

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.65 OF 2017

Hasmukh Solanki	.. Applicant
Vs.	
The State of Maharashtra	.. Respondent

**WITH
BAIL APPLICATION NO.313 OF 2017**

Devendra Baburao Jagtap	.. Applicant
Vs.	
The State of Maharashtra	.. Respondent

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Mr. Milan Desai i/b. Aswini Desai, Advocate for the Applicant.
Mr. Deepak Thakare, APP for Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : AUGUST 3, 2017.

P.C. :

The applicants have preferred the application for bail under Section 439 of the Code of Criminal Procedure, 439. The applicants were arrested in connection with C.R.No.23 of 2010, registered with Kurla Police station for the offences punishable under Sections 302, 452, 120-B read with 34 of Indian Penal Code and Sections 3, 25 and 27 of the Arms Act, as well as Sections 37(1)(a) and 135 of the Bombay Police Act. The investigation was,

thereafter, transferred to DCB CID which was investigated vide C.R.No.24 of 2010. The provisions of Section 3(1)(iii), 3(2), 3(4) of the MCOC Act were invoked against the accused. Subsequently, the applicants were discharged from the provisions of MCOC Act.

2 The prosecution case is as follows:

- (a) On 11th February, 2010 at about 7:00 p.m. three unknown persons who were standing outside the office of advocate Shahid Azmi, made enquiries with complainant about his office and availability. Since, the advocate was not present in the office at that point of time, the complainant, who was working as office boy intimated them to wait out of the office. Thereafter, the complainant went to bring drinking water at the residence of the advocate which is in the nearby vicinity and when he returned back to the office, he noticed that the said three persons were again making inquiries regarding location of advocate Azmi's office with one Ravi from adjacent office and on seeing him they left from the building premises.

- (b) Advocate Azmi reached his office around 7:30 p.m. and at that time the complainant informed him about the three persons having come to meet him and on learning about the same advocate Azmi instructed him to call them to office. The complainant then came out of the office and called the three persons who were standing outside the building premises.
- (c) The said three persons then came to the office of Advocate Azmi. The person with the long hair sat in front of advocate Azmi. Thereafter, two other persons came to the cabin and stood besides him. Advocate Azmi then inquired with them about the nature of work. However, they did not reply. The person having long hair who was sitting in front of advocate Azmi took out a pistol and shot at advocate Azmi. The other person who was standing to his right side also took out pistol from the plastic bag and fired at advocate Azmi. The accused with long hair also threatened the complainant by pointing pistol on his head and told him to disappear from the said place. The complainant ran out of office, while running he heard sound of firing by

accused. The complainant then went to the residence of advocate Azmi and informed the incident to his mother and other relatives. While running, he again heard the shots of gunfire. The assailants then ran away from the place of incident.

- (d) The injured was then taken to the hospital where he was declared as dead. On the basis of the statement of the complainant, First Information Report (FIR) was registered on 11th February, 2010 with Khar Police Station, Mumbai.
- (e) The supplementary statement of complainant Indersingh was recorded on 12th February, 2010 in which he stated that, the third person was also having pistol and while running out of his office he heard shots being fired in the office

3 The Applicant in Bail Application No.65 of 2017 was arrested on 9th March, 2010 and the applicant in Bail Application No.313 of 2017 was arrested on 16th February, 2010. On completing investigation, the charge-sheet was filed. The applicants preferred applications for bail before the Sessions

Court which were rejected on 22nd September, 2016 and 3rd January, 2017.

4 The learned advocate appearing for the applicants submitted that the applicants are in custody since 2010. The trial has not commenced. The applicants are entitled for speedy trial. Long incarceration of the accused in custody amounts to violation of Article 21 of the Constitution of India. He relied upon the decisions of the Hon'ble Supreme Court of India in the case of ***Sanjay Chandra Vs. CBI¹. And Sunder Singh Vs. State of Punjab***, delivered in Criminal Appeal No.1154 of 2005. The learned counsel for the applicant submitted that it is the case of prosecution that one pistol each was recovered at the instance of arrested accused and all pistols had some sort of inscription thereon. The pistol recovered were sealed and sent to Chemical Analyzer in sealed condition and as such Chemical Analyzer ought to have received pistols bearing the same inscription as were on the pistols allegedly recovered at the instance of arrested accused. However, the inscription on the recovered items with Chemical Analyzer had differed which means, what was allegedly recovered from accused was not sent to Chemical

1 (2012) 1 SCC 40

Analyzer for Ballistic Examination. Therefore, it is submitted that the material against the said applicants is in the nature of recovery of pistol. However, same is not connected with the crime. It is submitted that the applicants were identified in the test identification parade without assigning them any role either at the time of the parade or thereafter. It is submitted that there were discrepancies in conducting the parade. The Executive Magistrate who conducted the parade had not followed the norms and the procedure for conducting such parade. It is further submitted that the co-accused namely Pintu Devram Dagale has been released on bail. It is submitted that the applicants in both these applications are entitled to be released on the ground of parity. Reliance is placed on the order passed by this Court in the case of Criminal Bail Application No.913 of 2014, granting bail to accused Pintu Devram Dagale. It is submitted that the case of the present applicants and the case of the accused who have been granted bail is identical. It is submitted that in the aforesaid order granting bail this Court has considered the evidence of identification and recovery of fire arm from the said accused. It is observed by the Court that as per the report of Ballistic expert, some of the bullets which were fired during the incident were from the pistol recovered at the

instance of the said accused and, there was a discrepancy in respect to the description of the fire arm which is allegedly recovered at the instance of the said accused and the fire arm that was sent to Ballistic Expert which does not match. It is submitted that the Court has also considered the fact that the co-accused Devendra Jagtap and the accused Pintu Dagale were put up for the identification parade on the same day and that the dummy selected in both the parades were the same. It is further submitted that in the order granting bail, this Court has also considered the fact that the accused is in custody for a long period of time and that no role was attributed to the said accused by the witness while identifying him in the parade and no supplementary statement was recorded.

5 Learned advocate further submitted that as against the applicant in B.A.No.313 of 2017 Shri Devendra Jagtap, according to the prosecution, there is recovery of pistol with three live cartridges and the said cartridges and magazine had inscription. The discrepancy in respect to said articles is referred to hereinabove, as submitted by the advocate for applicants. There is also recovery of Pen-drive from the said applicant as well as cash. It is submitted that the alleged evidence of pointing out Cyber Café at the instance of the said

applicant Devendra Jagtap is not admissible in evidence in accordance with Section 27 of the Indian Evidence Act. The applicant led the police to the house of one Nanda Vaity who was his mother-in-law. The premises were situated at Ramchandra Vaity Niwas, near Municipal School, Mahatma Phule Road, Gavanpada, Mulund (East), Mumbai. The wife of accused Devendra Jagtap was also present at the said place. Pistol with magazine containing three live cartridges was recovered from said premises. It is submitted that the investigating authority did not carry seal of their office for the purpose of sealing the pistol and, therefore, forwarded a letter dated 16th February, 2010 to the Senior Police Inspector, Navghar Police Station requested them to lend their seal. In the said letter it was stated that the accused Devendra Jagtap had led them to the residence situated at Ekta Co-operative Housing Society, Vithaghar Road, Mulund (East) and that a pistol with three rounds has been recovered from the said place. It is submitted that the premises referred to in the said letter were different than the once from where alleged recovery was made. It is, therefore, submitted that the evidence of recovery is doubtful and the same shall not be relied upon. There were discrepancies in selection of dummies and placing them in the identification parade. In support of the ground of

parity to both the applicants, the learned counsel had relied upon the decision of this Court in the case of ***Amin Khan Amanullah Khan & Anr. Vs. the State of Maharashtra***². In the said decision, it was observed that mere parity cannot be sole ground for granting bail and each case has to be examined individually and that in case the bail is granted to one accused there should not be discrimination in case of the application for bail by other accused when cases of both the accused stand on the same footing.

6 Learned APP submitted that there is strong evidence against the applicants and they should not be granted bail. It is submitted that the case of the co-accused who is granted bail stands on a different footing then the present applicants. It is submitted that there is evidence of recovery and identification against the applicants. They are identified by the eye witnesses. It is submitted that the discrepancies, as pointed out by the advocate for the applicants cannot be considered at this stage. It can be considered as a defence which has to be considered at the time of trial. It is submitted that the applicants are involved in serious crime and merely on the ground that they are in custody

2 2003(4) Mh.L.J. 221

for long period of time, bail should not be granted to them. The Chemical Analyzer report supports the prosecution.

7 I have perused the charge-sheet which has been annexed to the applications as well as the orders passed by the Court. The first informant Indersingh Kirtisingh has stated that he was working in the office of the deceased advocate Shahid Azmi. The three accused came inside the office of advocate Azmi, one of them sat in front of the advocate (deceased) and two of them stood beside the accused who was sitting in the cabin. Thereafter, the accused who was sitting in front of advocate Azmi having long hair took out the pistol and fired one round at advocate Azmi. At the same time, the other accused also took out pistol and fired at the advocate. The accused also pointed out pistol towards the head of the complainant and asked him to leave the place or else he will be killed. The complainant, thereafter, ran away out of fear. While running away, he also heard sound of firing. The accused fled from the place of incident. The complainant has given description of the accused in the FIR. In the supplementary statement he has stated that the third person was also carrying pistol. During the course of investigation, the accused were arrested. It was revealed that

they were active members of organized crime syndicate headed by Bharat Nepali. The provisions of MCOC were applied which were challenged by the accused. The Special Court had discharged the said accused from the provisions of MCOC Act. The said orders are challenged by the prosecution by preferring an Appeal which is pending in this Court. It is the prosecution case that the applicants and other accused hatched the conspiracy for eliminating advocate Shahid Azmi which was accomplished on the date of incident.

8 The applicant in bail application no.65 of 2017 was arrested on 9th March,2010. According to prosecution at the time of his arrest, three mobile handset of Nokia Company and SIM Cards were recovered from him. Some documents were also seized from the said applicant which are mentioned in panchanama dated 9th March, 2010, which form part of the charge-sheet. On 10th March, 2010, on the basis of statement of the said applicant recorded vide memorandum, one pistol with magazine and three live cartridges were recovered under panchanama drawn under the provisions of Section 27 of the Evidence Act. The recovery was made from the premises where the mother and brother of the said applicants were present. The

identification parade was conducted on 25th March, 2010 in which he was identified by complainant Indersingh Kirtisingh and another witness Chirag Bhat. Assistance was taken from the Cyber Crime Cell. The said accused accessed to the E-mail ID with password. Cyber Crime Team saw the pictures on the mail sent by one Raju Tiwari, a wanted accused and checked for the sources of IP which is found as 124-157-179-202 by using the E-mail source code. The said IP was traced and it was found from Thailand, using the website whosis.domaintools.com. The suspicious mail sent by accused Raju Tiwari to the mail ID ortherroad12@yahoo.com, which was opened by accused Devendra Jagtap at Mulund Cyber Café. The picture of advocate Shahid Azmi were downloaded and, thereafter, the incident of attack on Shahid Azmi was accomplished. There is direct evidence about the involvement of the applicants spelt out from the statement of complainant and the owner of the Cyber Café who have also identified the applicants. The discrepancies, as submitted by the advocate for the applicants in both the applications can be agitated at the time of trial. He was also identified by the witness Chirag Bhat. It is also noted that on the basis of the statement of the accused Devendra Jagtap, the police visited the Cyber Café. The witness Chirag Bhat was preset in

the said premises. As per provisions case the applicants had obtained the photographs of advocate Shahid Azmi (deceased) through Internet by using E-mail from the said Cyber Café.

9 It is also noticed that there is recovery of the pistol and the rounds at the instance of the applicant-accused Devendra Jagtap (applicant in B.A.No.313 of 2017). The said recovery was made from the premises wherein the mother-in-law and wife of the accused was present. The arguments advanced by the learned counsel for the applicants that in the letter issued to the police station, it was mentioned that the recovery was made from a place which is not the actual place of recovery is an infirmity which would not vitiate the recovery. There is substantial evidence against both the applicants showing their involvement in the crime. The applicants are involved in a serious crime of assassination of advocate in his office. The informant himself had seen the incident. He had described the accused in the FIR. The eye witness has identified the applicants and there is *prima facie* evidence against them. The discrepancies, as submitted in respect to the inscription on cartridges or pistols at the time of recovery and the Ballistic Report has to be proved in the trial. As far as ground of parity is concerned, it is required to be noted

that this Court granted bail to co-accused Pintu Dagale. On perusal of the said order, it is apparent that several submissions were advanced by the advocate for the said accused during the course of hearing of the said application. It is pertinent to note that although it was submitted that there are discrepancies regarding the recovered pistol and the Ballistic Report, it appears that while granting bail, the Court has assigned reasons in paragraph nos.12 to 16 of the order granting bail and the discrepancies as submitted above was not the ground on which the bail was granted. The Court has also observed that one of the weapon used in the incident is said to have been recovered at the instance of the said accused from the room of the another accused. As far as the present applicants are concerned, the recovery was made from the residential premises and from the place where the family members of the applicants were found to be present or occupying the premises. Apart from the above, there is evidence of visiting the Cyber Café for the purpose of retrieving the photographs of the deceased against the applicants and identification by Shri Chirag Bhat. In addition to the other evidence, which is stated hereinabove, the case of the applicants thus can be distinguished from the accused who has been granted bail vide B.A.No.913 of 2014 by

this Court. Thus, the applicants are not entitled for bail on the ground of parity. Although, the applicants are in custody for a long period of time, it has to be considered that they are involved in a serious crime and there is direct evidence about their involvement in the crime. The Hon'ble Supreme Court in the case of ***Sanjay Chada Vs. Central Bureau of Investigation (Supra)***, which is relied upon by the learned advocate for the applicants has also observed that grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated to a particular extent by the facts and circumstances of each particular case. In another decision in the case of ***Rajesh Ranjan Yadav @ Pappu Yadav Vs. CBI***³, it has been observed by the Supreme Court that while it is true that Article 21 of the Constitution of India is of great importance because it enshrine the fundamental right to individual, liberty, but at the same time a balance has to be strike between the right to the individual liberty and the interest of the society. No right can be absolute and reasonable restrictions that can be placed on them while it is true that one of the consideration in deciding whether to grant bail to the accused or not is whether he has been in jail for a long time. The court has to also take into consideration other facts

and circumstances such as the interest of the society. It is also pertinent to note that by order dated 30th June, 2017 this Court had passed an order in Bail Application No.913 of 2014 which was placed before the Court for extension of time to conclude the trial. Vide order dated 30th June, 2017, this Court has extended the time to conclude the trial by a period of six months. The trial is, therefore, expected to be concluded within six months, as directed by this Court.

10 In view of the aforesaid observations, no case for grant of bail is made out by the applicants and, hence, both the applications are required to be rejected.

11 Hence, I pass the following order:

:: ORDER ::

- (i) Bail Application No.65 of 2017 and Bail Application No.313 of 2017 are hereby rejected and both the applications stand disposed of.

(PRAKASH D. NAIK, J.)