

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

***INTERIM APPLICATION NO.4209 OF 2025
IN
CRIMINAL APPEAL NO.802 OF 2018***

Faisal Ataur Raheman Shaikh
Age – 48 Years
Residing at – 203, Trupati Balaji Society,
Naya Nagar Meera Road,
Dist: Thane 401107 Presently
lodged at – Yerwada Central Jail

...Applicant
(Org. Accused No.19)

Versus

The State of Maharashtra
(At the instance of ATS, Kalachowki
Police Station, L.A.C. No.3 of 2006)
(Through P.P. High Court of Bombay)

...Respondent
(Org. Complainant)

Dr. Yug Mohit Chaudhry with Ms. Payoshi Roy for the Applicant.

Mr. J. P. Yagnik, Addl.P.P. for the Respondent-State.

***CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.***

DATE : 23rd FEBRUARY 2026

ORDER (Per Manjusha Deshpande, J.) :

1. By this Application, the Applicant seeks suspension of his sentence and enlargement on bail, pending the hearing and final disposal of his Appeal.

2. The case of the prosecution in short is that on 8th May 2006, a secret information was received by the DCP, ATS Mumbai that, a large quantity of arms and explosives would be transported in Marathwada region. In furtherance of the information received, the ATS have intercepted one Tata Sumo vehicle on 9th May 2006 at 8:30 p.m. Accused No.1-Amer was brought to Khultabad Police Station where the accused No.1 disclosed that the boxes in the vehicle contained arms and ammunition along with explosives i.e. AK 47 rifles, 40 magazines, 200 live cartridges and 30 kg explosives. Upon recovery of the arms and explosives, ATS P.I. Deshmukh registered Crime No.3 of 2006 at ATS Police Station, Mumbai under Section 4 and 5 of the Explosive Substances Act, 1908 read with Section 5, 6 and 9B of the Explosives Act, 1884, read with Section 3 and 25 of the Arms Act 1959, read with Section 16 and 18 of the Unlawful Activities (Prevention) Act, 1967 ('UAPA').

3. Dr. Yug Mohit Chaudhry, learned advocate for the Applicant submits that the Applicant was arrested on 27th July 2006 in C.R. No.77 of 2006 in the Mumbai Train Blast Case. While in the custody of the ATS, Mumbai in the Train Blast case on 24th August 2006, the Applicant was

interrogated by Mr. Arvind Kumar Singh, Assistant Director, Enforcement Directorate, under Section 37 of Foreign Exchange Management Act, 1999 (FEMA) and his confession was recorded. Similarly, his confession was also recorded on 5th October 2006 by DCP Brijesh Kumar Singh under Section 18 of MCOCA in the Train Blast case.

Both these confessions which have been relied for convicting him in the present case have been held to be inadmissible and discarded by this Court in Confirmation Case No.2 of 2015 i.e. the Train Blast case. The allegations against the Applicants are that he had assisted the absconding accused Faiyaz to get a Visa and travel to Pakistan via Iran.

It is the case of the prosecution that while the I.O. (PW87) was interrogating accused No.17-Firoz Deshmukh (acquitted) it was revealed that the Applicant (accused No.19) was also involved in the present offence.

The prosecution has produced copies of confession of the Applicant (accused No.19) recorded by the DCP, Brijesh Kumar Singh under MCOCA and the confessional statement recorded by Arvind Kumar Singh under Section 37 of the FEMA in the Train Blast Case, along with the Certified Copy of deposition of witnesses recorded in the MCOCA Special Case No.21 of 2006, which were marked as Articles 245, 256 and 247 and Exhibit 2064B, 2064C. This was the only evidence produced against the

Applicant. Neither of the officers who recorded the confessional statements have been examined in the present case. Even the statements of the witnesses, recorded under Section 164 of the Criminal Procedure Code ('Cr.P.C') along with panchanama have also been produced through PW80 in the present case and marked as Articles 220–222, no witnesses have been examined for the same in the present case.

4. It is submitted that the confessional statement recorded in the MCOCA Special Case No.21 of 2006 are not admissible in evidence, unless it is proved by examining the witnesses as contemplated under Section 33 of the Evidence Act, 1872. Since the only evidence available against the Applicant for recording his conviction were his confessional statements, which could have evidentiary value only if they were brought on record by examining the officers/persons who had recorded the confessional statements. Even otherwise the confessional statements relied by the prosecution have been held to be obtained by torture in the Confirmation Case No.2 of 2015 by this Court while acquitting the present applicant along with the other accused.

5. Mr. Chaudhry submits that in view of the aforementioned legal position the applicant has very good case on merits and fair chance of acquittal in the Appeal. He further submits that the Applicant has undergone imprisonment for more than 19 years since his arrest on 27th July 2006, since the present Appeal is not likely to be taken up for hearing in the immediate future, the Application of the Applicant deserves to be allowed by suspending the sentence and releasing him on bail.

6. The learned Addl.P.P. Mr. J. P. Yagnik while resisting the Application would submit that there are two confessional statements of the Applicant recorded by the Directorate of Enforcement, Mr. Arvind Kumar Singh and the DCP Mr. Brijesh Kumar Singh in MCOCA Case, which are recorded after following due procedure of law and have an evidentiary value. Although the judgment has been delivered by this Court acquitting the present Applicant in Confirmation Case No.2 of 2015, the fact remains that the Hon'ble Apex Court has stayed the operation of the said judgment by directing that the said judgment shall not be treated as a precedent in any other pending proceedings.

It is submitted that the accused has been found guilty of serious offences related to terrorist and unlawful activities against the State.

Considering the seriousness of the charges against him, his application does not deserve consideration. If he is released on bail there is every likelihood of the Applicant evading the present proceedings in the pending Appeal to avoid the remainder of sentence imposed upon him. Thus, according to him the application does not deserve consideration.

7. We have heard the learned advocate for the Applicant, the learned Addl.P.P. for the State and we have also perused the documents placed on record. It is not in dispute that the two confessional statements recorded by Mr. Brijesh Kumar Singh and Mr. Arvind Kumar Singh, recorded in MCOCA Special Case No.21 of 2006 have been relied by the Special Court for convicting the Applicant in the present case and that is the only substantive evidence against him. This position has been conceded by Mr. Yagnik, learned Addl.P.P. for the State.

8. The learned Special Judge while convicting the Applicant in paragraph no. 1698 has made following observations, which are reproduced hereinbelow:

“1698. So far as accused Faisal is concerned, the substantive evidence against him are his own confessions. One recorded by Shri. Brijesh Kumar

and another by Shri. Arvind Singh. This court has already accepted both the confessions being tendered voluntarily, truthful and corroborating each other in all material particulars.”

Based on these observations, the participation of the Applicant is held to be proved in the said offence. The advocate for the Applicant as well as the learned Addl.P.P. are in agreement about the fact that this is only evidence available against the Applicant.

9. As regards the admissibility of the confessional statements recorded in MCOCA Special Case No.21 of 2006 for recording conviction in the present case is concerned, merely confessional statements have been placed on record without examining the witnesses in order to prove the same. The officers recording the statements have not been examined to prove it. Reliance is placed on the certified copy of the evidence of the respective officers recorded in MCOCA Special Case No.21 of 2006, but none of them have been examined in the present case.

Section 33 of the Evidence Act, 1872 permits the evidence given by a witness in a judicial proceeding to be used in a subsequent judicial proceeding or in a later stage of the same judicial proceeding. Though Section 33 permits such evidence to be relied in the subsequent proceedings,

however it is permissible only upon fulfillment of conditions set out in Section 33 of the Evidence Act, 1872. Section 33 of the Evidence Act reads thus:-

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. —

Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided —

that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

10. Upon perusal of the aforementioned provision, it can be evinced that only on fulfillment of conditions as aforestated the evidence given by the witness, can be relied in the subsequent judicial proceedings. In the present case none of the conditions mentioned are fulfilled to attract

Section 33 of the Evidence Act. If at all the prosecution was desirous of relying on the confessional statements of the Applicant, it was necessary to be proved by examining witnesses who were very much available, which has not been done in the present case.

It would be apposite to rely on the observations of the Privy Council in the celebrated case of *Bal Gangadhar Tilak and Others v/s Shrinivas Pandit and Others*¹ on Section 33 of the Evidence Act. The relevant portion of the judgment throwing light on its interpretation is reproduced hereinunder:-

“.....

Under section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds-

“when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way, & c.”

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done.....”

1 AIR 1915 PC 7

11. In the present case none of the conditions enumerated in the Section is fulfilled so as to enable the prosecution to import the confessional statement recorded in MCOCA Special Case No.21 of 2006. We do not find any observations in the judgment recorded by the Special Judge, about unavailability of the witnesses, in the previous case to be examined in the present case, in order to rely on the confessional statements.

This application has been filed by the Applicant by invoking Section 389 of Cr.P.C. with a prayer for suspension of sentence and grant of bail during the pendency of Appeal. The Applicant is undoubtedly charged with serious offences under the UAPA, where there is a bar for grant of bail under Section 43-D(5). It is settled law that in cases involving serious offences, only in exceptional circumstances the benefit of suspension of sentence can be granted.

Considering the ground about inadmissibility of confessional statement recorded in the previous criminal proceedings relied in the present proceedings by the Special Judge, under Section 33 of the Evidence Act, and there being no other evidence against the Applicant, we find that the case of Applicant is an exceptional case, where this Court needs to exercise the powers granted under Section 389 of the Cr.P.C. to meet the ends of justice.

Upon *prima facie* consideration of the case of the Applicant, we find that he has every likelihood of succeeding in the Appeal, in view of the above legal position. In fact, if he is not enlarged on bail, it would amount to curtailing the right to life and personal liberty of the Applicant as guaranteed under Article 21 of the Constitution of India, importance of which has been time and again emphasized by the Hon'ble Supreme Court holding that Article 21 of the Constitution of India is applicable irrespective of the nature of crime.

We are guided by the judgment of the Hon'ble Apex Court in case of ***Union of India v/s K. A. Najeeb***² wherein the Apex Court has held that presence of statutory restrictions of Section 43-D(5) of UAPA *per se* does not oust the ability of constitution Courts to grant bail on the grounds of violation of Part III of the Constitution. Further observing that both the restrictions under a statute as well as powers exercisable under the Constitutional jurisdiction can be well harmonised.

Incidentally the co-accused of the Applicant i.e. accused (A10) Bilal Ahmed Razaq as well as accused (A14) Afroz Pathan have been granted bail by this Court on 15th July 2022 and 22nd June 2023, respectively.

2 AIR 2021 SC 712

In the wake of observations made hereinabove, we are in agreement with the submissions of Mr.Chaudhry, questioning the admissibility of confessional statements of the accused recorded in the previous proceedings, relied in the subsequent proceeding, without fulfilling the conditions stipulated in Section 33 of the Evidence Act, needs consideration. However, this legal issue can be addressed only while deciding the appeal. Since this Appeal is not likely to be taken up for hearing in the near future and considering that the applicant has already undergone imprisonment for a period of more than 19 years, it would be unjust to keep him under further incarceration till the decision of the Appeal.

12. Accordingly the Application is allowed and the Applicant's sentence is suspended by enlarging him on bail pending the hearing and final disposal of Appeal, on the following terms and conditions :-

ORDER

- i) The Applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;
- ii) The Applicant shall report to the office of the ATS, Mumbai, on first Monday of the every month between 09:00 a.m. and 05:00 p.m., till the final disposal of the Appeal ;

- iii) The Applicant shall keep the ATS, Mumbai, informed of his current address and mobile contact number and/or change of residence or mobile details, if any, from time to time;
- iv) The Applicant shall surrender/deposit his passport, if any, before the ATS, Mumbai, before his release;
- v) The Applicant shall not leave the State of Maharashtra without the permission of this Court;
- vi) If there are two consecutive defaults in appearing before the ATS, Mumbai, the concerned officer shall make a report to this Court and the prosecution would be at liberty to file an Application seeking cancellation of bail.

13. Interim Application is allowed in the aforesaid terms and is accordingly disposed of.

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

MANJUSHA DESHPANDE, J.

BHARATI DANGRE, J.