

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.1126 OF 2021

NAFIS KHAN @ MEWATI MAKSOOD KHAN,
VERSUS
THE STATE OF MAHARASHTRA

.....
Amicus curiae for Applicant : Mr. A. S. Tilve
APP for Respondent-State : Mr. V. M. Kagne
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
08-12-2021**

**Date of Pronouncing the Order :
20-01-2022**

ORDER :

1. The applicant is an under-trial prisoner. Sessions Case No.288 of 2018 pending before Sessions Court, Aurangabad, arising out of Crime No.208 of 2018, registered with MIDC Police Station, Aurangabad, District Aurangabad, for the offence punishable under Section 307, 109, 116, 120B, 34 of the Indian Penal Code.
2. The applicant came to be arrested and after his remand when he was in judicial custody, he turned approver in the same matter. Now his evidence is over, and therefore, he prays that he be released on bail under Section 439 of the Code of Criminal Procedure.

3. It is to be noted that the application of the applicant had come through jail, and therefore, learned Advocate Mr. A. S. Tilve was appointed as amicus curiae to represent the cause of the applicant.

4. Heard learned amicus curiae as well as learned APP Mr. V. M. Kagne. Perused the order passed below Exhibit 222 in Sessions Case No.288 of 2018 by learned Additional Sessions Judge-4 , Aurangabad, on 12-03-2021.

5. From the order that has been passed by the learned Additional Sessions Judge below Exhibit 222 which was the application filed by Superintendent Central Jail, Aurangabad seeking direction to transfer the present applicant to Central Jail, Jalna. It was contended that the present applicant had received life threats from other accused namely Ajit Data @ Shaikh Sartaj, Mehtab Ali and Imran Mehendi who are the inmates of Central Jail, Aurangabad. On the basis of report filed by the present applicant to the Harsul Police Station, a non-cognizable case No.155 of 2021 has been registered and upon the investigation of the same under Section 155 (2) of the code of Criminal Procedure, it was found that there is substance in the said complaint that was made by the present applicant. In this

order it has been specifically mentioned that the present applicant opted to be an accomplice in the crime. For the safety of the present applicant, he was then shifted to the Central Jail, Jalna. It is to be noted that in the communication that was made by the Central Jail, Aurangbad, it has been specifically stated that the evidence of the present applicant as an approver in Sessions Case No.288 of 2018 on the basis of the Crime No.208 of 2018 has been recorded and he has not turned hostile. Learned APP also accepts that the evidence of the present applicant is over, however, the learned APP objects granting of bail in view of Clause (b) to Sub-section (4) of Section 306 of the Code. He relies on the decision in *Suresh Chandra Bahri: Gurbachan Singh: Raj Pal Sharma vs. State of Bihar*, reported in 1994 AIR (SC) 2420, wherein Hon'ble Supreme Court observed that :-

"The dominant object of requiring an approver to be detained in custody until the termination of the trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from possible indignation, rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon

and released from custody. It is for these reasons that clause (b) of Section 306 (4) casts a duty on the court to keep the approver under detention till the termination of the trial and thus the provisions are based on statutory principles of public policy and public interest, violation of which could not be tolerated.”

6. Per contra, learned Amicus Curiae has relied on the decision of this Court in *Sharad Chandraprakash Agarwal vs. The State of Maharashtra*, decided on 08th January, 2020, *Criminal Bail Application No.3170 of 2019*. In this case after considering *Suresh Chandra Bahri vs. State of Bihar* (Supra), reliance was made on the Full Bench decision of Delhi High Court in *Premchand vs. State*, reported in 1985 Cr.L.J. 1534, in which it was held that :-

“The power can be exercised under Section 482 of the Cr.P.C. of releasing the approver on bail.”

It was then also held that this Court At Goa in *Sandip Kalangutkar vs. State* (*Cri. Bail Application No.129 / 2012*) and the Rajasthan High Court have held that, there is bar to grant bail to the accused in a specific circumstances where trial of case is unduly prolonged. It was on the basis that the personal liberty cannot be curtailed indefinitely.

7. As aforesaid, the present applicant opted to become approver in this case who was stated to be from gang of Imran Mahendi. As regards the Sessions Case No.288 of 2018 is concerned, the prosecution story is that said Imran Mahendi who is an under-trial prisoner in MCOCA Case No.17 of 2012 along with other 15 accused persons, hatched up a conspiracy to decamp the Imran Mahendi from the police custody when he was to be produced before the Court. In fact, all the accused persons with their common intention had made recce of the District Court campus at Aurangabad with the help of the accused persons who are from Madhya Pradesh, were introduced to procure revolver and bullets. Informant is a police officer in this case and their vehicle was intercepted on 27-08-2011. When one of the accused was about to shoot towards informant, those accused persons were overpowered. In that case, the Investigating Officer had arrested the present applicant. As aforesaid, he turned approver and gave the entire history. It shows that the role of the applicant as approver is over. The applicant says that if at all his presence is required further, he may come.

8. Now the question is, as to whether this Court can release him on bail or there is bar. The reliance can be placed on the decision in

Rajkumar Sahu vs. State of Chhattisgarh, reported in 2021 Cri.L.J. 1222, wherein the Chhattisgarh High Court has discussed as to why there is such provision in Section 306 of the Code. It is on the basis of the observations by the Apex Court in various cases. Section 307 of the Code which provides for power to direct tender a power has also been considered and taking into consideration both the provisions together which has been observed that :-

“19. Thus, from the aforesaid legal analysis, it is quite vivid that the provision under Section 306 (4) (b) of the Code is applicable to the Judicial Magistrate First Class if the pardon is granted by him, but if the pardon is granted to accomplice by the learned Sessions Judge under Section 307, Section 306 (4) particularly clause (b) mandating his continuation of custody till the termination of trial would not be applicable and the learned Sessions Judge would have the jurisdiction to release him on bail if found appropriate.”

The report of the law commission was also considered and Full Bench decision of Delhi High Court in *Premchand (Supra)* has also been considered along with the Full Bench decision of the Rajasthan High Court in *Noor Taki alias Mammu vs. State of Rajasthan*, reported in 1987 AIR (Raj.) 52. It has been thus concluded in

paragraphs No.26 and 29 that the High Court under inherent powers under Section 482 of the Code of Criminal Procedure can consider issuing the order of bail to the approver having a status of a witness only after being discharged from the case. The provision contained in Section 306 (4) (b) of the Code is applicable to the Magistrate granting pardon, but it is not applicable to the Sessions Judge while he grants pardon to the accused under Section 307 of the Code. As aforesaid, this Court also in *Sharad Chandraprakash Agarwal vs. The State of Maharashtra (Supra)* has exercised the power under Section 482 of the Code of Criminal Procedure for grant of bail. As regards the progress in the matter is concerned, it appears that the said case is still going on. Under such circumstances, the applicant cannot be asked to be behind bar for indefinite period as it affects his personal liberty enshrined under the Constitution of India. Therefore, by imposing conditions, he can be released on bail. Hence, following order is passed.

ORDER

- 1) Application stands allowed.
- 2) Applicant Nafis Khan @ Mewati Maksood Khan in Sessions Case No.288 of 2018, pending before learned Sessions Court, Aurangabad, be released on

P.R. of Rs.50,000/-(fifty thousand) with one or more solvent sureties of like amount to the satisfaction of the learned Additional Sessions Judge.

3) He shall undertake to remain present before the said Court as and when he receives summons/notice, if any in the said case in future.

4) He shall share his mobile number to the Investigating Officer, Superintendent of Central Jail, Jalna as well as to Trial Court i.e. Additional Sessions Judge, Aurangabad and shall not change the said number till the conclusion of the Trial.

5) Bail before Trial Court.

6) Fees of the appointed advocate is quantified at Rs.5000/- (in words rupees five thousand only), to be paid by High Court Legal Services Sub-Committee, Aurangabad.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-