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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 645 OF 2020

IN

CRIMINAL APPEAL NO. 266 OF 2020

Gulam Rasool Nathu Shaikh

This name is as per Charge-sheet

However the original name of the

Applicant is "Rasooluddin Nathu Shaikh"

..Applicant

(org. Accused No.2)

vs.

The State of Maharashtra

(At the instance of Sr. P.I.Navghar

Police Station, Bhayander (E),

Tal. and Dist. Thane)

..Respondent

.....

Mr. Aabad Ponda, Senior Advocate a/w. Mr. Mohsin Khan i/b Mr. Aiqan
Memon for the Applicant.

Ms. A. S. Pai, P.P. for the Respondent – State.

Mr. Raju D. Suryawanshi for the Intervenor.

.....

CORAM : PRASANNA B. VARALE &
N.R.BORKAR, JJ.

RESERVED ON : 06.10.2022.

PRONOUNCED ON : 10.10.2022.

ORDER (PER: N.R. BORKAR, J.)

1. By this application filed under Section 389 of Code of Criminal Procedure, 1973 (for short "Cr.P.C."), the applicant has prayed for suspension of sentence pending the appeal and to release him on bail.

2. The applicant has filed the appeal against the judgment and order dated 23 October 2019 in Sessions Case Nos.720 of 2011 and 681 of

2012. In the said sessions cases, the applicant who was accused No.2 was tried with other three co-accused for the offences punishable under sections 120-B, under Section 302 read with 34 of the Indian Penal Code, 1860 (for short "IPC") and Section 3 read with 25 of the Arms Act. By the impugned judgment and order, the trial Court convicted the applicant and other co-accused for the said offences and sentenced to suffer life imprisonment.

3. It is the case of the prosecution that on the date of incident, which took place on 8 May 2010, the deceased Prafulla Patil was sitting Corporator of Mira-Bhayandar Municipal Corporation and was running various educational institutions. There was a dispute between the deceased and the accused No.3 Vishal Mhatre on account of some landed property. According to the prosecution, the present applicant along with original accused No.1 Ajay @ Krishnachand Pandey committed the murder of deceased at the instance of accused No.3.

4. We have heard Mr. Ponda, the learned Senior Advocate for the applicant, Mrs. Pai, the learned Public Prosecutor for the respondent – State and Mr. Suryawanshi, the learned counsel for the original complainant.

5. We have perused the evidence on record. The prosecution has examined PW-8 Sukhdev Padwal and PW-29 Ganesh Raut as eye-witnesses to the incident. As the assailants were not known to PW-8 and PW-29, the test identification parade was conducted.

6. PW-8 in his examination-in-chief has stated that during the identification parade, he had identified one assailant. He however, stated that today he cannot identify the assailant to whom he identified in test identification parade.

7. PW-29 has stated in his examination-in-chief that he can identify the assailant to whom he had identified in the test identification parade. He was thus asked to identify the assailant. He identified accused No.1 and not the present applicant. Apart from it, in the cross-examination, PW-29 has admitted that the news was flashed on the television with the names and photographs of the assailants. He has further admitted that the police showed him photographs of the assailants. PW-29 further admitted that as the police showed him the photographs, he could identify the assailants in the test identification parade.

8. The learned Public Prosecutor has submitted that the examination in chief of PW-29 was over on 31 January 2019 and thereafter repeated adjournments were sought and he was cross-examined only on 26 February 2019, that is practically after one month. It is submitted that considering the admissions in the cross-examination of PW-29, it can be certainly said that he was won over by the accused taking benefit of the time of one month they got after the examination-in-chief was over. The learned PP submits that Hon'ble Supreme Court in *Vinod Kumar vs. State of Punjab*¹ has held that it is imperative if the examination-in-chief is over, the cross-examination should be conducted on the same day. If the

¹ (2015) 3 SCC 220

examination of witness continues till late hours the trial can be adjourned to next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial.

9. Even if it is presumed that PW-29 was won over by the accused, however, the fact remains that PW-29 has not identified the present applicant in the Court. It is also not understood as to why the Executive Magistrate, who conducted the test identification parade was not examined.

10. The learned PP has submitted that the deceased was shot and brutally assaulted by chopper. It is submitted that there is a recovery of chopper and bloodstained clothes at the instance of applicant. The learned counsel for the applicant submits that no reliance can be placed on the alleged recovery as stock panch was used. In our opinion, it would not be appropriate at this stage to re-appreciate the entire evidence and record the finding either way.

11. The learned PP, on instructions, submitted that except the present case there are no other criminal cases against the present applicant. This Court has already released the accused No.3 – Vishal Mhatre on bail. Admittedly, the applicant was arrested on 16 June 2010 and since then he is in jail and as such has undergone the actual sentence of more than 10 years.

12. The Hon'ble Supreme Court in ***Sonadhar vs. State of Chatisgarh***² has issued the following directions:

“we consider appropriate to issue directions in terms of aforesaid suggestions to the Patna High Court and on a pari materia basis to even the other High Courts. However, in order to carry out this exercise, the data would have to be compiled of such of the persons who have been in custody for more than 10 years and more than 14 years, with these persons being considered for grant of bail pending appeal and if there is no chance of hearing of the appeal in the near future, unless there are reasons for denial of bail. We can understand if any of the parties is delaying the appeal itself but short of that, we are of view that all persons who have completed 10 years of sentence and the appeal is not in a proximity of hearing with no extenuating circumstances should be enlarged on bail.”

13. The appeal is of the year 2020 and is not likely to be taken up for hearing within short period. Considering the overall facts and circumstances, we are inclined to suspend the sentence and release the applicant on bail. In the result, following order is passed.

ORDER

(i) Interim Application is allowed.

(ii) The sentence imposed on the applicant/original accused No.2 Gulam Rasool Nathu Shaikh (Rasooluddin Nathu Shaikh) by the learned Additional Sessions Judge, Greater Mumbai in Sessions Case No. 720 of 2011 and Sessions Case No.681 of 2012 vide impugned judgment and order dated 23 October 2019 is hereby suspended and he be released on bail on executing P.R. Bond in the

2 Special Leave to Appeal (Cri.) No.529 of 2021 decided on 15.09.2022

sum of Rs.25000/- (Rupees Twenty Five Thousand) with one or more sureties in the like amount.

(iii) The applicant shall not stay within the limits of Municipal Corporation of Mira-Bhayandar and shall not enter into the limits of said Corporation without permission of this Court. The applicant shall give address of his stay and contact details at which he shall always be available during pendency of the appeal to Navghar Police Officer.

(iv) The applicant shall keep Vakalatnama of his Advocate alive and valid till the appeal is finally decided by this Court and he shall not be entitled to any fresh notice at the stage of final hearing.

(v) The applicant during the pendency of appeal shall attend the Police Station within whose jurisdiction he is going to stay after his release on first working Saturday of every month between 11.00 a.m. to 2.00 p.m.

(vi) The failure of applicant to observe any of the terms and conditions of this order shall entitle the respondent – State to take him in custody.

[N.R.BORKAR, J]

[PRASANNA B. VARALE, J.]