

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.516 OF 2016
 IN
 CRIMINAL APPEAL NO.281 OF 2016

Atif Nasir Mulla	...	...Applicant
v/s.		
The State of Maharashtra		...Respondent

...

Mr.Mubin Solkar i/b Mr.Ubaid Ahmed Ghawte for the Applicant.

Ms.Rohini Salian, Spl.PP for the Respondent/State.

...

CORAM : A.S.OKA &
A.A. SAYED, JJ.

DATED : 10 AUGUST 2016

P.C.:

This is an Application made under Section 389 of the Code of Criminal Procedure, 1973 (for short "CrPC") by the Appellant in Criminal Appeal No.281 of 2016. The Applicant is accused No.2 in POTA Special Case No.2/2003. Case No.2/2003 concerned three bomb blasts at three places in Mumbai, at Mumbai Central, Vile Parle and Mulund. As far as the present Applicant is concerned, he has been convicted for the offence punishable under section 4(a) of the Prevention of Terrorism Act, 2002 (for short "POTA"). He has been sentenced to undergo Rigorous Imprisonment for ten years and he has been directed to pay a fine of Rs.1,00,000/-

(Rupees One lakh). He has also been convicted for the offence punishable under sections 3, 7 read with section 25(1-A) of the Arms Act, 1959. For this offence, he has been sentenced to undergo RI for five years and to pay a fine of Rs.20,000/-. The substantive sentences have been ordered to run concurrently.

2. Learned Counsel appearing for the Applicant firstly pointed out that under order of this Court, pending trial, the Applicant was ordered to be released on bail and till disposal of the case, he was on bail. He urged that there are no allegations made against him as regards misuse of bail or the breach of terms and conditions of bail. Inviting our attention to the finding recorded by the Special Judge under the POTA against the Applicant, he urged that the only allegation of the prosecution is as regards recovery of one AK-56 rifle, 28 live cartridges of the said rifle and two empty cartridges at the instance of the Applicant. He invited our attention to the memorandum panchanama at Exhibit 495 and seizure panchanama at Exhibit 496. He invited our attention to the evidence of P.W.69-Mr.Bipin Gajanan Pilankar, who is allegedly the panch witness to Exhibits 495 and 496. He submitted that in the cross-examination, the witness admitted that he signed both the documents in the office of Police Officer Shri Lohar. He also pointed out that in the cross-examination he admitted that he never entered the room from which the recovery has been allegedly made. He

also invited our attention to the evidence of P.W.147- Shri P.N.Parab, the Police Officer who was working as PSI at Charkopar Unit in the year 2003. He pointed out that though in the cross-examination initially the Officer claimed that his statement under section 161 of CrPC was not recoded, in the further part of the cross-examination, he admitted that his statement was recorded on 1 September 20013 by Sr.PI Lohar. He pointed out that further admissions given by the witness show that the version in the examination-in-chief of the said witness as regards recovery at the instance of the Applicant is clearly an omission. Relying upon the decisions of the Apex Court, in the case of **Mousam Singha Roy and ors. v/s. State of W.B.**¹ and **Varun Chaudhary v/s. State of Rajasthan**², he urged that the evidence of alleged recovery at the instance of the Applicant needs to be completely discarded.

3. Learned Spl.PP invited our attention to the findings recorded by the learned Trial Judge. She submitted that the panch witness in the examination-in-chief supported the prosecution, but within a day, he turned hostile. She submitted that the learned Trial Judge after considering Exhibits 495 and 496 and the testimony of P.W.147 was satisfied about the genuineness of the recovery made at the instance of the Applicant. Her submission is that argument canvassed in this Application as regards the

1 (2003) 12 SCC 377

2 (2011) 12 SCC 545

evidence of P.W.147-P.N.Parab was never canvassed before the learned Special Judge and therefore, the same does not appear to have been considered by the learned Special Judge. She also invited our attention to the magnitude of the offence complained of as well as the provisions of section 4(a) of POTA. Her submission is that admittedly AK-56, which was recovered at the instance of the Applicant will be covered by clause-(a) of section 4. Her submission is that considering the findings recorded by the learned Special Judge on appreciation of evidence and considering the seriousness of the offence, no case is made out for enlarging the Applicant on bail. On a query being made by this Court as regards antecedents of the Applicant, she stated that except for the case in hand there are no antecedents. She has also accepted that till disposal of the trial, the Applicant was on bail in terms of the order of this Court and there are no allegations of misuse of bail.

4. We have considered the submissions. As stated earlier, undisputedly the conviction of the Applicant is based only on recovery of AK-56 rifle and 28 live cartridges at the instance of the Applicant. That is how he has been convicted for the offence under section 4(a) of POTA and under relevant sections of the Arms Act, 1959.

5. We have perused the evidence of Shri Pilankar-P.W.69, who is allegedly the witness to the memorandum panchanama at Exhibit 495 and the seizure panchanama at Exhibit 496. Though various submissions are made by the learned Counsel appearing for the Applicant on the evidence of this witness as well as evidence of witness Shri P.N.Parab-P.W.147, at this stage we are not appreciating the evidence, but we are only considering the glaring aspects of the case. Exhibit 495 is the memorandum panchanama, which is signed by the said witness. Exhibit 496 is the seizure panchanama of the said AK-56 rifle, 28 live cartridges and two empty cartridges as well as other movables. It is true that in the examination-in-chief, to a great extent, the witness-Pilankar has supported the prosecution. However, in response to a question of the Special PP as to what was done after the seizure of articles by the Police, he stated that he does not remember about "what is done about the panchanama by the Police". Thereafter, when he was confronted with the panchanama, he accepted his signature and contents of the said panchanama.

6. Our attention is invited to paragraph 5 of his cross-examination. Relevant part of paragraph 5 reads thus:

"For half an hour I was there in office. During that period I had talk with Lohar Saheb. I did not ask to Lohar Saheb how much time will be

required. Officer told me that around half hour will be required in the office. I did ask to Lohar Saheb as to whether we will be required to go out of office. Lohar replied. Lohar Saheb told that we will be required to go to Padgha. He told me that for seizure weapon we had to go to Padgha at Saw Mill for purpose of seizing AK 56, magazine and cartridges. For about 10 to 15 minutes there was talk between me and Lohar Saheb. Lohar Saheb inquired my name and address during that period. It is correct that from their talk I came to know that Lohar Saheb was attached to Ghatkopar Unit. When my talk with Lohar Saheb was going on, other officers were there. I was talking with Lohar Saheb by sitting on chair. When our talk was going on Lohar Saheb was not writing anything. Immediately after talk with Lohar from 10 to 15 minutes he obtained my signatures on paper. I gave two signatures at that time. It is true that one signature amongst two i.e. from Exh.495 is of mine, my signature on Ex.496 is given in office i.e. 496 at last page. Both signatures are encircled which are identified by witness on request of advocate for accused. When I made these two signatures papers were written.

(Underline added)

7. This witness stated that his signatures on both Exhibits 495 and 496 were obtained by PI Lohar in his office. What is more glaring is the statement of the witness in paragraph 9 of the cross-examination. As stated earlier, the case of the prosecution is that the Applicant led the police and the panch witnesses from Mumbai to a premises of a Saw Mill at Padgha and the recovery was made from a room in the said premises. In the cross-examination, in paragraph 9, the witness stated that he personally

does not know as to what transpired in the said room. In fact, he accepted the correctness of the suggestion that he personally did not enter that room. He stated that when Shri Lohar announced the recovery, he was standing near a vehicle. His cross-examination shows that he accepted that when the alleged recovery was made from the room, he was not present in the room from which the alleged weapon was recovered.

8. Learned Spl.PP is right to an extent that after the said witness turned hostile, on appreciation of evidence of the other witness examined by the prosecution, namely P.W.147-P.N.Parab, a finding could have been legitimately recorded that the recovery of the weapon at the instance of the Applicant has been proved. Her contention is that the learned Trial Judge has accepted the evidence of Shri Parab-P.W.147. Hence, we have perused the evidence of P.W.147-P.N.Parab. In the examination-in-chief, he has deposed about Exhibits 495 and 496. What is pertinent is the statement made in the cross-examination. In paragraph 4, he stated that his statement was recorded by the Investigating Officer in the present case. What is more material is what is stated in paragraph 6 of the cross-examination. The material portion reads thus:

"It is correct that my statement was recorded in this case on 1-9-2003. it was recorded by Senior P.I.Lohar. It was read over to me. It was correct

as per my say. In that statement I did not state that I interrogated with accused Ateef on 3-5-2003. I did not state that he volunteered to give memorandum statement. I did not tell in that statement that by calling panch witnesses I recorded memorandum statement of accused Ateef. I did not tell that I completed memorandum and signature of panch witnesses were obtained on it and I also signed on it. I did not tell that alongwith accused as per his instruction we had been to Padgha Saw Mill, accused demanded key of room from Manager, we to loft and took out all articles and I prepared seizure panchanama and thereafter obtained signatures of panch witnesses on it. It is correct that whatever stated by me in chief examination about memorandum and seizure given by accused on 3-5-2003 was not stated in my statement. It is not correct that whatever deposed by me in chief examination is false story prepared by me and therefore I did not state all this fact in my statement before I.O. On 1-9-2003.” (Underline added)

9. Thus, prima facie, it appears to us that the learned Counsel for the Applicant is right when he submitted that what is deposed by the witness in his examination-in-chief as regards the alleged recovery is an omission.

10. There are three aspects which are relevant for consideration of the present Application. Firstly, that pursuant to the order of this Court, the Applicant was on bail during the pendency of the trial and there is no allegation made that he has misused the facility granted under the order of bail. Secondly, except the case in hand, there are no antecedents of the Applicant. Thirdly, from the evidence of two witnesses, it appears to us that

there is a very serious doubt about the genuineness of the case of the prosecution as regards recovery of the weapon at the instance of the Applicant. Fourthly, the conviction is based only on the alleged recovery.

11. In the circumstances, a case is made out for suspending the operation of the substantive sentence and for releasing the Applicant on bail subject to compliance with the stringent conditions.

12. Hence, we dispose of the Application by passing the following order:

ORDER

- (i) The operation of the substantive sentence imposed on the Applicant will stand suspended till the disposal of the Appeal and the Applicant shall be enlarged on bail subject to condition of execution of PR Bond in the sum of Rs.1,50,000/- with one solvent surety in the said amount;
- (ii) The bail is granted subject to condition that the Applicant will surrender passport, if any, possessed by him with the Registrar (Judicial-I) of this Court within a period of three weeks from today;

- (iii) At this stage the learned Counsel appearing for the Applicant states that the passport of the Applicant is already seized during the investigation. The Advocate for the Applicant to satisfy the Registrar (Judicial-I) on this aspect. Writ will be issued only after the Registrar (Judicial-I) is satisfied that the passport is already seized;
- (iv) The bail is granted subject to further condition of the Appellant filing an Affidavit-cum-Undertaking within a period of three weeks from today stating that he will not indulge in any illegality and that he will not travel abroad without seeking prior permission of this Court;
- (v) The bail is granted subject to further condition that the entire amount of fine payable under the impugned order shall be deposited by the Applicant.
- (vi) The bail is granted subject to further condition that the Applicant shall report to the learned Special Judge under POTA, Mumbai or to such other Sessions Judge, as may be nominated by the Principal Judge of the City Civil Court, Mumbai on every first Monday of every calendar

month at 11 a.m. for a period of two years from today. On completion of period of two years, subject to satisfactory compliance of the terms and conditions in this order, the Applicant shall report to the learned Sessions Judge at 11 a.m. on every first Monday of the months of January and July of every calender year till the disposal of the Appeal.

(vii) The Application is disposed of on above terms.

(A.A. SAYED, J.)

(A.S.OKA, J.)