

Sayali Upasani

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

**BAIL APPLICATION NO.- 3797 OF 2023
WITH
INTERIM APPLICATION NO. 4768 OF 2023**

Venktesh Alias Kumar Ramu Shettiar and ... Applicants
Others

**SAYALI
DEEPAK
UPASANI**

Vs.

The State of Maharashtra ...Respondent

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DEEPAK
UPASANI
Date: 2024.03.19
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Mr. Aditya Sharma with Vinod Gupta, Ms. Priya Maurya, for
Applicants.

Ms. Aruna Pai, Special PP for Respondent No. 1.

Mr. H. V. Kode, J. S. Karnik with Amey Lambhate, for
Intervener.

Mr. Patil, Senior PI, Unit I, DCB, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 14th MARCH, 2024

ORDER:-

1) The applicants, who are arraigned as accused Nos. 1 and 3 in Sessions Case No. 29 of 2023 arising out of CR No. 67 of 2013, registered with Vashi Police Station, for the offences punishable under Sections 120-B, 302 and 201 read with

Section 34 of the Indian Penal Code, 1860 and Sections 3 (25), 3 (27) and 4 (27) of the Arms Act, 1985, have preferred this application to enlarge them on bail primarily on the ground of long incarceration.

2) Since the application is premised on the ground of long incarceration and the principle of parity as the co-accused have been enlarged on bail, it may not be necessary to note the facts of the case in detail.

3) The gravamen of indictment against the applicants and co-accused is that at the behest of Emanuel Amolik (A2), the principal conspirator, a conspiracy was hatched to kill the deceased; the father of the applicant in intervention application No. 4768 of 2023. In pursuance of the said conspiracy on 16th February, 2013, while the deceased came in front of his office, the applicant No. 1-Venktesh @ Kumar Ramu Shettiar (A1) fired at deceased and the applicant No. 2 Vajid @ Jahir Nabi Ahmed Qurashi (A2) unleashed the blows by means of Chopper. The applicant No. 1- Venktesh was apprehended by the first informant and other persons, who were present in the office of the deceased. Investigation revealed the complicity of the rest of the accused. The deceased was killed by employing the contract

killers.

4) The applicant No. 1 was arrested on 16th February, 2013.

The applicant No. 2 came to be arrested on 17th February, 2013.

5) The applicants aver that they have been in custody for more than 11 years and there is no real prospect of the conclusion of the trial despite several orders passed by this Court directing day-to-day conduct of the trial for its expeditious conclusion. In the meanwhile, the co-accused have been released on bail by the Sessions Court, this Court and the Supreme Court. The applicants aver the accused Nos. 4 to 8 and 13 have been released on bail by this Court. Accused Nos. 9, 10, 12 and 14 have been released by the Court of Session. Accused Nos. 2 and 11, whose bail applications were rejected by this Court, have also been released on bail by the Supreme Court. Thus, the applicants are entitled to parity. Even otherwise, a long period of incarceration of about 11 years, without the possibility of conclusion of the trial, negates the fundamental right of the accused to have a speedy trial.

6) The prosecution has opposed the prayer for bail. The Intervener has filed an Intervention Application and additional affidavit in opposition to the prayer for bail.

7) I have heard Mr. Aditya Sharma, the learned Counsel for the applicants, Ms. Aruna Pai, the learned Special Public Prosecutor for the State and Mr. H. U. Kode, the learned Counsel for the Intervener at some length.

8) Mr. Sharma, the learned Counsel for the applicants submitted that the continued detention of the applicants for over 11 years without the trial being concluded is in complete negation of the applicants' right to life and personal liberty. Mr. Sharma submitted that the Supreme Court has released the accused Nos. 2 and 11 on bail on the ground that they were incarcerated for over 9 years. On the basis of the orders passed by the Supreme Court, this Court also released Kailash Gummaneh- (A8) by an order dated 17th August, 2022. Taking the Court through the orders passed by the Supreme Court and this Court releasing the co-accused on bail, Mr. Sharma strenuously submitted that there is no reason to deny the same dispensation to the applicants, who have been incarcerated for over 11 years.

9) Mr. Sharma further submitted that the delay in conclusion of the trial is wholly attributable to the prosecution. Attention of the Court was invited to the observations of this Court in the

order dated 25th October, 2021 in Criminal Bail Application No. 2865 of 2021, whereby the co-accused Mahesh Chelaram Bijlani (A12) was released. In the said order, this Court had, inter alia, observed that based on the record of the proceedings before the trial Court, it appeared that the prosecution was to be held responsible for the delay in trial.

10) Ms. Pai, the learned Special Public Prosecutor stoutly countered the submissions on behalf of the applicants that the prosecution was responsible for the delay in trial. Ms. Pai would urge that the applicants and the co-accused have been preferring applications for various reliefs and thereby the trial is delayed. It was submitted that the 80th and the last witness was under cross-examination. The trial is likely to conclude in a short period.

11) On the claim of parity, Ms. Pai urged that the applicants cannot claim parity with the co-accused, who have been released on bail. The applicants are the principal assailants. The acts of applicant Nos. 1 and 2 of firing and unleashing blows by means of a Chopper, have been captured in CCTV footage. There is overwhelming direct evidence against the accused Nos. 1 and 2. They are the contract killers. Therefore, the submission that

since the co-accused are released on bail, the applicants are also entitled to the same dispensation, cannot be accepted.

12) Mr. Kode, the learned Counsel for the Intervener supplemented the submissions of Ms. Pai. Mr. Kode invited the attention of the Court to the screenshots of CCTV footage, which clearly show the applicant Nos. 1 and 3 in the act of perpetrating the murderous assault on the deceased. The release of the applicants, at this stage, when the trial is at its fag end would cause grave prejudice to the prosecution, and pose a grave danger to the life and safety of the first informant and the witnesses, who have categorically deposed against the applicants, submitted Mr. Kode.

13) As rival submissions were made regarding the role of the parties, in delaying the conclusion of the trial, it was considered appropriate to call a report from the learned Additional Sessions Judge, seized with Sessions Case No. 29 of 2023, regarding the stage and progress of the trial as well as the circumstance due to which the trial could not proceed since July, 2023. In the report dated 12th March, 2023, the learned Additional Sessions Judge states as under:-

“...It is also submitted to your honour that, since dtd. 01-07-2023 thereafter matter is successively kept on board and evidence is recorded. Following are the dates showing the matter was listed before this court.

01-07-2023, 03-07-2023, 06-07-2023, 12-07-2023, 15-07-2023, 17-07-2023, 18-07-2023, 20-07-2023, 28-07-2023, 02-08-2023, 09-08-2023, 22-08-2023, 29-08-2023, 12-09-2023, 26-09-2023, 30-09-2023, 13-10- 2023,26-10-2023, 01-11-2023, 07-11-2023, 05-12-2023, 19-12-2023, 28-12- 2023, 06-01-2024, 16-01-2024, 25-01-2024, 08-02-2024, 17-02-2024, 29-02- 2024, 06-03-2024 and on 13-03-2024. Entire Roznama of the proceeding for the above period is forwarded with this report.

I would like to submit your honour that, during the course of evidence special P.P. Mr. Naik went under eye surgery and on one or two occasion Ld Adv. Mr. Kakan could not attend the matter on death of his relative. In this mater Ld. Counsel for the accused Mr. Kakan who is attending court from Yavatmal and considering the availability of all the advocates and Special Public Prosecutor, the matter is kept oon board from time to time and evidence is recorded continuously. Hence, matter is not delayed. In the exceptional dates, evidence could not be recorded for non availability of witness as witness Sardesai was not feeling well and he was at Amravati, who was forwarded Medical Certificate of Civil Surgeon Amravati on 05/12/2023.

However, on each and every date evidence in this matter is recorded. I would like to further submit Your Honour that as on today prosecution has examined 79 witnesses and the evidence of witness No.80 is going on. So, when the matter is transferred to this Court it is expedited and short dates are given. So there is no delay caused by the prosecution or from the accused side. Matter is regularly part heard and matter is in progress day by day.

It is prayed to Your Honour that this court is having lots of under trial matters as well as time bound matters. In this case as the prosecution has examined 80 witnesses and the evidence of prosecution is going on. Considering the number of witnesses, I most respectfully submit to Your Honour that this matter may be time bound to be decided till 30th June 2024, because the evidence of the prosecution is yet to be completed, which is at last stage. Thereafter statement under Sec. 313 Cr.P.C. is to be recorded regarding 80 witnesses, then if any defense witness and argument of both the sides will take some time.”

14) Evidently, the prosecution has till date examined 79 witnesses and 80th witness is in the witness box. The learned Additional Sessions Judge has categorically stated that delay has not been caused by the prosecution or accused. The matter has been regularly kept on board and evidence has been regularly recorded from 1st July, 2023.

15) Nonetheless, a period of 11 years can only be said to be an inordinately long period of incarceration, as an under-trial prisoner, even in the context of punishment under Section 302 of the Penal Code, 1860.

16) It is a matter of record that the co-accused have been released on bail by the Supreme Court and this Court. By an order dated 27th July, 2023, Emanuel Amolik (A2) was released on bail by the Supreme Court taking into consideration the fact

that all the witnesses, except Investigating Officer and Medical Officer, were examined and accused No. 2 had been incarcerated for a period of about 10 years. Likewise, Arif Gulam Dastgir Shaikh (A.11) was released on bail by the Supreme Court as the said accused was incarcerated for almost 9 years.

17) On the basis of the aforesaid orders, this Court released co-accused Kailash Gummaneh (A8) by an order dated 14th September, 2021, and Fransis Devraj Chouri (A7), by an order dated 14th December, 2022. Both of whom had been in custody for more than 9 years.

18) It is trite that a long period of incarceration without a real prospect of the expeditious conclusion of trial furnishes a justifiable ground for the release of the accused on bail as such prolonged detention as an under-trial prisoner infringes the right to speedy trial, a facet of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India.

19) Courts have been releasing the persons, who have spent a long period as an under trial prisoner *de hors* the merits of the claim for bail. Such prolonged period of incarceration as an under trial prisoner is considered a ground for the exercise of discretion to release the accused on bail, even in cases where

there are statutory restrictions in the matter of grant of bail like the provisions in UAPA, NDPS Act, 1985 and MCOCA, 1999. In the case of **Union of India V. K.A. Najeeb**¹, the Supreme Court enunciated that statutory restrictions meltdown where there is a prolonged period of incarceration.

20) In the facts of the case, whether the Court would be justified in exercising its discretion to release the applicants on bail by applying the principle of parity? On the aspect of the period of detention, the applicants have in fact undergone a couple of years more incarceration than the co-accused, who have been released on bail. The issue, thus, essentially boils down to the role of the applicants in the alleged offences.

21) It is true, while opposing the grant of bail to the co-accused, the prosecution had adverted to the gravity of the accusation and the fact that those co-accused were principal confederates especially in the case of Emanuel Amolik (A2), and yet bail was granted. However, the nature of the accusation and evidence in support thereof qua the applicants, prima facie appears to be quite distinct.

22) A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of **Tarun Kumar vs.**

1 (2021) 3 SCC 713

Assistant Director Directorate of Enforcement², wherein the Apex Court repelled the contention on behalf of the appellant therein to grant bail on the ground that the other co-accused who were similarly situated as the appellant therein, have been granted bail. The Supreme Court observed, “it may be noted that parity is not the law. While applying the principle of parity, the Court is required to focus upon the role attached to the accused whose application is under consideration”.

23) I am conscious that as the trial is at the fag end and the evidence of as many as 79 witnesses has been recorded, at this stage, any observations by this Court may have the propensity to influence the trial. Yet, since the applicants are claiming parity, the Court is constrained to look into the role attributed to the applicants.

24) Suffice it to note that *prima facie* there is material to indicate that applicant No. 1 fired at the deceased. Applicant No. 2 unleashed blows by means of Chopper. Apart from the ocular account, the act of the applicants is captured in the CCTV footage. Applicant No. 1 appears to be wearing the uniform of a security guard and seen firing at the deceased. Applicant No. 2 is allegedly seen giving blows by means of Chopper. What

2 AIR 2024 SCC 169

weight is to be attached to this evidence is undoubtedly a matter for consideration at the trial. However, since the accusation is that the applicants allegedly killed the deceased as contract killers and, prima facie, there is evidence against the applicants, in my considered view, the applicants claim for parity with the co-accused, who were alleged to be the conspirators, abettors, accessory before the fact and accessory after the fact, ought to be rejected.

25) In the backdrop of the facts of the case, the apprehension on the part of the prosecution also appears well founded. In the totality of the circumstances, I am not inclined to exercise the discretion in favour of the applicant.

26) I am impelled to take this view also in view of the report of the learned Additional Sessions Judge that the trial is likely to be concluded by the end of June, 2024.

27) Hence, the following order

ORDER

1. The application stands rejected.
2. By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of

entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicants and the co-accused, and the trial court shall not be influenced by any of the observations made hereinabove.

3. In view of rejection of the Bail Application, the Intervention Application also stands disposed.

[N. J. JAMADAR, J.]