

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1314 OF 2022

Abu Bakar Rashid Shaikh
Versus
The State of Maharashtra

...Appellant
...Respondent

....

Mr. Mubin Solkar a/w Mr. Tahir Hussain, Anas Shaikh, Hemal Shaikh i/
by Tahera Qureshi, Advocate for the Appellant.

Mr. V. A. Kulkarni, APP for the Respondent – State.

PSI R. S. Chaudhari, Crime Branch Bhiwandi, Thane City is present.

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**CORAM : PRAKASH D. NAIK &
N. R. BORKAR, JJ.**

DATE : 19th APRIL 2024

P.C.:-

1. The appeal is listed before us in view of Administrative directions.
2. The appellant was arrested on 03rd June 2017. He is seeking bail in MCOCA Special Case No. 10 of 2012 and 06 of 2013.
3. The case of the prosecution in brief is as under:

The first informant is resident at Bhiwandi. He is a member of Vishwa Hindu Parishad. He has office at Bhiwandi. He is an Advocate by profession. He had gone to the Bhiwandi Court wherein, he was threatened

by accused No.1. Complaint was lodged with the Commissioner of Police. He was granted police protection. On 03rd August 2012, the complainant was travelling in his car along with his armed bodyguard. Three shots were fired at him from the fire arm. One of the bullets grazed his right upper arm. The complainant's bodyguard got down from the vehicle to ascertain, who had fired. He could not see anyone. He called police control room and informed them about the incident. FIR was registered with Nizampura Police Station, Bhiwandi vide C.R. No.I-131 of 2012 under Sections 307, 120-B of Indian Penal Code, 1860 and Sections 3, 25, 27 of the Arms Act. Investigation proceeded. Co-accused were arrested. The provisions of the Prevention of Unlawful Activities Act (for short "UAPA") and Maharashtra Control of Organized Crime Act (for short "MCOC") were invoked. Charge-sheet was filed for the offences under Sections 16(1)(B), 18 of the UAPA Act and Section 3(1)(ii) 3(2) 3(4) of MCOC Act and Section 153-A of I.P.C. were invoked.

4. The Appellant preferred an application for bail before the Special Court. The said application was rejected vide order dated 16th November 2022. The appellant preferred an application for bail before this Court viz. Criminal Bail Application No.1571 of 2019, which was disposed of vide order dated 30th October 2021, by allowing the application to be withdrawn with liberty to apply for bail afresh in the event, the trial is not concluded

within one year. The order referred the submissions of prosecution that, out of total 70 witnesses. 20th witnesses is under cross-examination. Thus, in the said background and having regard to the criminal antecedents in this State and in the State of Uttar Pradesh, the Court was not inclined to show any indulgence.

5. Learned Advocate for Appellant submitted that, pursuant to disposal of the aforesaid application vide order dated 30th October 2021, the prosecution has been able to examine total 26 witnesses and several other witnesses are yet to be examined. The appellant is in custody for seven years. The appellant was in custody in the case registered at Uttar Pradesh. His custody was sought in the present case. The appellant was not absconding. In all the cases, except one the appellant is on bail. There is no cogent evidence to show involvement of the appellant in this crime. The co-accused are granted bail by this Court. While granting bail to the co-accused, this Court has examined the nature of evidence against them and deprecated the theory of conspiracy, recovery of weapon and identification of the accused. From the contents of the FIR it is apparent that, the complainant had no occasion to see the assailants nor the bodyguard of the complainant had occasion to see the assailants, who had fired at the complainant. Thus, there is no identification of the accused by the complainant. The statement of bodyguard of the complainant was recorded

subsequently where he had claimed to have seen certain persons running from the place of incident. Bodyguard has been examined as PW-2. In his examination-in-chief, he has not identified the assailants. The tenor of his cross-examination would indicate that, he had no occasion to see the assailants. In the examination-in-chief, no question was put up by the prosecution about identification of the accused. The tenor of cross-examination would indicate that, he could not identify the assailants. The case of the prosecution is that, the appellant was the pillion rider. The accused No.2 Guddu @ Mohd. Hafiz Hamza Khan was riding the two wheeler. It is alleged that the appellant had fired at injured. The fire-arm was allegedly recovered at his instance. The accused, who were prime conspirators in the crime, were granted bail by this Court by assigning detailed reason. Their orders were confirmed by the Apex Court. The appellant is in custody since seven years. He is entitled to be released on bail on the ground of long incarceration in custody. although, the appellant was granted liberty to move fresh application for bail in the event, the trial is not concluded within one year, period of about 3 years has passed after the previous application was disposed off by this Court. The involvement of the applicant in the crime is not established. The rigors of Section 21(4) of MCOC Act and Section 43(D)(5) of UAPA Act would not be an impediment for granting bail to the appellant. The appellant is in custody for a long period. There are no chances of trial being concluded within short span of

time. In several decisions the Apex Court has held that long incarceration in custody violates Article 21 of the Constitution of India and the accused is entitled for bail. Reliance is placed on the recent decision of the Apex Court in the case of ***Vernon Vs. The State of Maharashtra and Anr.***¹.

6. Learned APP vehemently opposed grant of bail. It is submitted that, offence is of serious nature. The appellant was arrested on 3rd June 2017. He was absconding. The appellant is the main accused. The case of the appellant could be distinguished from the accused, who are granted bail. The appellant had fired at the complainant. The fire-arm used in commission of crime has been recovered. Provisions of MCOC and UAPA has been invoked against the appellant. The appellant is involved in other cases. The appellant has preferred an application for bail before this Court. However, the said application was disposed off with liberty to move afresh application for bail. While adjudicating previous application, the Court did not grant bail to the appellant, considering the involvement of the appellant in other offences, the State contemplating to move application for cancellation of bail of the co-accused. PW-2 is proposed to be recalled for the purpose of identification of the appellant. There is evidence to show that the appellant was conspirator along with co-accused. All the accused had attempted to commit murder. Trial has commenced. The prosecution

¹ 2023 ALL SCR (ONLINE) 610

has examined about 26 witnesses. The trial could be over within short time. The prosecution proposes to examine about 20 more witnesses. Test identification parade was conducted. The accused was identified in the test identification parade. There is strong evidence against the appellant to show his involvement in the crime. Hence, appeal may be rejected. Reliance is placed on decision in the case of Gurwinder Singh Vs. State of Punjab and Anr. ²

7. The alleged incident had occurred on 3rd August 2012. The prosecution case is that, two persons came on the motorcycle and one of them had fired at the complainant. Investigation proceeded. Co-accused were arrested. Charge-sheet was filed. The appellant was in custody in another case. He was arrested in 2017 and since then he is in custody.

8. The involvement of the assailants is primarily based on the identification. From the tenor of the FIR it is apparent that, the complainant had stated that, there was incident of firing. He did not have occasion to see the assailants. His bodyguard got down from the vehicle. Even, he did not see the assailants. Subsequently, statement of bodyguard was recorded. He has been examined as PW-2. He has allegedly identified the assailants in the test identification parade. It was conducted one month after the arrest of the appellant and after a period about five years from the

² 2024 SCC OnLine SC 109

incident. Apparently, during the identification, no overt act is attributed to the accused. The evidence of PW-2 does not indicate that, he has identified the accused in the Court. In the cross-examination, he has stated that he had not seen person firing on Omni Car. He had told the complainant that he had tried to see the assailants but he could not see them.

9. Liberty was granted to move afresh application vide order dated 30th October 2021 if, trial is not concluded within one year. However, the period of three years have passed and it appears that prosecution has examined about six witnesses post order dated 30th October 2021. The appellant is in custody for a period about seven years.

10. Co-accused Guddu @ Mohd. Hafiz Hamza Khan has been granted bail vide order dated 29th October 2015. While granting bail this Court had observed that, the said accused was identified on 10th October 2012. However, no specific role has been attributed to him by identifying witness during test identification parade and supplementary statement of the identifying witness was not recorded. The order indicate that, the Court had raised doubt about several circumstances relied upon by the prosecution. This Court has criticized the theory of conspiracy and other circumstances relied upon by the prosecution. It was also observed that, FIR does not indicate that, the bodyguard of the complainant had seen anyone but on the contrary it is categorically stated that, bodyguard had not seen anyone. The

complainant and his bodyguard had been together after the firing and they had gone to the police station together. The bodyguard was present when the FIR was registered and in spite of that statement was made that the bodyguard was not seen anyone in the FIR. When the statement of the bodyguard was recorded, he did not state about having seen two persons going away on motorcycle, after the firing, but in view of the said fact that FIR mentions that, he had not seen anyone that there is conflict in the material collected during investigation in that regard, is obvious. In paragraph 17 it was observed that, firing had actually taken place, is not free doubt. The accused Shamil Saquib Nachan has been granted bail by the learned Single Judge vide order dated 6th May 2013 and accused Aakif Ateeque Nachan was granted bail vide order dated 13th August 2013. These orders were confirmed by the Hon'ble Apex Court.

11. In the case of ***Vernon Vs. State of Maharashtra and Anr.*** (supra), the Apex Court had observed that, the accused therein were in custody for five years. In the cases the ***Union of India Vs. K. A. Najib***³ and ***Angela Harish Sontakke Vs. State of Maharashtra***⁴, delay in trial was considered to be a relevant factor while examining the plea for bail of the accused. Fundamental proposition of law was laid down that bail restricting clause cannot denude the jurisdiction of a constitutional court in testing if

3 [(2021) 3 SCC 713]

4 [(2021) 3 SCC 723]

continued detention in a given case would breach the concept of liberty enshrined in Article 21 of the Constitution of India, would apply in case where such bail restricting clause is being invoked on the basis of materials with prima facie low-probative value or quality.

12. In several like other decisions of the Apex Court which has been held that rigors of the provisions would melt down when there is no likelihood of trial would be completed within reasonable time and the period of incarceration is already undergone has exceeded for substantial part of prescribed sentence.

13. Considering the material on record and the fact that, the appellant is in custody for a period about seven years. The restrictions for grant of bail provided under MCOC Act and UAPA would not be an impediment for grant of bail. Even on merits considering the nature of evidence, observations made by this Court while granting bail to co-accused, would satisfy the requirement of grant of bail in consonance with Section 21(4) of MCOC Act and Section 43(D)(5) of the UAPA Act.

ORDER

- (i) Criminal Appeal No. 1314 of 2022 is allowed;
- (ii) The appellant is directed to be released on bail in connection with MCOCA Special Case No.10 of 2012 and

06 of 2013 arising out of FIR dated 4th August 2012 vide C.R. No. I-131 of 2012 registered with Nizampura Police Station, on executing PR bond in the sum of Rs. 50,000/- with one or more sureties in the like amount;

- (iii) The appellant shall report to the trial Court on First Monday of each calendar month, till the disposal of the appeal.
- (iv) The appellant shall provide details of his place of residence to the trial Court.
- (v) the appellant shall not tamper with the evidence.
- (vi) Appeal stands disposed off.

(N. R. BORKAR, J.)

(PRAKASH D. NAIK, J.)