

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

**CRIMINAL APPLICATION NO.536 OF 2017
IN
CRIMINAL APPEAL NO.335 OF 2016**

Saquib Abdul Hamid Nachan

.... Applicant
(Org.Appellant)

versus

The State of Maharashtra

... Respondent
(Org.Complainant)

.....

- Mr.Mubin Solkar i/by Miss Tahera Qureshi, Advocate for the Appellant.
- Ms.Rohini Salian, SPP for the State/Respondent.

**CORAM : RANJIT MORE &
SARANG V. KOTWAL, JJ.
DATE : 29th JUNE, 2017.**

P.C. :

1. The present application is filed by the applicant for his release on bail during the pendency and final disposal of the Criminal Appeal No.335/16. The applicant was convicted by the Special Court under Prevention of Terrorism Act, 2002 at Mumbai in POTA Special Case No.2/03 for the offences punishable u/s 4(a) of

POTA and was sentenced to suffer rigorous imprisonment of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to suffer simple imprisonment for one year. The applicant was also convicted for the offences punishable u/s 3, 7 r/w 25(1-A) of the Arms Act, 1955 and was sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.20,000/- and in default of payment of fine to suffer simple imprisonment for two months. He was further convicted u/s 3, 7 r/w 25(1-B)(a) of The Arms Act and was sentenced to suffer simple imprisonment for two years and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer simple imprisonment of one month.

2. The applicant has preferred the present Criminal Appeal No.335/16 before this Court and the said appeal is pending its final disposal.
3. It is the case of applicant that he has undergone more than 9 years and 6 months of his imprisonment out of maximum sentence

of 10 years awarded to him. On this ground he is seeking bail during pendency of the appeal.

4. In the past, the present applicant had preferred two applications for bail during the pendency of the appeal. The first application was filed vide criminal application No.815/16 in Criminal Appeal No.335/16 which was dismissed as withdrawn by an order dated 10/08/2016 (Coram : A.S.Oka and A.A.Sayed, JJ.). It was observed in the said order that in case of change of circumstances it was open for him to make a fresh application in accordance with the law.

5. Subsequently the applicant preferred Criminal Application No.1325/16 in Criminal Appeal No.335/16 for the same relief of releasing him on bail during the pendency of the Criminal Appeal. Even this application was rejected by an order dated 31/01/2017 (Coram : A.S.Oka and A.A. Sayed, JJ.). It was clarified in the said order that the Court had not dealt with the argument that, as the

appeal was not likely to be heard before the applicant underwent the entire substantive sentence, he deserved to be enlarged on bail. The applicant was permitted to move the regular bench in that behalf. Thereafter, the applicant has preferred the present application before us.

6. In view of the above two orders, the applicant did not advance any submissions on the merits of the case. The applicant only urged that substantial part of the sentence was already over and that the appeal was not likely to be heard in the near future. He also submitted that the three of the co-accused whose appeals were similarly pending and who had undergone much lesser sentence than him, were already granted bail. On these grounds, the applicant prayed that he should be granted bail during the pendency of the present appeal.

7. In support of his case, the applicant has relied on the order passed in the Criminal Application No.555/16 in Criminal Appeal

No.303/16. By the said order dated 03/08/2016 this Honourable Court (Coram : A.S.Oka and A.A. Sayed, JJ.) was pleased to grant bail to the original accused No.3 who had undergone 8 years of actual sentence out of 10 years of sentence awarded to him. The said order was passed only on the ground that the appeal was not likely to be heard in near future. The applicant has also relied on the order passed in Criminal Application No.871/16 in Criminal Appeal No.341/16 passed by this Court on 01/08/2016 (Coram : A.S.Oka and A.A.Sayed, JJ.), wherein the original accused No.4 was granted bail during the pendency of the appeal. The said accused-appellant had undergone 6 ½ years of actual imprisonment out of 10 years of imprisonment awarded to him. He was also granted bail on similar grounds as those in the case of the original accused No.3 Hasib Mulla.

8. Apart from these two accused, the applicant has also pointed out an order dated 10/08/2016 passed by this Court in Criminal Application No.516/16 in Criminal Appeal No.281/16 in the case

of accused No.2 Ateef Mulla. In this case, the bail was granted on consideration of merits and not on the ground that he had undergone substantial part of his sentence.

9. The respondent has resisted the present application for bail and has filed an affidavit dated 25/04/2017 of Mr. Prasad M. Dharia, Assistant Commissioner of Police, D-1 (East), DCB CID. Apart from other averments in the said affidavit, there is a mention in the said affidavit that the present applicant was convicted and sentenced in TADA case Nos.2/93, 7/93 and 2/94 which were conducted in Gujarat. Initially he was sentenced to suffer life imprisonment by the trial Court, but in appeal the Honourable Supreme Court had reduced his sentence to rigorous imprisonment for 10 years. The applicant had undergone the entire sentence and thereafter was arrested on 10/04/2003 in the case which is subject matter of the present appeal.

10. It is also mentioned in the said affidavit that MCOC Special

Case No.10/2012 is pending against him in the MCOC Court at Thane, for commission of offence punishable under Maharashtra Control of Organized Crime Act, 1999.

11. While it is true that three of his co-accused whose appeals are pending before this Court are granted bail, the accused No.2 Ateef was granted bail on merits. The present applicant's applications for bail on merits were rejected in the past. Therefore, the order granting bail to Ateef Mulla has no bearing on the present application for grant of bail to the present applicant.

12. Though the accused No.3 Hasib Mulla and accused No.4 Gulam Khotal were released on bail during the pendency of the Appeal, mainly on the ground that they had completed substantial part of their sentence, there is vital difference between their case and that of the present applicant for the consideration of bail. Both, the accused No.3 and 4 were granted bail with specific observations that these two accused had no criminal antecedents,

whereas the present applicant has not only been convicted under TADA, but one more case under MCOCA is still pending against him at present. Therefore, the applicant cannot claim parity or any other benefit from the orders granting bail to these two accused.

13. The respondent has also pointed out that the applicant has not paid fine and therefore substantive sentence which he has to undergo in default of payment of fine, would be extended by more than a year. The respondent-State has also preferred an appeal for enhancement of sentence and also against the order of acquittal of the present applicant u/s 3(3), 21(2), 21(4) of the Prevention of Terrorism Act 2002 and u/s 121(A), 122, 212 and 120 (B) of the Indian Penal Code and u/s 5 of the Explosive Substance Act, 1908 and u/s 9(B) of the Explosive Substance Act 1884 and u/s 302, 307, 326, 332, 333, 427 and 435 of the Indian Penal Code and u/s 151, 152, 153 and 154 of Indian Railway Act 1989 and u/s 3 of Prevention of Damage to Public Property Act, 1984. These appeals are admitted and are pending for their final disposal.

14. In the above circumstances, we are not inclined to release the present applicant on bail during the pendency of Criminal Appeal No.335/16. Hence the application is rejected.

(SARANG V. KOTWAL, J.)

(RANJIT MORE, J.)

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