it needs to be kept in mind that even Article 21 of the Constitution of India which guarantees personal liberty contemplates deprivation of personal liberty by procedures established in law. It is settled law that personal liberty cannot be taken away except in accordance with the procedure established by law. Under criminal laws, a person accused of offences which are non bailable in nature, is liable to be detained in custody during the pendency of the trial unless he is enlarged on bail. In the case in hand, for want of muddemal, the prosecution is unable to proceed further with the trial and, therefore, it cannot be said that detention of the applicant is violative of Article 21 of the Constitution of India entitling him bail on that count only. Such detention of the applicant cannot be construed as violative of Article 21 as the same is authorized by law. Hence I find no force in the contention of the learned counsel for the applicant that pre-trial detention of the present applicant / accused is not warranted.

11. Now, let us examine whether the prosecution has collected prima facie evidence to implicate the applicant /

accused in the offence punishable either with death or life imprisonment so as to deprive him of his liberty during the pendency of the trial.

12. According to the prosecution case as reflected from the charge-sheet, the incident of firing bullet from firearm at Comrade Govind Pansare (since deceased) and Uma Pansare occurred at 9.25 a.m. on 16th February, 2015. The place of incident appears to be a public road in front of the house of Champalal Oswal at Pratibha Nagar. From the statements of witnesses recorded by the Investigating Officer, it becomes clear that two persons who came on a motor cycle fired bullets at Comrade Govind Pansare and his wife Uma Pansare. Ultimately, Comrade Govind Pansare succumbed to gunshot injuries on 20th February, 2015 and the post mortem report shows that he died because of complications following firearm injuries. *Prima facie*, therefore, his death seems to be homicidal. It is also seen from the charge-sheet that Uma Pansare suffered gunshot injuries but she ultimately recovered.

13. Perusal of the F.I.R. lodged by Mukund Dinkar

Kadam as well as the panchanama recorded by the Investigating Officer immediately after the incident goes to show that few cartridges were found on the spot. Those along with earth mixed blood, simple earth and gun powder scrapped from the wall came to be seized by the Investigator.

14. Immediately after the incident, the Investigator has recorded statements of eye witness namely Attarva Shrikant Shinde, who is a child witness aged about 14 years. At the relevant time, he was going to his tuition class on his bicycle. Because of malfunctioning of mudguard, he could not ride his bicycle any further and he stopped at the spot for fixing the problem. Attarva Shinde saw two persons arriving on the motor cycle of Pulsar make. Witness Attarva Shinde gave description of those young persons in his statement. Statement of Attarva Shinde further discloses that he saw pillion rider firing shots from a small gun at Comrade Govind Pansare and his wife. His statement further discloses that he attempted help the injured persons but at the instance of passers-by, he went away from the spot. Statement of Attarva Shinde further shows that he then went to his tuition class and immediately reported the incident to his tuition teacher and

his friend. Investigator then recorded statements of Sangita Kalke - teacher and Ajinkya Gudhave - friend of Attarva Shinde. Statements of these two witnesses prove contemporaneous disclosures made to them by Attarva Shinde, which become relevant under section 157 of the Evidence Act.

15. Charge-sheet reveals that subsequently the prosecution has conducted the test identification parade. The learned counsel for the applicant / accused argued that the news of arrest of the present applicant / accused came to be published widely in print as well as electronic media and as such, identification of the applicant / accused by Atharva Shinde is of no consequence. There is no such material on record to support this contention. Memorandum of test identification parade *prima facie* shows that witness Attarva Shinde has identified the present applicant / accused as the assailant.

16. Now, comes the question of scope of appreciation of evidence of this child witness at the pre-trial stage. Evidence Act nowhere disqualifies a child from being a

competent witness. At the time of trial, his understanding, maturity and capacity will be examined by the trial Judge. At this stage, one cannot brand a child witness as an witness incompetent to understand the things. Statement of Atharva Shinde was recorded even prior to arrest of the accused and as such, it cannot be said that he is a tutored witness. Witness Atharva Shinde has given vivid description of the incident in his statement, which is objected to by the learned counsel for the applicant by arguing that the same cannot be terms as natural statement. At this juncture, it needs to be pointed out that a child usually possesses photographic memory and the incident of such gruesome murder gets imprinted in his mind so as to enable him to recollect and narrate detailed description of the event. Even otherwise, this cannot be a stage to disbelieve the child witness and to hold that there is nothing against the applicant / accused to implicate him in the crime in question.

17. Non identification of the applicant / accused by three other witnesses is of no consequence in view of his identification by Atharva Shinde.

18. Apart from the eye witness account of the alleged offence, the prosecution is also relying on corroborative evidence. It is seen from the charge-sheet that cellphone of the applicant was put under the surveillance. Transcript of the recording is produced with the charge-sheet. Sample of natural voice of the present applicant / accused was collected by the prosecution. Report of the Forensic Laboratory goes to show that the recorded conversation is in the voice of the present applicant. It is seen that the applicant had long talks with one Jyoti Kamble. She also appears to be a devotee of Sanatan Sanstha. Statement of Jyoti Kamble recorded under section 161 of the Criminal Procedure Code goes to show that the present applicant / accused had proposed her for marriage and she had accepted the proposal of the applicant / accused. Statement of Jyoti Kamble, *prima facie* shows that she was in love with the applicant / accused and as such was enjoying position of trust and confidence with the applicant / accused. Perusal of the conversation of transcript of the applicant / accused with Jyoti Kamble *prima facie* shows the extra judicial confession of the applicant / accused. On 19th June, 2015, the applicant / accused disclosed Jyoti Kamble that now Pansare is finished and whether he should finish of Nitin Wagle. In

vernacular, these were the utterances of the applicant / accused “आता पानसरे झाला आता नितीन वाघळेच करू का,”. The applicant / accused had also talked with his colleague Sagar on the cellphone. On 27th June, 2015, the applicant / accused had disclosed to Sagar that he had committed lot of sin and he needs to take holy dip in the Kumbh Mela of Nashik. According to the prosecution, the present applicant had telephonic conversation with Anjali Zarkar, another devotee of the Sanatan Sanstha. He told her that he is trapped in a big scandal. The present applicant also told Anjali telephonically that he killed the one whom he wanted. In vernacular, there were his utterances “ज्याला मारायचे आहे त्याला मारले आहे, आता कोणी शत्रु नाही”. According to the prosecution, this conversation of the applicant with his colleagues at Sanatan Sanstha prima facie shows extra judicial confession of the applicant / accused which corroborates the version of the child witness Atharva Shinde.

19. After noting down the material against the applicant / accused in the crime in question, let us examine the criteria for grant of bail. The enormity of the charge, nature of accusation, the severity of the punishment which

the conviction will entail are the factors relevant while releasing the accused on bail. The Court is supposed to exercise its discretion in a judicial manner and not as a matter of course. In the case in hand, *prima facie*, it is seen that the applicant / accused is a devotee of the Sanatan Sanstha and Comrade Govind Pansare had criticised the Sanatan Sanstha on several occasions. This has resulted in filing some civil as well as criminal cases against Comrade Govind Pansare in the Courts at Goa at the instance of the Sanatan Sanstha. The material collected by the prosecution *prima facie* shows that in a pre-planned conspiracy Comrade Govind Pansare was eliminated. The incident in question is shocking the conscience of the society. The applicant / accused had no personal enmity with Comrade Govind Pansare but *prima facie* it appears that following a particular ideology and only because of difference of ideology, Comrade Govind Pansare was murdered and his wife was murderously assaulted. Considering the gravity of the charge and the seriousness of the offence, no case is made out for bail. Apart from this, I find substance in contention of the learned Special PP that in the event of his release, the applicant may not be available for the trial. It is also pointed out that in past there was an

attempt to tamper prosecution evidence and N.C. Case for offence punishable under section 506 of the Indian Penal Code is registered against the applicant for pressuring the witness in this case. Hence the application is rejected.

20. In view of the disposal of the main application, Criminal Applications, if any, are disposed of accordingly.

(A.M.BADAR, J.)