

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 1110 OF 2022**

Mohammed Zakir Abdul Haque Shaikh

... Appellant

V/s.

State Of Maharashtra

... Respondent

Mr. Mihir Desai, Senior Advocate i/b Ms. Tahira Qureshi for Appellant.

Mr. A. M. Chimalkar, Special PP a/w Mr. Siddharth Jagushte a/w Ms. S. D. Shinde APP, for Respondent State.

**CORAM : A.S. GADKARI AND
PRAKASH D. NAIK, JJ.****DATE : 2nd MARCH, 2023.****PC. :**

1. Present Appeal under Section 21 of the National Investigation Agency Act (for short "*NIA Act*") impugns Order dated 19th August, 2022 passed in Bail Application filed below Exh-597 in Sessions Case No. 4 of 2015 arising out of C.R. No. 152 of 2008 registered with Matunga Police Station for the offences punishable under Sections 295(A), 505 (2), 507, 506 (II), 120 (B), 121, 122 & 286 of the Indian Penal Code (*for short "IPC"*) r/w Sec 3, 25 of the Arms Act r/w Section 6 & 9 (B) of the Explosives Act, 1884 r/w. Section 4 & 5 of the Explosive Substance Act, 1908 r/w. Section 13(1)(a)(b), 16, 18, 19, 20 of the Unlawful Activities (Prevention) Act, 1967 (*for short "UAPA"*) r/w. Section 66 of the Information Technology Act, 1967 r/w Section 66 of the Information Technology Act, 2000 r/w. Section 3(1)(ii), 3(2), 3(4) of the Maharashtra

Control of Organized Crimes Act, 1999 (MCOCA) by the learned Special Judge under MCOCA, TADA, POTA & NIA City Civil and Sessions Court, Mumbai, rejecting the Application for bail preferred by the Appellant under Section 439 of the Code of Criminal Procedure (*for short "Cr.PC."*).

2. Heard Mr. Desai, learned Senior Advocate for Appellant and Mr. Chimalkar, learned Special PP for Respondent State. Perused record and Affidavit-in-reply dated 23rd January, 2023 filed by Assistant Commissioner of Police, (D Special), DCB CID, Mumbai, of the Investigating Agency.

3. This is consecutive Application for bail by Appellant. The earlier Application bearing Criminal Bail Application No. 1878 of 2015 preferred by Appellant was rejected by the learned Single Judge of this Court (Mr. Prakash D. Naik, J.) by its Order dated 1st July, 2017. The said Order was challenged by Petitioner before the Hon'ble Supreme Court by way of Special Leave Petition (Criminal) Diary No(s). 9190 of 2018. The Hon'ble Supreme Court by its Order dated 13th August, 2018 was pleased to dismiss the said Special Leave Petition.

4. By relying on a decisions of the Hon'ble Supreme Court in case of *Kalyan Chandra Sarkar V/s. Rajesh Ranjan @ Pappu Yadav And Anr. reported in (2005) 2 SCC 42 : (2005) SCC (Cri) 489 : (2005) SCC OnLine SC 117*, Mr. Desai, learned Senior Advocate for Appellant submitted that, there is now a substantive change in circumstance than was prevailing on 1st July, 2017 when the earlier Application for bail by the Appellant was rejected by this Court. He submitted that, Appellant has now been

acquitted by the Special Court at Ahmedabad on 8th February, 2022 from the case, which is colloquially known as Ahmedabad Blast case. He further submitted that, he is not contesting present Application on merits as this Court has already decided the earlier Bail Application No. 1878 of 2015 on merits. However by the present Appeal, the Appellant seeks his release on bail only on the ground of prolonged incarceration without trial. He submitted that, Appellant has been arrested on 24th September, 2008 in the present crime and since then for last about 14 years and 4 months he is behind bars without trial. He submitted that, though in the present case the trial Court has framed charge on 23rd December, 2013, till date the prosecution has not examined even a single witness in support of its case. That, in the present case the prosecution has cited 82 witnesses as per the list of witnesses submitted alongwith charge-sheet. It may take considerable time to examine 82 witnesses and to conclude the trial. He submitted that, speedy trial is a right of every accused and keeping the accused in jail without speedy trial would amount to violation of fundamental right as enshrined in the Constitution of India. He submitted that, minimum sentence prescribed under Section 18 of the UAPA is five years of imprisonment and assuming for the sake of argument that, the Appellant is convicted for the charges levelled against him, he has already undergone the minimum sentence prescribed under the said Act. He submitted that, presence of statutory restriction as contemplated under Section 43D (5) of the UAPA per say does not oust the ability/power of Constitutional Courts

to grant bail on the ground of violation of fundamental rights guaranteed under the Constitution of India. In support of his contention, he relied on the decisions of the Hon'ble Supreme Court in the cases namely ;

(i) Kalyan Chandra Sarkar V/s. Rajesh Ranjan @ Pappu Yadav And Anr. (Supra) ; (ii) Rajesh Ranjan @ Pappu Yadav V/s. State of Bihar And Anr. decided in Petition (s) for Special Leave to Appeal (Cri.) No. 1645 of 2002 by its Order dated 10th May, 2022 ; (iii) State of Maharashtra V/s. Captain Buddhikota Subha Rao, reported in (1989) Supp (2) SCC 605 ; (iv) Kunhayammed And Ors. V/s. State of Kerala And Anr., reported in (2000) 6 SCC 359 : (2000) SCC OnLine SC 1008 ; (v) Ashim Alias Asim Kumar Haranath Bhattacharya Alias Asim Harinath Bhattacharya Alias Aseem Kumar Bhattacharya V/s. National Investigation Agency, reported in (2022) 1 SCC 695 ; (vi) Mohammed Zakir Abdul Haque Shaikh V/s. The State of Maharashtra, in Criminal Bail Application No. 1878 of 2015 by Order dated 1st July, 2017; (vii) Anil Shankar Patil V/s. The State of Maharashtra, in Bail Application No. 33 of 2022 by Order dated 29th July, 2022.

5. Mr. Chimalkar, learned Special PP fairly conceded to the facts pertaining to the present status of the case stated by Mr. Desai and submitted that, appropriate Orders in the interest of justice may be passed.

6. The Hon'ble Supreme Court in the case of *Union of India Vs. K.A. Najeed (Supra)* in paragraph Nos.10, 11, 12, 15 and 17 has held as under:-

“10. It is a fact that the High Court in the instant case has not

determined the likelihood of the respondent being guilty or not, or whether rigours of Section 43-D(5) of UAPA are alien to him. The High Court instead appears to have exercised its power to grant bail owing to the long period of incarceration and the unlikelihood of the trial being completed anytime in the near future. The reasons assigned by the High Court are apparently traceable back to Article 21 of our Constitution, of course without addressing the statutory embargo created by Section 43-D(5) of UAPA.

11. *The High Court's view draws support from a batch of decisions of this Court, including in Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616 : 1996 SCC (Cri) 366, laying down that gross delay in disposal of such cases would justify the invocation of Article 21 of the Constitution and consequential necessity to release the undertrial on bail. It would be useful to quote the following observations from the cited case: (SCC p.622, para 10)*

“10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] , on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.”

(emphasis supplied)

12. *Even in the case of special legislations like the Terrorist*

and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi) (1999) 9 SCC 252 : 1999 SCC (Cri) 1156, Babba v. State of Maharashtra (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118 and Umarmia v. State of Gujarat (2017) 2 SCC 731 : (2017) 2 SCC (Cri) 114 enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.”

- “15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not

be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.”

“17. *It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.*

7. The said decision of the Hon’ble Supreme Court in the case of *Union of India V/s. K. A. Najeeb (Supra)* has been followed by the learned Single Judges of this Court in atleast three decisions, rendered respectively by them.

8. In the present case, as noted above, the Appellant has been arrested on 24th September, 2008. The prosecution framed charges against the Appellant on 23rd December, 2013 i.e. approximately after five years of

his date of arrest and till date in last more than nine years the trial of the said case has not progressed.

Mr. Chimalkar, learned Special PP pointed out that, in the interregnum, the Appellant was tried at Ahmedabad in the said blast case and therefore the Appellant was not available for trial in the present case at Mumbai.

9. There are 82 witnesses cited by the prosecution in the list of witnesses annexed to the charge-sheet. The possibility of conclusion of trial of the present case in near future appears to be remote. Taking into consideration the fact that, the Appellant is behind bars in present case for more than 14 years and 4 months for an offence/offences which are punishable with minimum five years of imprisonment and after applying the aforementioned principles of law as enunciated by the Hon'ble Supreme Court, the Appellant can be enlarged on bail.

10. Hence the following Order :

- (i) Appellant be released on bail in Sessions Case No. 4 of 2015, arising out of C.R. No. I-152 of 2008 registered with Matunga Police Station, Mumbai on his executing P.R. bond in the sum of Rs.1,00,000/- (Rs. One Lakh Only) with one or two solvent local sureties in the same amount.
- (ii) Appellant shall not leave jurisdiction of Districts of Mumbai, Thane and Pune without prior permission

from the trial Court.

- (iii) Appellant shall attend office of CIU, DCB CID, Mumbai on every first Monday of the month between 10.00 am and 12.00 noon initially for the period of one year and thereafter on every first Monday of every third calendar month i.e. four times in a year, till the conclusion of the trial.
- (iv) Appellant shall not in any way directly or indirectly attempt to contact, pressurize or threaten either complainant or any of the witnesses in the present case.
- (v) Appellant shall not tamper with the evidence and/or influence the prosecution witnesses.

10. Appeal is allowed in the aforesaid terms.

(PRAKASH D. NAIK, J.)

(A.S. GADKARI, J.)