

(2023) 06 BOM CK 0054

In the Bombay High Court

Case No : Criminal Interim Application No. 906 Of 2022 (For Bail) In Criminal Appeal No. 439 Of 2017

Afroz Khan Shahid Khan Pathan

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 22-06-2023

Acts Referred:

Unlawful Activities (Prevention) Act, 1967 — Section 10(a), 13, 16, 18, 20, 23, 38, 39
Indian Penal Code, 1860 — Section 120B
Arms Act, 1959 — Section 7, 25(1A), 25(1AA), 25(1B)(a), 26, 27
Explosive Substances Act, 1908 — Section 5(b), 6, 9B(a)(b)
Maharashtra Control Of Organised Crime Act, 1999 — Section 3(1)(ii), 3(2), 394
Evidence Act, 1872 — Section 65B

Citation : ?

Hon'ble Judges : Revati Mohite Dere, J;Gauri Godse, J

Bench : Division Bench

Advocate : Mubin Solkar, Tahir Hussain, Tahera Qureshi, Raja Thakare, S. S. Kaushik, Siddharth Jagushte, Prashant Mohite

Final Decision : Disposed Of

Judgement

Revati Mohite Dere, J

1 Heard learned counsel for the parties.

2 By this application, the applicant seeks suspension of his sentence and enlargement on bail, pending the hearing and final disposal of his aforesaid appeal.

3 The applicant vide judgment and order dated 28th July 2016, passed by the learned Special Judge, under MCOCA, has been convicted alongwith other co-accused for the offences punishable under Sections 10(a), 13, 18, 20, 38, 39 of the Unlawful Activities (Prevention) Act (`UAPA') and sentenced as under:

- for the offences punishable under Sections 18 and 20 of the UAPA, to suffer rigorous imprisonment for life and to pay fine of Rs.20,000/- in default, to suffer

simple imprisonment for 1 year;

- for the offence punishable under Section 120B of the Indian Penal Code (‘IPC’), in view of the sentence imposed for the above offences, no separate sentence is awarded;

As far as offences punishable under Sections 16, 23 of the UAPA, Sections 25(1A), 25(1AA), 25(1B)(a), 26 r/w Sections 7 and 27 of the Arms Act; Sections 4(b)(ii) and 5(b), 6 of the Explosive Substance Act; Section 9B(a)(b) of the Explosives Act and Sections 3(2), 3(1)(ii) and 3(4) of the Maharashtra Control of Organized Crime Act are concerned, the applicant has been acquitted of the said offences.

4 Mr. Solkar, learned counsel for the applicant submits that there is no evidence on record to show that the applicant visited Bangladesh to collect funds as alleged by the prosecution. He further submits that the prosecution has relied on two confessions, one made by Mohammed Amir Shakil Ahmed and the other by Sayyed Aakif Sayyed Zafaruddin, to show that the applicant was sent to Bangladesh alongwith another co-accused to collect funds. He submits that a perusal of the said two confessions made by the said co-accused, by no stretch of imagination, show that the applicant visited Bangladesh to collect funds or that he had collected funds and brought the same to India or that he had the knowledge, the purpose for which he was sent to Bangladesh. He submits that infact co-accused Sayyed Aakif has, before the Chief Metropolitan Magistrate, Esplanade, Mumbai, not admitted the contents of the confession mentioned in para 4 at Page 3 i.e. the applicant was sent to Bangladesh, though he has admitted some of the other paragraphs in the confessions made by him. He further submits that since the applicant has been acquitted of the offences under the MCOCA, the confessions so recorded under the MCOCA cannot be taken into consideration. Mr. Solkar further submits that the email sent by the applicant to Sayyed Aakif (A-11) relied upon by the prosecution, by no stretch of imagination, can be said to be incriminating and that although the learned Judge has observed the same, has relied upon the said email while holding that the applicant was part of a larger conspiracy. Mr Solkar submits that admittedly the print-out of the said email was not accompanied by a Certificate as mandated under Section 65B of the Evidence Act. He further submits that even the CDRs cannot be relied upon in the absence of a 65B Certificate. According to Mr. Solkar, only because the applicant’s phone was not active in the first week of May, the prosecution has concluded that the applicant had gone to Bangladesh, during the said period. He further submits that the two witnesses examined by the prosecution to show that the applicant was not in his shop in the first week of May, have turned hostile and as such, no reliance can be placed on their evidence. It is lastly submitted that the applicant is in custody since 2006 and as such undergone almost 17 years sentence.

5 Mr. Thakare, learned Special P.P for the State vehemently opposed the application. He submitted that the applicant was part of a larger conspiracy to

strike terror in the people or any section of people with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India by using explosive substances; to overawe by means of criminal force the government established by law; to create instability in the State of Maharashtra and India; to shake and reduce the faith of the common citizen in its elected democratic government; to exploit the communal sentiments of Muslims in the name of religion; to collect money from across the border for achieving their objective of the criminal conspiracy; to organize training camps in Pakistan; to establish training camps in India and to do other illegal acts and activities. Learned Special PP submitted that the applicant was a part of the organized crime syndicate and had abetted the commission of the offences as disclosed by the co-accused in their confessions made under the MCOCA. He submitted that one of the co-accused in the case i.e. Mustafa @ Munna Mustafa @ Sayyed Bademiya, who had made a confession, was made an approver, however, his pardon was withdrawn after he turned hostile. Learned Special P.P also relied on the approver's confession, although learned counsel for the applicant opposed the same. According to Mr. Thakare, the two confessions made by Amir and Aakif would have to be read as a whole, to see the complicity of the applicant in the alleged crime. Mr. Thakare, when confronted, does not deny the fact, that Section 65B Certificate was not produced by the prosecution, along with the CDRs or the email. He submits that the same, however, would not weaken the prosecution case, having regard to the confessions made by the co-accused. Mr. Thakare, further submits that the confessions so recorded under the MCOCA can be looked into, although the applicant has been acquitted of MCOCA, having regard to the Constitution Bench Judgment of the Apex Court in Prakash Kumar vs. State of Gujarat (2005) 2 SCC 409. He submits that even otherwise, the State of Maharashtra has filed an appeal against the acquittal of the accused under the MCOCA and that this Court has admitted the said appeal.

6 A few facts as are necessary to decide the application are as under:

According to the prosecution, during the course of inquiry by the Anti-Terrorism Squad ('ATS') into the incidents that took place i.e. the Nanded Bomb Blast Case, seizure of explosives in Buldhana and the bomb blasts which took place in 2002 and 2003 in Marathwada, they gathered intelligence on 9th May 2006 that some explosives and weapons were likely to be transported in the region. Accordingly, the ATS deputed a team along Manmad-Yevala, Aurangabad Road. It appears that at about 4:00 p.m, a team led by ACP Shengal, which was at Yevala Junction on Yevala-Aurangabad Road noticed one Tata Sumo jeep coming from Manmad and going towards Aurangabad. They tried to intercept the jeep but the jeep sped away. The said jeep was then chased by the police and was intercepted at Ghrushneshwar Temple, Taluka Khuldabad, Aurangabad. The three occupants of the Jeep namely, Mohammed Amir (A-1), Abdul Azim (A-4) and Syed Zubair (A-2) alighted from the said vehicle and started running from the said spot. It appears that A-1 - Mohammed Amir was apprehended on the spot while the other two escaped. A-1 - Mohammed Amir and the Sumo jeep were taken to

Khuldabad Police Station and during the search of the jeep, huge amount of arms and ammunition were recovered. Accordingly, after establishing telephonic contact with ATS Police Station, Mumbai, Crime No. 3/2006 was registered by the ATS Police Station, Mumbai.

7 During the course of investigation, several accused came to be arrested. As far as the applicant is concerned, it appears that he surrendered on 13th June 2006, pursuant to which, he was arrested. After investigation, charge-sheet was filed. After a full-fledged trial, the applicant was convicted along with the other co-accused vide order dated 28th July 2016, as stated aforesaid in para 3 of this order. The appeal of the applicant has been admitted by this Court vide order dated 2nd May 2017.

8 The prosecution essentially relies on two confessional statements i.e. one of the co-accused Mohammed Amir (A-1) and the other of Aakif (A-11), the CDRs of the applicant and one email. We have gone through the confessional statements of the co-accused Mohammed Amir (A-1) and Aakif (A-11). As far as the applicant is concerned, Mohammed Amir (A-11), in his confession vis-a-vis the applicant, has stated as under :

9 As far as the applicant is concerned, Aakif (A-11) in his confessional statement vis-a-vis the applicant, has stated as under :

10 The learned Special Judge, whilst convicting the applicant, in Paras 1687 to 1691 with respect to the applicant's role, has observed as under:

"1687. So far as accused Afroz-Khan is concerned, there is substantive evidence of confession of accused Mohd. Amer and Sayyed Aakif. Learned Advocate while arguing the case of accused, claimed that confession of one accused cannot be corroborated by confession of another accused which in itself is referable material. However, this argument may be good so far confession under the Indian Evidence Act is concerned. Under special statutes like TADA, MCOCA, POTA, confession itself is substantive evidence, as held in catena of authorities referred to above.

1688. The confessions of Mohd. Amer and Sayyed Aakif, acted upon by the court establish that accused Afroz was associated with accused Mohd. Amer, Sayyed Jabiuddin @ Zabiuddin @ Jabi, Sayyed Aakif, Aslam Kashmiri and wanted accused Fayaz Kagazi. He was sharing common thought process of Jihad against Hindus. The evidence has shown that he was in constant contact with accused Sayyed Aakif on e-mail and was using mobile phone to establish contacts with other accused persons which is proved from CDR. He failed to establish his plea of alibi even by probabilities. The said plea is exposed by the CDR in respect of mobile phone used by him. False plea of alibi and denial of use of mobile phone is thus, an additional link against him.

1689. The confession of accused Mohd. Amer will be used as substantive evidence against accused Afroz Khan. As per said confession at the instance of

accused Mohd. Amer, Afroz Khan visited Bangladesh, illegally along with accused Mustafa @ Munna with a view to fetch funds from wanted accused Juned, a Pakistani national and member of LeT. The said visit was in first week of May and it was crucial in view of the fact of interception of a huge consignment of arms, ammunitions and explosives sent at the instance of said accused Juned. The absence of accused has been proved due to non-use of his mobile phone, precisely in the first week of May 2006, leading to strong inference that during that period he was in Bangladesh.

1690. The above referred confession of Mohd. Amer about visit of accused Afroz Khan to Bangladesh, is confirmed by accused Sayyed Aakif in his confession. He has played active role for fetching funds. He was equally sharing common thought process to strike terror called Jihad and, thus, found involved himself in the larger conspiracy though not in actual procuring arms, ammunitions and explosives.

1691. It has been held in Mohd. Khalid vs. State of West Bengal, ((2002) 7 SCC 334), as under:

"Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration."

In present facts of the case also, there is trustworthy evidence which establish all the links of circumstantial evidence. The confessions of both the accused is also corroborated by other substantive evidence and as such, the same has to be used against accused Afroz Khan."

11 We may note that apart from the aforesaid confession of the two co-accused i.e. Mohammed Amir (A-1) and Aakif (A-11), where there is a reference to the applicant, no other corroborative material/evidence has been pointed out by the prosecution, to show that the applicant infact visited Bangladesh via Calcutta and that the applicant brought funds pursuant thereto. Neither of the aforesaid confessions where there is a reference to the applicant, prima facie show that the applicant had infact gone to Bangladesh and had got funds or that the applicant had knowledge or reason to believe the purpose for which, he was sent to Bangladesh or of the larger conspiracy. Admittedly, both the said confessions have been retracted. Nothing has been recovered at the instance of the applicant.

12 It is also pertinent to note, that the email relied upon by the prosecution sent by the applicant to Mohammed Amir (A-11), prima-facie cannot be said to be incriminating. The said email dated 1st May 2006, reads thus : "aslamalaikum aapkaise hai aur kahan ho mai yahan per qairiat se hon"

The learned Special Judge despite observing that the said email is not incriminating has observed that the same cannot be overlooked. The CDR does not show that the applicant was in Bangladesh. Infact, the CDR shows the tower location of Maharashtra of calls made on 5th May 2006. As far as the said email

and the CDRs are concerned, admittedly, Section 65B Certificate has not been produced by the prosecution.

13 We, vide order dated 15th July 2022, have suspended the sentence of the co-accused-Bilal Ahmed Abdul Razaq @ Bilal, after considering the evidence qua the applicant therein. The applicant herein stands on a better footing. The applicant is in custody for the last 17 years. It appears that the applicant whilst in custody completed his B.A through IGNOU and secured 63% and later did his Masters in Political Science. It also appears that the applicant has done a 6 month Yoga Course and is working in the Jail Hospital at Taloja. It also appears that the applicant is conducting counseling and de-radicalization sessions in Prison with the help of Jail authorities.

14 Considering the aforesaid evidence on record, we are prima facie, of the view that the applicant has made out a case for suspension of his sentence and enlargement on bail, pending the hearing and final disposal of his appeal. The application is accordingly allowed and the applicant's sentence is suspended and he is enlarged on bail, pending the hearing and final disposal of his 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 local solvent sureties in the like amount;
- ii) The applicant shall report to the ATS, once in two months on the first Saturday of the month, till his Appeal is finally disposed of. ATS, to give an acknowledgment, on the diary to be maintained by the applicant, when the applicant reports;
- iii) The applicant shall keep the trial Court and the ATS 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 deposit his passport, if any, with the Investigating Officer before his release;
- v) The applicant shall not leave the State of Maharashtra without the prior permission of this Court.

15 The Application is accordingly disposed of.

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