

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2747 OF 2018

Arif Gulam Dastgir Shaikh .. Applicant

vs.

The State of Maharashtra .. Respondent

WITH

CRIMINAL APPLICATION NO. 215 OF 2019

Mr.E.B. Dixit I/b Ms Sudha Dwivedi a/w. Mr. Vinay Dubey
a/w. Mr. Aditya Sharma for the Applicant.

Ms A.A. Pai, Special Public Prosecutor for the Respondent-
State.

Mr. Ameya Lambhate for the Applicant in APP 215 of 2019

CORAM : R. G. KETKAR, J.

RESERVED THE ORDER : 2nd AUGUST 2019.

PRONOUNCED THE ORDER : 19th AUGUST 2019.

PC :-

1] By Administrative Order passed by the Hon'ble the
Chief Justice, this bail application was specially assigned to
this Court.

2] Heard Mr. E.B. Dixit, learned Counsel for the applicant,
Ms A.A. Pai, learned Special Public Prosecutor for the
respondent – State and Mr. Ameya Lambhate, learned
counsel for the applicant in Application No. 215 of 2019 at
length.

3] By this application under Section 439 of Code of
Criminal Procedure, 1973 (for short “Cr.P.C.”), the applicant
has prayed for enlarging him on bail in Sessions Case No.281
of 2013 in C.R. No. I-67 of 2013 of Vashi Police Station

registered under Sections 302, 34, 120(B) Indian Penal Code, 1860 (for short "*I.P.C.*") read with Sections 3(25), 3(27), 4 (27) of Arms Act, 1959.

4] In support of this application, Mr. Dixit strenuously contended that the applicant at the relevant time was carrying on business of Estate Agent. He submitted that the applicant was arrested on 29th October 2013 by the DCB CID, Unit-1, Vashi, Navi Mumbai. The applicant is languishing in jail for around six years. The first charge-sheet was filed in May 2013. The supplementary charge-sheet was filed against the accused persons under Sections 302, 201, 120-B read with 34 I.P.C. on 30th October 2017. The prosecution has cited as many as 200 witnesses. The applicant is not assailant. The deceased Sunilkumar Lahoria was having disputes with Builders. The applicant has no dispute with the deceased. No weapon was recovered from the applicant. No criminal antecedents are alleged against the applicant. This is the first Bail Application made by the applicant in this Court.

5] Mr. Dixit submitted that by order dated 18th December 2018, the Division Bench of this Court in Criminal Application No. 549 of 2018 with Criminal Application No. 459 of 2018 in Writ Petition No. 4617 of 2018 directed learned Trial Judge to conduct trial on day to day basis. He submitted that till date only 23 witnesses out of 200 witnesses are examined. He submitted that in the charge-

sheet, the applicant was arrayed as accused No.11 and was shown as wanted accused. Along with the charge-sheet, Airtel Pre-paid Enrollment Form of the applicant was enclosed. In the Enrollment Form, the address of the applicant is mentioned. The first charge-sheet was filed in May 2013. No attempts were made by the Investigating Agency by visiting the applicant's place shown in the said Enrollment Form. No summons were issued to the applicant, still he was shown as wanted accused.

6] Mr. Dixit submitted that the case is based upon circumstantial evidence. As many as on 145 days, the Public Prosecutor remained absent. The prosecution did not examine main witnesses, including viz. (i) Fahim Abbas Ulber, (ii) Haroon Allahabaksh Shaikh and (iii) Mohd Irfan Abdul Rashid Londhe. He submitted that merely because the charge is framed and the trial is going on are no grounds for denying the bail. He relied upon paragraph 8 of the decision in ***Jaya Simha vs. State of Karnataka – (2007) 8 SCC 145***. He also relied upon the decision in ***Maulana Mohd. Amir Rashadi Vs. State of U.P. -(2012) 2 SCC 382***. In this case, as many as 36 serious cases were filed against respondent No.2- accused. The appellant had challenged the order dated 6th August 2010 passed by the High Court of Judicature at Allahabad enlarging respondent No.2- accused on bail. The Apex Court held that the relevant considerations are (i) the accused has been in jail since 24th August 2009, (ii) trial had commenced by examining two prosecution

witnesses, and (iii) the High Court while granting bail has imposed several conditions for strict adherence during the period of bail. He submitted that in the present case stringent conditions may be imposed while enlarging the applicant on bail.

7] Mr. Dixit relied upon the decision in **Nagendra Nath Chakravarti – VOL.LI Indian Law Reports 402** to contend that the bail cannot be withheld merely as a punishment. The said decision was considered by the Apex Court in **Dattaram Singh vs. State of Uttar Pradesh and anr. - (2018) 3 SCC 22** and in particular paragraphs 2, 3 and 5 thereof. Mr. Dixit also relied upon the decision of Peshawar High Court in the case of **Bakht Zada vs Mst. Hamida**, the complainant (**Criminal Misc. Bail Application No. 359-P/2015**) decided on 3rd April 2015 to contend that it is a settled law that bail may not be refused merely on the ground that accused is directly charged in the F.I.R. for a heinous offence, when otherwise, he is found entitled to concession of bail because any mistaken relief of bail, can be repaired by convicting the accused, if proved guilty at the trial, but no proper reparation can be offered for his unjustified incarceration, albeit, his acquittal in the long run. He also relied upon the decision of **REX vs. Hawken – British Columbia Reports Vol.LX page 64**) to contend that it is not only the right but the duty of the Judge before whom an application for bail is made for a person committed for

murder to examine the evidence taken on the preliminary hearing, and if the evidence does not justify a committal or the evidence is so weak that there is little chance of a conviction, and when the other circumstances are such there will be no chance of the accused failing to appear on his trial if bail is granted, then bail should be granted. He further submitted that the accused viz. Altaff Aftab Khan, Sumeet Bachhewar, Mohd. Anees Naseer Ansari @ Bhaijan and Bhupesh Gupta with serious allegation have been released by this Court and the said orders are upheld by the Apex Court.

8] Mr. Dixit has taken me through the statement of Fahim Ulber recorded on 17th February 2013. He submitted that in this statement, Fahim did not even disclose the applicant's name. His supplementary statement was recorded on 17th March 2013, that is to say after one month. He has also taken me through the statements of Mohd. Irfan Abdul Rashid Londhe, Farookh Shamshuddin Khan, Haroon Allahbaksh Shaikh. He submitted that the accused having more active role than the applicant were enlarged on bail. He further claimed parity on the ground that Sumeet Bachhewar (accused No.4), Altaff Aftab Khan (accused No.5), Mohd. Anees Naseer Ansari @ Bhaijan (accused No.6) and Bhupesh Gupta (accused No.9) were enlarged on bail. For all these reasons, he submitted that the applicant deserves to be enlarged on bail.

9] On the other hand, Ms Pai and Mr. Lambhate strenuously opposed the application. Ms. Pai submitted that earlier investigation was carried out by Vashi Police Station. The said Investigating Agency had recorded statement of Mr.Fahim Ulber on 17th February 2013 , i.e., on the next date of the incident, i.e., 16th February 2013. The investigation was transferred to Crime Branch, Mumbai and thereafter his supplementary statement was recorded on 17th March 2013. The supplementary statement was recorded after the transfer of investigation from Vashi police to Crime Branch.

10] Ms Pai has taken me through the order dated 20th April 2015 passed by learned Additional Sessions Judge-1, Thane below Exhibit-3 in Session Case No.118 of 2014. Exhibit-3 was the application moved by the applicant herein under Section 439 of Cr.P.C. for enlarging him on bail. In paragraph 4, learned Sessions Judge observed that the allegations in the present matter are that the applicant along with other accused persons in furtherance of common intention conspired to kill deceased Sunilkumar Lahoria. The applicant is stated to be very close friend of main accused namely Emanuel Amolik. The motive alleged for commission of murder is that the deceased had made various complains against different builders including co-accused Anurag Garg (wanted accused) in regard to un-authorised and illegal constructions made by them. It is also alleged that the accused No.2 Amolik and some other accused had given a contract to kill the deceased and the applicant also alleged to

have participated actively in this crime for the purpose of money.

11] In paragraph 5, learned Sessions Judge considered the submission of the applicant that there is no material to show his involvement in the crime and there are no incriminating circumstances. Learned Sessions Judge also considered the parity claimed by the applicant in paragraph 8 and rejected the application.

12] Ms Pai has taken me through the statement of Fahim Albas Ulber recorded on 17th February 2013, where his role prior to the date of incident of 16th February 2013 and after the incident of 16th February 2013 are stated. In the supplementary statement dated 17th March 2013 of Fahim Ulber, he has disclosed meetings of 15th February 2013, 16th February 2013 and 17th February 2013. A perusal of the statement shows presence of the applicant on these dates in the company of other accused as also his active role. She also relied upon the statement dated 5th March 2013 of Mohd.Irfan Abdul Rashid Londhe, as also statement of Haroon Allahbaksh Shaikh recorded on 17th March 2013.

13] Ms Pai has invited my attention to the order dated 18th July 2013 passed by this Court in Criminal Bail Application No. 1036 of 2013 filed by Altaff Aftab Khan and in particular paragraph 9. In paragraph 9, this Court has referred to the role of the present applicant (wanted accused). She also

invited my attention to the order dated 8th April 2014 passed by this Court in Criminal Bail Application No. 122 of 2014 filed by Mohammed Anis Nazir Ansari @ Bhajan. She submitted that case of these accused is less serious and the applicant cannot claim parity.

14] Ms Pai has invited my attention to the order dated 17th May 2019 passed by learned Additional Sessions Judge, Thane below Exhibit-701 in Sessions Case No. 281 of 2013 and in particular paragraphs 15 and 26. She submitted that the charge came to be framed on 30th October 2017. By order dated 18th December 2018, this Court directed learned Sessions Judge to conduct the trial on day to day basis. The then Special Public Prosecutor assigned to the Court has resigned as she was not able to conduct the case on day to day basis. However, some time elapsed in appointing another Special Public Prosecutor. During that period, the Court had directed the Public Prosecutor from the Office of District Government Pleader of Thane District Court to conduct the trial. Learned District Government Pleader expressed inability to do so. Learned Sessions Judge issued summons to the witnesses on its own and conducted the trial under Section 309 of Cr.P.C., so as to comply the order of this Court. Learned Sessions Judge while passing the order below Pursis Exhibit-958 observed that till date 23 witnesses have examined. If Roznama is perused, it will be evident that parties are in habit of making various applications, may be for transfer from one jail to another, deferring of some

witnesses, there are various objections even during the evidence, sometimes there is repetition of similar objections and similar applications and much time of Court has consumed in hearing of those application and deciding the same. She therefore, submitted that delay in conducting the trial is not solely attributable to the prosecution. She submitted that no case is made out for enlarging the applicant on bail.

15] I have considered the rival submissions advanced by learned counsel for the parties. I have also perused the material on record. The prosecution has come with a case that Sunilkumar Lahoria, Proprietor of S.K. Builders and Developers having Office at Plot No.16, Sector No.28, Vashi, Navi Mumbai was assassinated at around 8.00 a.m. on 16th February 2013 right outside his Office. The employees of the deceased were successful in apprehending Vyankatesh R. Shettiyar – accused No.1 on the spot. Mr. Dixit submitted that the applicant has absolutely no role in the murder. He had no dispute with the deceased. He is also not having any rivalry against the deceased. In short, the applicant has absolutely no motive or intention to commit murder of Sunil Kumar Lahoria. The applicant is falsely implicated in the case.

16] In order to appreciate this submission, it is necessary to refer to the statements recorded by the Investigating Agency. Mr. Dixit relied upon the statement dated 17th

February 2013 of Fahim Ulber to contend that in this statement, name of the applicant is not even mentioned. The supplementary statement of Fahim Ulber was recorded on 17th March 2013, almost after one month. As against this, Ms Pai submitted that earlier investigation was carried out by Vashi Police and the same was transferred to the Crime Branch, Mumbai and after transfer of the case to Crime Branch, Mumbai, Fahim Ulber statement was recorded.

17] With the assistance of learned counsel for the parties, I have perused the statement of Fahim Ulber dated 17th February 2013 and supplementary statement dated 17th March 2013. A perusal of supplementary statement dated 17th March 2013 discloses that at around 3.30 p.m. on 15th February 2013, accused No.2 Emanuel Amolik, accused No.3 Wajeed Nabi Ahmed Qureshi and the applicant/accused No.11 had a meeting near Hotel Sahil, Mumbra. On 17th February 2013, accused No.2 Amolik was arrested. On 17th February 2013 at around 10.00 a.m., the applicant came to Kausa Kabrastan. Fahim along with Haroon, the applicant and children of Amolik went to residence of Suresh Bijlani at Vashi.

18] A perusal of statement dated 17th February 2013 of Fahim Ulber shows that he met accused No.1 Vyankatesh R. Shettiyar, accused No.2 Emanuel Amolik and accused No.3 Wajeed Nabi Ahmed Qureshi. He stated that when his statement was recorded on 17th February 2013, out of fear he

did not disclose name of the applicant.

19] A perusal of statement dated 5th March 2013 of Mohd. Irfan Abdul Rashid Londhe also shows that the applicant had played active role by issuing various directions. The role of the applicant as compared to the role of Altaff Khan is different. The applicant took active lead in the case. A perusal of the statement of Haroon A. Shaikh, driver of accused No.2 Emanuel Amolik also shows that the applicant was in the company of accused No.2 Emanuel Amolik and accused No.3 Wajeed on 15th February 2013 at around 3.30 p.m.. Even he took active part on 16th February 2013, the date of the incident. On 17th February 2013, the applicant was also present near Kausa Kabrastan.

20] As mentioned earlier, by order dated 20th April 2015, learned Sessions Judge had rejected the application made by the applicant for enlarging him on bail. In paragraph 2, learned Sessions Judge dealt with the contention of the applicant that Mohd. Anis Ansari alias Bhaijan, Altaff Aftab Khan, Sumit Bachhewar and Bhupesh Gupta were enlarged on bail and the applicant is therefore, entitled to be released on bail on the ground of parity. In paragraph 5, learned Sessions Judge considered the statements of witnesses as also presence of the applicant in various meetings with the other accused including Amolik (accused No.2), Wajeed Nabi Ahmed Qureshi (accused No.3) near Hotel Sahil at Mumbra. The applicant is seen to be in contact with accused No.2

Amolik since prior to commission of murder and on the date of murder and also thereafter he is present at the spot and keep watching on the activities. It is also clear from the details of call records of the applicant. Learned Sessions Judge rejected the submission that call details cannot be incriminating circumstances, as at this stage, the case is based on circumstantial evidence and the circumstance that the applicant was in constant contact directly as well as telephonically with other accused is also one of the circumstances alleged and that can be termed as one of the links in circumstances to be established.

21] In paragraph 6, learned Sessions Judge has noted that the applicant/accused was not traceable and was absconding from the date of incident in February 2013 till his arrest in October 2013. In paragraph 8, learned Sessions Judge dealt with plea of parity and observed that the role attributed to the applicant is much more active than the accused released on bail earlier. The nature of allegation, seriousness of offence and the manner in which it is stated to have been committed are also the factors to be taken into account while disposing of the bail application.

22] After considering the materials on record, I do not find that any case is made out for enlarging the applicant on bail. Mr. Dixit has relied upon various decisions referred to herein above. In the facts and circumstances of the present case, I do not find that the decisions advance the case of the

applicant, as I am satisfied from the material on record that *prima facie* the applicant has played the active role in the commission of offence.

23] Insofar as delay in conducting the trial is concerned, a perusal of order dated 17th May 2019 passed by learned Trial Judge below Exhibit-701 in Sessions Case No. 281 of 2013 shows that the then Special Public Prosecutor assigned to the Court has resigned as she was not able to conduct the trial on day to day basis. Obviously, some time lapsed in appointing another Special Public Prosecutor. Learned Trial Judge conducted the trial under Section 309 of Cr.P.C., so as to comply with the order dated 18th December 2018 passed by this Court. A perusal of the order below Pursis Exhibit-958 shows that the parties were in habit of making various applications, may be for transfer from one jail to another, deferring of some witnesses. The parties were raised various objections during the course of recording of evidence and also were filing applications which consumed time of the Court in hearing and deciding the applications. Thus, the delay is not attributable solely to the prosecution. I therefore, do not find any merit in the submission of Mr. Dixit. Hence, the application fails and the same is rejected.

24] Intervention Application being Criminal Application No.215 of 2019 does not survive and the same is disposed of as such. Order accordingly.

(R. G. KETKAR, J.)