

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 380 OF 2020

Mr.Sunderlal Tuhiram Parashar

Age : 62 years, Occ. Retired,
Residing at 179, Rajouri Apartment,
(Presently lodged at Mumbai Central)
Prison, Arthur Road, Mumbai)
Taluka Niphad, Dist. Nashik

... Appellant
(Org. Accused No.3.)

Versus

1. The National Investigation Agency,

Ministry of Home Affairs, Government of India,
Cumballa Hill Telephone Exchange, 7th floor,
Peddar Road, Mumbai-26.

....Respondents
(Org. Complainant)

2. The State of Maharashtra

Mr. Mubin Solkar a/w. Mr. Amir Supariwala i/b Zara Salati for appellant.

Mr. Sandesh Patil a/w. Mr. Chintan Shah for respondent No.1-National Investigation Agency.

Smt. S.D. Shinde, APP for respondent No.2-State.

**CORAM : S. S. SHINDE &
N.J. JAMADAR, JJ.**

Reserved for Judgment on : 24th September 2021.

Judgment Pronounced on : 29th September 2021.

JUDGMENT (PER N.J. JAMADAR, J.) :

1. This appeal, under section 21(4) of the National Investigation Agency Act, 2008, is directed against an order dated 1st July 2019 passed by the learned Special Judge, NIA, Greater Bombay, in Bail Application

No. 394 of 2019 in NIA Special Case No. 03/2019, whereby the prayer of the appellant-accused No.3 to enlarge him on bail, came to be rejected.

2. Shorn of superfluities, the background leading to this appeal can be stated as under :-

(a) The appellant-accused No.3 came to be arraigned in FIR No.RC-01/2019/NIA-Mum, dated 10th January 2019 for the offences punishable under section 120B of the Indian Penal Code, 1860 ('the Penal Code'), section 3, 7 read with 25 of the Arms Act, 1959 ('Arms Act'), section 37 read with 135 of the Maharashtra Police Act, 1951 ('Police Act') and sections 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 ('UAPA'), with co-accused Harpal Singh @ Raju @ Happy (A-1), Mohiuddin Siddiqui @ Mohin Khan @ Moin Khan (A-2) and wanted accused Gurjeet Singh Nijjar (WA-1).

(b) Initially, crime was registered at FIR No.13/2018 with ATS Police Station, Kalachowki, Mumbai against Harpal Singh (A-1) for the offences punishable under section 3 read with 25 of the Arms Act and section 37(1) read with 135 of Police Act, with the allegation that on 2nd December 2018, the accused No.1 was found in possession of country made pistol and five live cartridges. Subsequently, the provisions contained in sections 18

and 20 of UAPA were invoked. Eventually, NIA took over the investigation and registered the above-numbered FIR.

(c) Post completion of investigation, NIA filed a charge-sheet alleging, *inter-alia*, that Harpal Singh (A-1), Moin Khan (A-2) and wanted accused Gurjeet Singh Nijjar (WA-1) entered into a criminal conspiracy to commit terrorist act for the formation of separate “Khalistan State” and thereby threatened the security, integrity and sovereignty of India and made attempts to revive Sikh Militancy. In pursuance of the said conspiracy, the above-named accused arranged illegal weapons and ammunition and thereby committed the offences punishable under aforesaid sections. As regards the appellant-accused No.3, it was alleged that a conspiracy was hatched between the appellant and Moin Khan (A-2) to provide and sell country made pistol and, in pursuance of that conspiracy, the appellant delivered a country made pistol to Moin Khan (A-2), which was, in turn, delivered to Harpal Singh (A-1) and, subsequently, recovered from the possession of Harpal Singh (A-1) and thus the appellant and the above-named co-accused, committed offences punishable under section 120B of the Penal Code and sections 3 and 7 read with 25 of the Arms Act.

(d) The appellant preferred an application for bail asserting that the appellant was a retired decorated Officer of Delhi Police. The appellant was in contact with Moin Khan (A-2) to elicit information relating to terrorist organisations such as Lashkar-e-Taiba (LeT), Islamic State of Iraq and Syria (ISIS) etc. The appellant had not supplied any firearm to Moin Khan (A-2). In any event, the appellant was not charged with the offences punishable under UAPA. Since the investigation had been complete, the pre-trial detention of the appellant was unwarranted.

(e) The learned Special Judge was persuaded to reject the application of the appellant opining, *inter-alia*, that the interdict contained in the proviso to section 43D(5) of UAPA against grant of bail came into operation. The accusation that the appellant had supplied country made pistol to Moin Khan (A-2), which was, in turn, delivered to Harpal Singh (A-1), member of Khalistan Organisation, appeared to be *prima-facie* true. Thus, the appellant was not entitled to be released on bail.

(f) Being aggrieved by and dissatisfied with the impugned order, the accused No.3 is in appeal.

3. Prayer of the appellant to enlarge him on bail is opposed by the respondent No.1-NIA, by filing an affidavit in reply.

4. Admit. With the consent of the counsels for the parties, heard finally.

5. We have heard Mr. Mubin Solkar, the learned counsel for the appellant, Mr. Sandesh Patil, the learned special counsel for respondent No.1-NIA and Smt. Shinde, the learned APP for the State. With the assistance of the learned counsels for the parties, we have perused the material on record including the affidavit in reply filed on behalf of respondent No.1-NIA.

6. Mr. Solkar, the learned counsel for the appellant strenuously submitted that the learned Special Judge has committed a manifest error in rejecting the application for bail by invoking the proviso to section 43D(5) of the UAPA as the appellant has not at all been charged for the offences punishable under sections 18 and 20 of UAPA, for which the co-accused Harpal Singh (A-1) and Moin Khan (A-2) stand charged. In contrast, the appellant has been arraigned for the offences punishable under section 120B of the Penal Code and sections 3 and 7 read with 25 of the Arms Act. Mr. Solkar would further urge that the charge for the offence punishable under section 7 read with 25(1A) of the Arms Act is also wholly misconceived as Harpal Singh (A-1) was not found in

possession of prohibited arms or ammunition, in contravention of section 7 of the Arms Act. Since the appellant has undergone more than two and a half years of incarceration, against the maximum punishment of three years imprisonment, which the offence punishable under section 3 read with 25(1B) of the Arms Act entails, the appellant deserves to be enlarged on bail.

7. In the backdrop of the aforesaid submission, we deem it appropriate to extract the relevant portion of charge formulated against the appellant and co-accused in the charge-sheet filed by the NIA. It reads as under :

“18. Charge :

That, the arrested Harpal Singh @ Raju @ Happy (A-1), Mohiuddin Siddiqui @ Mohin Khan @ Moin Khan (A-2) and wanted accused Gurjeet Singh Nijjar (WA-1) entered into the criminal conspiracy hatched by them between January 2018 to December 2018 to commit terrorist act for the formation of separate ‘Khalistan State’ and thereby threatened the security, integrity and sovereignty of India and has been making attempt to revive Sikh militancy.

Wanted accused Gurjeet Singh Nijjar (WA-1), accused Harpal Singh (A-1) and accused Moin Khan were used to post videos & images containing praises of militant Jarnail Singh Bhinranwale, Jagtar Singh Hawara (a convicted accused in assassination of Beant Singh, former Chief Minister of Punjab), images & videos of Operation Blue Star of 1984, Pro-Khalistani post related to Babbar Khalsa International (BKI) with sole intention to motivate likeminded Sikh youths and others to join the Khalistan movement in India with an ultimate objective of separate ‘Khalistan State’. In pursuance of said conspiracy they also arranged an illegal weapon and ammunition thereby committed offences punishable under section 120B of Indian Penal Code, Sections 3, 7 r/w 25 of the Arms Act, 1959, Section 37 r/w section 135 of The Bombay/Maharashtra Police Act, 1951 and section 18 & 20 the Unlawful Activities (Prevention) Act, 1967.

A conspiracy hatched between accused Sunder Lal Parashar (A-3) and accused Moin Khan (A-2) for providing and sale of

country made illegal pistol. Accused Sunder Lal Parashar (A-3) had given a country made pistol to accused Moin Khan (A-2) which was further delivered/sold by accused Moin Khan to accused Harpal Singh (A-1) which was later on recovered from the possession of accused Harpal Singh (A-1) thereby the committed offences punishable under Section 120B of Indian Penal Code and Section 3, 7 r/w. 25 of the Arms Act, 1959.

18.3 The sanction of prosecution of accused Harpal Singh (A-1), Moin Khan (A-2) and wanted accused Gurjeet Singh Nijjar (WA-1) under section 45(1) of Unlawful Activities (Prevention) Act, 1967 has been obtained and enclosed herewith. The sanction under section 39 of Arms Act, 1959 against Harpal Singh (A-1), Moin Khan (A-2), Sunder Lal Prashar (A-3) and wanted accused Gurjeet Singh Nijjar (WA-1) has also been obtained and enclosed herewith.....”

8. In the context of the aforesaid charge, Mr. Patil, the learned special counsel for NIA fairly submitted that the appellant has, in fact, been not charged for the offences punishable under UAPA. We find that the aforesaid stand of respondent No.1 is made amply clear in the affidavit in reply as well. Paragraph No. 5.21 of the affidavit in reply, *inter-alia*, reads as under :

“5.21 That in reply to paras 48(ii) to 48(iv), it is submitted that, this is a fact that applicant accused has not been charge sheeted under the provision of UA(P) Act. He has been charge sheeted under section 3, 7 r/w 25 of the Arms Act and U/s 120(B) IPC.”

9. If the contents of the charge-sheet (extracted above) are read in conjunction with the aforesaid contention in the affidavit in reply, it becomes explicitly clear that the appellant has not been charged for the offences punishable under UAPA. The grievance of Mr. Solkar that the

learned Special Judge could not have invoked the bar contained in the proviso to section 43D(5) of the UAPA, in the absence of a charge for the offences punishable under UAPA qua the appellant, appears well merited. Evidently, the learned Special Judge could not have rejected the prayer for bail on the said count.

10. The second limb of the submission of Mr. Solkar based on inapplicability of section 7 of the Arms Act appears equally well founded. As indicated above, at best, the indictment against the appellant is that of supplying a country made pistol to Moin Khan (A-2). Even if the said allegation is taken at par, in our view, the invocation of section 7 of the Arms Act qua the appellant appears *ex-facie* unsustainable.

11. Section 7 of the Arms Act reads as under :

*“7. Prohibition of acquisition or possession, or of manufacture or sale of prohibited arms or prohibited ammunition.—No person shall—
(a) acquire, have in his possession or carry; or
(b) [use, manufacture] sell, transfer, convert, repair, test or prove; or
(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof; any prohibited arms or prohibited ammunition unless he has been specially authorised by the Central Government in this behalf.”*

12. Sub-section (1A) of section 25 prescribes punishment for acquisition, possession and carrying the prohibited arms or prohibited ammunition in contravention of section 7, of imprisonment for a term,

which may extend to ten years, and fine.

13. Section 2(h) and (i) define “prohibited ammunition” and “prohibited arms” as under :

(h) “prohibited ammunition” means any ammunition containing, or designed or adapted to contain, any noxious liquid, gas or other such thing, and includes rockets, bombs, grenades, shells, 3[missiles,] articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition;

(i) “prohibited arms” means—

(i) firearms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine

containing the missiles is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing, and includes artillery, anti-aircraft and anti-tank firearms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms.

14. On a plain reading of aforesaid provisions, it becomes abundantly clear that section 25(1A) provides punishment for acquisition, possession and use of arms which are automatic, of sophisticated nature and have mass destruction potential. A country made pistol hardly satisfies the description of prohibited arms. Thus, the enhanced punishment prescribed under section 25(1A) for contravention of section 7 of Arms Act may not be attracted in the facts of the case at hand. Resultantly, the appellant can, in the peculiar facts of the case, be legitimately prosecuted

for the offences punishable under section 120B of the Penal Code and 25(1B)(a) of the Arms Act for contravention of the provisions contained in section 3 of the said Act. The later offence entails maximum punishment of three years imprisonment. Indisputably, the appellant has been in custody since 24th April 2019. The appellant has, thus, suffered incarceration for a period of 2 years and 5 months. Further incarceration of the appellant, as an under-trial prisoner, therefore, appears wholly unjustifiable.

15. Indisputably, the appellant had been a member of Delhi Police Force. It cannot be said that the appellant has no roots in society. In the context of the charge against the appellant, it does not appear that the release of the appellant would either hamper the further investigation or put hindrance in the trial. Nonetheless, we propose to impose appropriate conditions to ensure that the release of the appellant on bail does not either result in prejudice to the prosecution or impede the trial.

16. For the foregoing reasons, the appeal deserves to be allowed.

17. Hence, the following order :

O R D E R

- (i) The appeal stands allowed.
- (ii) The impugned order dated 1st July 2019 passed by the learned Special Judge, NIA, Greater Bombay, in Bail

Application No. 394 of 2019 in NIA Special Case No. 03/2019 stands quashed and set aside.

(iii) The appellant-Mr.Sunderlal Tuhiram Parashar be released on bail on furnishing a PR bond in the sum of Rs.50,000/- (Rupees Fifty thousand only) and one or two sureties in the like amount to the satisfaction of the learned Judge, NIA Court.

(iv) The appellant shall report the N.I.A., Mumbai Branch on the first Tuesday of every month between 10:00 am to 12:00 noon, for a period of six months from the date of his release.

(v) The appellant shall attend each and every date of the proceeding before the NIA Court.

(vi) The appellant shall surrender his passport, if any (if not already surrendered). If the appellant does not hold the passport, he shall file an affidavit to that effect before the NIA Court.

(vii) The appellant shall not, either himself or through any other person, tamper with the prosecution evidence and give threats or inducement to any of prosecution witnesses.

(viii) The appellant shall not indulge in any activities similar to the activities on the basis of which the appellant stands prosecuted.

(ix) The appellant shall not try to establish communication with the co-accused or any other person involved directly or indirectly in similar activities, through any mode of communication.

(x) The appellant shall co-operate in expeditious disposal of the trial and in case delay is caused due to him, then his bail would be liable to be cancelled.

(xi) In the event, the appellant violates any of the aforesaid conditions, the relief of bail granted by this Court will be liable to be cancelled.

(xii) After release of appellant on bail, he shall file undertaking within two weeks before the NIA Court stating therein that he will strictly abide by the conditions No. (iv) to (xi) mentioned herein above.

(xiii) By way of abundant caution, it is clarified that the observations made in this judgment and order are limited to the consideration of the question of grant of bail to the appellant and they shall not be construed as an expression of opinion which bears on the merits of the matter at the trial. The learned Special Judge shall proceed with the trial against the appellant and the co-accused uninfluenced by the

observations made hereinabove.

The appeal accordingly stands disposed of.

All concerned to act on an authenticated copy of this order.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)

At this stage, Mr. Chintan Shah, Advocate holding for Mr. Sandesh Patil, the learned counsel for respondent-NIA prays for stay to the execution and operation of this order.

For the reasons, which we have indicated in this judgment to exercise discretion to release the appellant on bail, the prayer for stay does not seem justifiable.q

Hence, the oral application for stay stands rejected.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)