

(2010) 02 BOM CK 0150
In the Bombay High Court
Case No : Criminal Appeal No. 1076 of 2008

Adnan Bilal Mulla

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-02-2010

Acts Referred:

Constitution of India, 1950 — Article 20, 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 167, 439, 46
Maharashtra Control of Organised Crime Act, 1999 — Section 21(4), 24, 3(2)
Penal Code, 1860 (IPC) — Section 143, 147, 149, 225, 341
Prevention of Terrorism Act, 2002 — Section 20, 21(1)(4), 3, 32(1), 34

Citation : (2010) CriLJ 1990

Hon'ble Judges : V.K. Tahilramani, J; B.H. Marlapalle, J

Bench : Division Bench

Advocate : Akhil Sibbal, instructed by Mubin Solkar, for the Appellant; Aruna Pai, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—Heard the learned Counsel for the appellant. Admit.

2. Mrs. Pai, the learned Addl. P.P. waives service for the respondent - State of Maharashtra.

2A. Print dispensed with as the private paper book copies have been circulated. Appeal is heard finally.

3. The appellant in this appeal, filed in the second round u/s 34 of the Prevention of Terrorism Act, 2002 (the POTA for short) by accused No. 15 in POTA Special Case No. 2 of 2003, prays for being released on bail.

4. The appellant is a resident of village Borivali, Post - Padgha, Taluka - Bhiwandi, District - Thane and he was initially shown wanted in C.R. No. 25 of 2003 registered with the Padgha Police Station on 27/3/2003 for the offences punishable under Sections 143, 147, 149, 225, 341, 353 and 355 of I.P.C. This

complaint pertains to the alleged incident of obstruction put up by the villagers of Borivali to the Padgha police and the police officials of DCB - CID, Mumbai on 27/3/2003, when a heavy police contingent of Mumbai Crime Branch led by Sr. P.I. Pradeep Sharma and Daya Nayak had gone to village Borivali - Padgha for arresting accused No. 1 - Saquib Nachan in connection with the offence of Mulund Bomb blast being DCB-CID C.R. No. 21 of 2003. As per the appellant, as the police were making rounds to his house, he surrendered to the Padgha police on 5/5/2003 and on the same day he was handed over to the officers of the Mumbai Crime Branch. His marriage was scheduled on 24/5/2003 and it could not be performed as he was illegally detained by the officials of DCB - CID from 5/5/2003 to 9/6/2003, on which day he was shown to be arrested and was produced before the Special Court on 10/6/2003 as accused No. 15 in DCB-CID C.R. No. 21 of 2003. A combined charge-sheet came to be filed in respect of three Bomb blasts i.e. (a) Mumbai Central - taken place on 6/12/2003, (b) Vile-Parle - taken place on 27/1/2003 and (c) Mulund - taken place on 13/3/2003. He applied for being released on bail in Bail Application No. 14 of 2004 before the Special Court and the same was rejected on 18/1/2005. He approached this Court in Criminal Appeal No. 298 of 2005 and it was dismissed on 24/2/2006 by the Division Bench. He claims that in response to his application made under the Right to Information Act on 17/4/2007, he received some additional information/material on 23/5/2007 and based on that he preferred a fresh bail application registered as Bail Application No. 5 of 2007 before the Special Court on 5/6/2007. While the said application was pending before the Special Court, he filed Criminal Writ Petition No. 2188 of 2007, in which an order came to be passed on 10/3/2008, directing the learned Principal Sessions Judge for Greater Mumbai to conduct a judicial inquiry and submit report to this Court on the allegations of his illegal detention from 5/5/2003 to 9/6/2003. The Principal Sessions Judge conducted the inquiry and submitted his report on 8/7/2008 and a copy of the same was also placed before the Special Court in the pending bail application. However, the Special Court rejected the second Bail Application, as well, on 9th/10th September, 2008 and hence this appeal in the second round for being released on bail.

5. The appellant has also pointed out that against the order dated 24/2/2006, dismissing Criminal Appeal No. 298 of 2005, he has filed SLP (Cri) No. 2360 of 2006 and the same is pending before the Apex Court. It is the case of the appellant that notwithstanding the pendency of the said SLP, his fresh plea for bail is required to be considered on account of the changed circumstances and as per him the learned Special Judge failed to consider his plea of changed circumstances and while passing the impugned order dated 9th/10th September, 2008, the Special Court was overwhelmed by the observations made by this Court in its earlier order dated 24/2/2006.

It has been pointed out that the trial in POTA Special Case No. 2 of 2003 has been stayed by the Supreme Court as per the order dated 18/10/2005 and the said order continues as of now. As many as three accused i.e. accused No. 2 -

Atif Nasir Mulla, accused No. 4 - Gulam Akbar Khotal and accused No. 10 - Arif Hussain Sabir Hussain Shaik @ Arif Panwale have been released on bail. As per the enquiry report dated 8/7/2008 submitted by the Principal Sessions Judge, the appellant was in illegal detention from 5/5/2003 to 9/6/2003 and he was picked up as a witness but when he refused to give statements against the main accused - Nachan, he was shown as an accused and for doing so he was shown to have been arrested on 9/6/2003. Our attention has been drawn to the observations made in the inquiry report, as under:

...As only bailable offence was registered in Padgha police station, his further detention in police custody could not have been authorised by Magistrate. Adnan was not produced before the Magistrate from 5/5/2003 till 9/6/2003 and so, in view of Sections 56, 57 and 167 of Cr.P.C. the detention of Adnan during this period was illegal, unauthorized. The arrest was also not made as provided by Sections 46-53 and 58 of Cr.P.C. The procedure was not followed by DCB CID obviously with intention to avoid creating of the record and there is clear probability that investigating agency did not want to make Adnan an accused but it wanted to make him a witness.

Mr. Sibbal also submitted that even the statements recorded under Sections 161 and 164 of Cr.P.C. of some witnesses as well as coaccused did not take the prosecution case any further to show any prima facie evidence so as to result in the conviction of the appellant for the offences punishable either under Sections 3, 4, 5, 20, 21(1)(4) of the POTA. He also relied upon the decisions of the Supreme Court in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, , Ram Govind Upadhyay Vs. Sudarshan Singh and Others, , Dagdu and Others Vs. State of Maharashtra, , Surinder Singh @ Shingara Singh Vs. State of Punjab, , Babba alias Shankar Raghuman Rohida v. State of Maharashtra (2005) 11 SCC 569 and Shaheen Welfare Association Vs. Union of India and others, in support of his fresh plea for bail.

6. Mrs. Pai, the learned Addl. P.P., on the other hand, opposed the appeal. She pointed out that the SLP filed by the appellant against the earlier order dated 24/2/2006 is still pending and the appellant failed to make out any case of changed circumstances to entertain this second bail application. As per Mrs. Pai, the observations made by this Court in the earlier order dated 24/2/2006 regarding parity for being released, as some other accused have been granted bail, the law laid down in Navjot Sandhu's case etc. cannot be reconsidered in this fresh application for bail as the challenge to the said observations is under consideration in the pending SLP. She also submitted that in SLP (Cri) No. 5170-5172 of 2005, leave to appeal has been granted by the Supreme Court on 29/2/2008 further to the stay granted to the trial of POTA Special Case No. 2 of 2003 on 18/10/2005 and the State Government has already filed an application for expeditious hearing of the said appeal. As per Mrs. Pai, as one of the accused has approached the Supreme Court and obtained stay to the trial of the POTA Special Case, the State Government cannot be blamed for the delay caused in

commencing the trial. The inquiry report submitted by the Principal Sessions Judge cannot be relied upon in this appeal as the same is a subject matter for scrutiny in Criminal Writ Petition No. 2188 of 2007, which is pending. The learned Addl. P.P. further submitted that the two circumstances against the appellant are prima facie supported by the prosecution case, namely, (a) he had transported and delivered one AK 47 Rifle to the main accused and (b) he was instrumental as a driver of the Jeep which transported some of the witnesses to the training camp at Mahuli Hills. The impugned order passed by the Special Court does not suffer from any errors in law and, therefore, no interference is called for in the same, so as to release the appellant on bail. She pointed out that the order dated 4/5/2009 passed by the Special Court releasing accused No. 4 on bail is a subject matter of challenge before this Court in Criminal Appeal (Stamp) No. 936 of 2009 for cancellation of the bail and some other coaccused have filed appeals for bail which are pending before this Court, as indicated below:

- i) Cri.Appeal No. 305/09 - Saquib Nachan (Accd. No. 1)
- ii) Cri. Appeal No. 389/09 - Haroon Lohar (Accd. No. 13)
- iii) Cri. Appeal No. 608/09 - Farhaan Khot (Accd. No. 6)
- iv) Cri. Appeal No. 609/09 - Rashid Ansari (Accd. No. 14)
- v) Cri. Appeal No. 612/09-Noor Mohd. Ansari (Accd. No. 7)
- vi) Cri.Appeal No. 679/09-Wahid Jabbar Ansari(Accd. No. 8)
- vii) Cri.Appeal No. 624/09-Hasib Zuber Mulla (Accd. No. 3)

The learned APP also stated that during the pendency of this appeal, the appellant had moved for the third time in Criminal Application No. 89 of 2009 for bail before the Special Court on the ground of parity with accused No. 4 and the same has not been pointed out either in the appeal memo or during the arguments advanced by the learned Counsel for the appellant and the said application has been allowed to be withdrawn on 8/2/2010 by imposing costs of Rs. 1000/-.

7. As noted earlier, this appeal arises from the order rejecting the plea for bail in the second round and, therefore, we are required to consider, whether the appellant has made out a case to point out that the impugned order is required to be set aside and that he is required to be released on bail by considering the changed circumstances, if any. Our earlier order dated 24/2/2006 is already under challenge in the pending SLP filed by the appellant and, therefore, the appeal is required to be considered independent of the reasons set out in the said order and it cannot be held that this appeal is required to be dismissed only because the appellant's plea for being released on bail is a subject matter for consideration before the Apex Court. So far as the third application filed by the appellant before the Special Court is concerned, it has been submitted by the learned Counsel for the appellant that the application was sent directly from the

Jail to the court and it was not within the knowledge of Shri Solkar, the learned Advocate appearing for the appellant.

8. In any case, the application has been allowed to be withdrawn on 8/2/2010 by the Special Court and as of now it is not pending. The letter dated 26/11/2009 received by the Assistant Commissioner of Police, DCB CID, Mumbai from the Additional Government Advocate before the Supreme Court, Government of Maharashtra, states that though a detailed counter affidavit of API Shri Manojkumar R. Mhatre dated 11/8/2006 was filed long time back before the Supreme Court, the appeal was admitted by the Supreme Court on 29/2/2008 and the appellant therein had submitted Cri. Misc. Petition No. 19824-19827 of 2008 praying for early date of hearing. The said application was allowed on 9/1/2009 by directing Cri. Appeal No. 419-421 of 2008 to be listed for final hearing on 28/1/2009. Nonetheless, the appeal could not reach for final hearing and on 24/11/2009 the State Government has filed a Cri. Misc. Petition for vacation of interim stay. The further progress in criminal appeal, in which the trial of the Spl. POTA Case No. 2 of 2003 has been stayed is not known. Mrs. Pai also raised an additional ground contending that the statement made by the co-accused (accused No. 7) goes to show that in April 2002 the present appellant had undergone training of arms and ammunition and preparation of crude bombs imparted by accused No. 7. She also relied upon some literature like 'Al Qaida Manual' found in the panchanama dated 19/4/2003 drawn at medical shop owned by accused No. 1 and alleged that the accused are propagating for a delayed trial.

9. Section 49(6) of the POTA states that notwithstanding anything contained in the Criminal Procedure Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard. As per Section 49(7) of the POTA, where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any rule made there under shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence. The proviso below the said Section is important for our considerations and it reads as under:

Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of Sub-section (6) of this section shall not apply.

(the word "not" is added by the Supreme Court)

The proviso, therefore, makes it clear that if the application for bail is submitted after a period of one year of detention, the provisions of Section 49(6) of the POTA shall not apply and the application will have to be considered on the parameters of Section 439 of Cr.P.C. and this position in law is well settled. At the same time, in the case of Navjot Sandhu (Supra), the Supreme Court held that

the confession made by an accused before a police officer shall be admissible against the maker of the confession in the course of his trial, it may be a joint trial along with some other accused; but, the language of Section 32(1) of the POTA cannot be stretched to bring the confession of the co-accused within the fold of admissibility. By applying this settled legal principle, the confession of the co-accused cannot be read against the present appellant while considering his plea for bail in this appeal.

10. In the case of Gokul Bhagaji Patil Vs. State of Maharashtra and Another, , the Supreme Court was considering the plea for being released on bail of an accused charged under the Maharashtra Control of Organized Crime Act, 1999 (MCOCA). It would be useful to reproduce the following observations in para 10, 13 and 14 of the said Judgment:

10. Since the provisions of MCOCA have been invoked in the present case, in addition to the basic considerations, namely, the nature and seriousness of the offence; the character of the evidence; reasonable apprehension of witness being tampered with and reasonable possibility of the presence of the accused not being secured at the trial, etc.; which normally weigh with the courts for granting bail in nonbailable offences, the limitations imposed in Sub-section (4) of Section 21 of MCOCA need to be kept in view while deciding whether or not the appellant is entitled to bail.

13. It would not be appropriate at this juncture to go into detailed examination of the alleged crime in order to arrive at a positive findings as to whether or not the appellant has committed offences u/s 3(2) or 24 of MCOCA. What is required to be considered is whether in the light of the circumstances, enumerated above; (i) there is a reasonable ground to believe that the appellant is not guilty of the two offences he has been charged with under MCOCA, and (ii) that he is not likely to commit an offence under MCOCA while on bail.

14. We have considered the matter in the light of the inferences drawn by the High Court from the material on record and the role attributed to the appellant. After hearing learned Counsel for the parties, we are of the view that the purported acts of omission and commission on the part of the appellant may not per se bring his case within the ambit of Section 3(2) of MCOCA. Nevertheless, the aforementioned circumstances do tend to indicate that as a public servant he had failed to take lawful measures under MCOCA, attracting the provisions of Section 24 of MCOCA. Having reached this conclusion and bearing in mind the fact that the appellant has been in judicial custody for over three years, the maximum period of sentence contemplated u/s 24 of MCOCA, we are of the view that the appellant deserves to be released on bail.

In the case of Babba (Supra), the accused was in jail since 16/7/1992 and bail was refused. There was no regular TADA Court at Mumbai and TADA case's trial was likely to take some time to commence and, therefore, a fresh bail application was filed. The Supreme Court was pleased to grant bail on certain stringent

conditions.

In the case of State Vs. Amarmani Tripathi, , the Supreme Court held that while considering the application for bail what is required to be looked into is, (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge, (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence bearing repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. It is also equally well settled that when an application for bail is being considered, the period in jail, delay in commencing the trial and the right to life and personal liberty under Article 21 of the Constitution are also equally important factors which ought to be considered. As a civilized country valuing the dignity of the individual, the founding fathers decided that when it came to depriving a person of his life or putting his person under restraint by imprisonment, justice required that the safeguards provided by Articles 20, 21 and 22 should be available to citizen and non-citizen alike before anyone is held guilty of committing a crime, and before he is sentenced to death or imprisonment. (Seervai on "Constitutional Law of India")

11. So far as the prima facie evidence relied upon by the learned APP on the first issue, namely, that the appellant was found to have transported and delivered one AK 47 Rifle to village Borivali Padgha, District Thane to accused No. 1 is concerned, our attention has been invited by the learned Counsel for the appellant to the findings recorded on this issue by the Special Court in its order dated 21/3/2009 passed in Application at Exh.54, which read as under:

7. I have gone through the statements of the witnesses appearing on page No. 525 and 529 of Volume No. V of the chargesheet and on careful perusal of the statements of the witnesses recorded u/s 164 of Cr.P.C., I find that the witnesses referred above did not state that applicant Adnan transported AK-47 rifles from Malegaon to village Borivli, Padgha, Dist. Thane along with co-accused Noor Mohd. Ansari. It is therefore clear that above two witnesses do not support the allegation referred above.

12. Three of the co-accused have been released on bail. The appellant has been under arrest for about 7 years by now. The enquiry conducted by the Principal Sessions Judge indicates that the appellant was initially picked up as a witness and when he refused to give statement against the main accused, who is his brother-in-law, he was shown as an accused and for doing so he was shown to have been arrested on 9/6/2006. We have considered the statements recorded under Sections 161 and 164 of Cr.P.C. for considering the gravity of the two circumstances relied upon by the learned Addl. P.P., namely, (i) that the appellant had transported and delivered on AK 47 gun to the main accused and (ii) he was instrumental as a driver of the jeep which transported some of the witnesses to

the training camp at Mahuli Hills. As far as the confessional statements of accused No. 7 are concerned, this Court in the earlier order dated 24/2/2006 noted that the learned APP did not dispute the proposition that the confessions recorded u/s 32 of the POTA are not admissible as against co-accused as laid down by the Supreme Court in the case of Navjot Sandhu (Supra). In the case of Navjot Sandhu (Supra) the Supreme Court also held that the theory of agency cannot be extended to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others and those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy, but the nonparticipant conspirators cannot be found guilty of the offence or offences committed by the other conspirators. It is also well settled that accomplice evidence is of a tainted character and as such is a weak evidence, even as and when the trial of the pending POTA case commences. Inordinate delay in a trial is one of the relevant factors for grant of bail considering the legal position that the speedy trial is a facet of the fundamental rights under Article 21 of the Constitution. It is not known, with certainty as of now, as to when the trial in POTA Special Case No. 2 of 2003 would commence and on the face of this uncertainty, the incarceration of the appellant in jail for close to seven years cannot be allowed to continue. Even the allegation made by the prosecution that the appellant had participated in the training is based on the confession statement of accused No. 7 and, therefore, it cannot be treated as a circumstance against him, as of now, by following the decision in Navjot Sandhu's case. When the learned Special Public Prosecutor filed his reply on 16/8/2007 before the Special Court to oppose the Bail Application No. 5 of 2007, it was specifically stated that the evidence against the applicant as disclosed in the charge-sheet was as under:

(a) That he transported AK-47 rifle from Malegaon to village Borivali Padgha, District Thane along with co-accused Noor Mohd. Ansari (Accused No. 7). On this point there are statements of witnesses recorded u/s 164 of the Cr.P.C.

(b) The present appellant had transported Muslim youths to Mahuli Hills for undergoing the illegal training of fire arms i.e. AK-47 rifles and for preparing and exploding bombs. On this there are witnesses who have identified him as the driver of vehicle in which the Muslim youths as stated above were transported. Similarly there are statements under 161 and 164 of the Cr.P.C. which contain the said acts of the appellant.

This reply filed before the Special Court does not anywhere allege that the appellant himself has undergone the training of arms and ammunition and preparation of crude bombs imparted by accused No. 7 and this ground appears to have been raised for the first time while opposing this appeal and that too on the basis of the confession statements made by accused No. 7. The substance of these allegations, therefore, cannot be held against the appellant while

considering his plea for bail. So far as the printed literature, which was relied upon by the learned APP, is concerned, the same may help the prosecution in support of its application before the Supreme Court for early disposal of the pending Criminal Appeal.

13. We are, therefore, of the considered opinion that having regard to the totality of the circumstances as they emerged after the earlier bail plea was rejected on 24/2/2006, the appellant has been wrongly denied bail by the trial court. The trial court failed to consider that there were changed circumstances and it has mainly relied upon the observations made by this Court in the earlier order dated 24/2/2006. We do not approve of the Special Court's refusal to consider the enquiry report submitted by the Principal Sessions Judge, notwithstanding the fact that the said report is a subject matter of scrutiny in the pending writ petition. The incidents described in the charge-sheet make out a large operation conspired and hatched by the main accused i.e. accused No. 1. The appellant is the brother-in-law of accused No. 1 and the evidence, *prima facie*, indicates that he was associated in one or two operations of the entire large operation and this evidence cannot be, as of now, read as to hold that there is sufficient evidence against the appellant to record a conviction against him on the basis that his engagement, agreement, association and/or involvement was in the entire operation.

14. We must also note that this is not a case where the trial has commenced and is getting delayed for some reasons or the other. The reliance of Mrs. Pai on the decision of the Supreme Court in the case of Gobarbhai Naranbhai Singala Vs. State of Gujarat and Others, is, therefore, misplaced. The reasoning set out by the Special Court in rejecting the application for bail is unsustainable and in any case after the said order was passed the period of one year and five months has elapsed, which by itself is an additional circumstance in favour of the appellant.

15. Hence, this appeal succeeds and the same is hereby allowed. The impugned order is hereby quashed and set aside. The appellant - Adnan Bilal Mulla is directed to be released on bail, if not required in any other case, on furnishing the bail of Rs. 1,00,000/- (Rupees One lakh only) and two solvent local sureties in the like amount. In addition, the appellant shall report to the Padgha Police Station every day between 6 p.m. to 9 p.m. till the trial in Spl. POTA Case No. 2 of 2003 commences and after commencement of the trial, he shall report to the said police station once in a week. In case he holds a passport, he shall surrender the same to the prosecuting agency i.e. DCB CID, Mumbai forthwith and he shall not move out of the area within the jurisdiction of Padgha Police Station without informing the same to the Senior P.I. of the said police station. Bail Application No. 5 of 2007 stands allowed accordingly.

Mrs. Pai, the learned APP, submitted an oral application praying for stay to the operation of this order for a period of eight weeks. This has been opposed by Mr. Solkar.

We stay the operation of this order for a period of four weeks from today.