2024:BHC-AS:613-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.656 OF 2023

Mirza Himayat Beig @ Umar,
Age: 42 years, Occu: NIL,
Residing at: Juna Bazar, Near Kamani,
Kamwada Galli, Dist – Beed
(Presently lodged at Nashik Central Jail) ...Appellant
(Org. Accused No.2)

Versus

The State of Maharashtra
(At the instance of Anti-Terrorist Squad
[ATS], Mumbai) ...Respondent
(Org. Complainant)

Mr. Mubin Solkar a/w Mr. Tahir Hussain and Mr. Hemal Shah i/b Mr. Ibraheem K. M. for the Appellant.

Ms. P. P. Shinde, A.P.P for the Respondent – State.

P.I – Rahul More, ATS, Nashik a/w API – Ashish Lavangale and HC – Sangale, ATS, Nashik, are present.

CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.
RESERVED ON : 19th DECEMBER 2023
PRONOUNCED ON : 5th JANUARY 2024

JUDGMENT (Per Revati Mohite Dere, J.) :

1. Heard learned counsel for the parties.

2. Admit. Learned APP waives notice on behalf of the respondent –State.

3. With the consent of the parties, the appeal is taken up for final disposal, forthwith.

4. By this appeal, the appellant seeks quashing and setting aside of the impugned order dated 4th October 2021, passed by the learned District Judge-2 and Additional Sessions Judge, Nashik, by which, the learned Judge was pleased to reject the appellant's bail application (Exhibit 406) filed in Sessions Case No. 192 of 2010 and as such, seeks the appellant's release on bail.

5. Mr. Solkar, learned counsel for the appellant argued for release of the appellant on bail, both, on merits as well as long incarceration. As far as merits are concerned, he submitted that the prosecution has relied on two witnesses' statements dated 24th

September 2010 and 3rd October 2010. He submitted that both the said witnesses' statements were recorded a few days prior to the appellant's arrest and that the said witnesses have disclosed about an incident i.e. an alleged meeting which had taken place 4 years prior i.e. in December 2006. He has stated that it is alleged by the said two witnesses that the appellant incited and instigated them to go to Pakistan for Hijrat i.e. training for Jihad. He further submitted that post December 2006, there is no evidence on record to show that the said witnesses went pursuant to the said incitement/instigation or that the appellant was involved in the present case, post the alleged meeting of December 2006. He submitted that the alleged incident is of December 2006 and Lashkar-E-Taiba ('LET') was declared as a terrorist organization on 31st December 2008 and as such, the Unlawful Activities (Prevention) Act, 1967 ('UAPA') will not apply. He further submitted that for both the sections i.e. Section 18 and 18B of the UAPA, the minimum sentence is 5 years, going upto imprisonment for life. Mr. Solkar submitted that the appellant is in custody for 13 years 2 months and that 30 more witnesses are yet to be examined and

as such, the trial is not likely to be over in the immediate near future.

6. Mr. Solkar relied on ***Union of India v. K. A. Najeeb***[1]***; Jahir Hak v. The State of Rajasthan***[2]***; Ashim @ Asim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Kumar Bhattacharya v. National Investigation Agency***[3]***; Chandeep Singh @ Gabbar Singh v. National Investigation Agency***[4]***; Yedala Subba Rao & Anr. v. Union of India***[5]***; Yasir Sayyed Anis Sayyed @ Hujefa v. The State of Maharashtra***[6]***; Vernon v. The State of Maharashtra & Anr.***[7]***; National Investigation Agency, Ministry of Home Affairs, Government of India v. Areeb Ejaz Majeed***[8] in support of his submission i.e. for bail on the ground of long incarceration.

7. Learned APP opposes the appeal. She submitted that there are two statements of witnesses with respect to the meeting dated

1 2021 SCC OnLine SC 50
2 Cri. Appeal No. 605/2022 (Arising out of SLP (Crl.) No. 7003/2021
3 (2022) 1 SCC 695
4 2023:PHHC:118039-DB
5 (2023) 6 SCC 65
6 2014 ALL MR (Cri) 4205
7 2023 ALL SCR (OnLine) 610
8 2021 SCC OnLine Bom 239

December 2006, in which the appellant incited/instigated the witnesses including co-accused No.1 - Shaikh Lal Baba to go to Pakistan for Jihad. A photograph of 2003 was also relied upon by the learned APP, wherein the appellant is seen with the other co-accused. Learned APP, however, does not dispute the fact that the appellant is in custody for more than 13 years and that 30 more witnesses are yet to be examined by the prosecution.

8. Perused the papers. The appellant along with other co-accused was arrested in connection with C.R. No.21 of 2010 registered with the ATS Mumbai, for the alleged offences punishable under Sections 419, 420, 465, 467, 468, 471, 153A, 109 and 120B r/w 34 of the Indian Penal Code; Sections 4, 5 and 6 of the Explosive Substances Act and Sections 10, 13, 15, 16, 18, 18A, 18B and 20 of the Unlawful Activities (Prevention) Act, 1967 ('UAPA') and Section 12(1)(c) of the Passport Act.

9. According to the prosecution, the ATS Mumbai received information on 7th January 2010 that certain members belonging to a banned terrorist organisation, namely Lashkar-E-Taiba ('LET') had entered Nashik City and that one Shaikh Lal Baba Mohammed Hussain (A1) was residing at Jijamata Nagar, Satpur, Nashik, under a false identity i.e. in the name of Amir Parekh. Pursuant thereto, ATS Mumbai apprehended A1 from Nashik on 7th September 2010. In his personal search certain incriminating material/documents were seized under a panchanama on 7th September 2010. It is the prosecution case, that ATS had received information that pursuant to a criminal conspiracy, the accused were conducting recce of some sensitive places by making video films of the targets in preparation of alleged terror strike and that the accused were in contact with their associates belonging to LET in Pakistan through Internet.

10. After A1 - Shaikh Lal Baba was arrested on the intervening night of 7th and 8th September 2010, 700 grams of RDX, 4 detonators, mobile phones, documents such as residential certificates, voter ID

Card, etc. were recovered at the instance of A1 from a flat, under a panchanama.

11. After about one month of the A1's arrest i.e. on 7th October 2010, ATS sought the appellant's custody from Yerwada Central Jail, Pune, on a transfer warrant, as the appellant was already in judicial custody in connection with another case registered with the ATS, Mumbai i.e. C.R. No.6 of 2010 (initially registered as CR No.83 of 2010 with the Bund Garden Police Station, Pune). Admittedly, nothing incriminating was recovered at the instance of the appellant. After investigation, charge-sheet was filed as against the appellant and other co-accused in the Court of the Chief Judicial Magistrate, Nashik on 4th December 2010. Thereafter, the case came to be transferred to the Court of Sessions i.e. before the learned Special Judge, as UAPA was applied, being Sessions Case No. 192 of 2010. The said case is pending before the learned Additional Sessions Judge, Nashik i.e. Special ATS Court. As far as the appellant is concerned, a few days post the arrest of A1 and few days prior to the arrest of the appellant,

the ATS recorded the statements of two witnesses on 24th September 2010 and 3rd October 2010.

12. According to the witness, whose statement was recorded on 24th September 2010, in December 2006, after Namaz he, A1 and the appellant were sitting and chatting, when the appellant told him that he had organised a meeting in his room; that pursuant thereto, all 3 went to his apartment near Pune College; that the appellant had called two more people for the said meeting; that the appellant told them that the organisation LET in Pakistan was doing good work; that he had chatted with one of the members of the said organisation based in Pakistan; that the said person i.e. Abu Khalid had told him that Fayyaz Kagzi, Jabiuddin Ansari and other boys had received good training in Pakistan; that Abu Khalid wanted to increase his network in India and that he required boys; that Abu Khalid and LET were giving training of weapons and ammunition in Pakistan at their training centre; that A1 like Fayyaz Kagzi was thinking of doing 'Hizrat' and asked the said witness what he proposed to do. According to this

witness, he was asking him to do 'Hizrat', pursuant to which, he asked the appellant what was the meaning of 'Hizrat', to which, the appellant replied that 'Hizrat' meant going to Pakistan for Jihad. The appellant is further alleged to have told the said witness that if he contacted Fayyaz Kagzi, he would get further guidance. He has further alleged that on hearing the same, A1 agreed to go for training. According to the said witness, since he did not agree with the views, he cut down his contact with the appellant and also told the appellant, that he had the responsibility of his family members and as such he disagreed with the appellant.

13. The statement of the 2nd witness, recorded on 3rd October 2010 is more or less identical. The second witness has further stated that after a month of the said meeting, he learnt that A1 had gone to Qatar that the appellant had told him that A1 was in touch with him, when he was in Qatar and that Fayyaz Kagzi was going to help A1 in training. He has further stated that he advised the appellant not to do any such thing and that thereafter, he cut contact with the appellant.

14. The aforesaid alleged disclosures were made to the said two witnesses, in December 2006. It is alleged that this amounted to inciting/instigating the witnesses to join the LET. Admittedly, none of these 2 witnesses joined any organisation nor had they disclosed about the same to any person till the arrest of A1. Admittedly, LET was declared a terrorist organisation on 31st December 2008, post the alleged meeting of December 2006.

15. As noted above, this is the only material *qua* the appellant. There is no recovery of any document/material *qua* the appellant. There is nothing on record to show that pursuant to the said meeting, A1 went to Pakistan. Infact, it is the prosecution case that A1 went to Qatar and not to Pakistan. The photograph i.e. group photo relied upon by the prosecution is of the year 2003, in which the appellant is seen with some of the co-accused.

16. Section 18 of UAPA deals with punishment for conspiracy, or attempt to commit, or advocate, abet, advise or [incite, directly or knowingly facilitate] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act and Section 18B deals with recruiting of any person or persons for terrorist act. Although, learned counsel for the appellant submitted that Section 18B would not apply, since the appellant did not recruit any person, we do not wish to go into the same. Suffice to state, that the offences alleged under Sections 18A and 18B as against the appellant are punishable with a minimum of 5 years and extend upto life imprisonment. It is not in dispute that the appellant is in custody for the last 13 years 2 months. Admittedly, the charge-sheet in the said case was filed on 4th December 2010; charge was framed on 9th March 2012 and the first witness was examined on 22nd September 2017. Till date, evidence of 23 witnesses is over and the 24th witness is in the witness-box. According to the prosecution, they propose to examine 30 more witnesses.

17. The Apex Court in the case of ***K. A. Najeeb (supra)*** had confirmed the grant of bail to respondent – K. A. Najeeb, keeping in mind the length of period spent by the accused therein and the unlikelihood of the trial being completed anytime in the near future. The Apex Court in paras 18 to 20 of the said judgment has observed as under:-

> *"18. It is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of 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 Statue 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 UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.*
>
> *19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind*

the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, Section 43-D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc."

18. The Apex Court in ***Jahir Hak (supra)***, observed that the appellant therein was facing prosecution under the provisions of UAPA and was in custody for about 8 years and that the prosecution had only examined 6 witnesses. The Apex Court having regard to the

fact, that the prosecution intended to examine as many as 109 witneses, of which only 6 had been examined and having regard to the fact, that the appellant, an undertrial prisoner, having undergone a long period of incarceration, granted bail to the appellant therein, though the appellant was charged with offences, some of which were punishable with a minimum punishment of 10 years with a sentence which may extend to life imprisonment.

19. In ***Yedala Subba Rao (supra)***, the Apex Court after observing that taking the material as against the appellants therein as it is, we are unable to form an opinion that there are reasonable grounds for believing that the accusation against the appellants of commission of offence under the UAPA are *prima facie* true and accordingly observed that the embargo on the grant of bail under the proviso to sub-section (5) of Section 43-D would not apply. It is also noted that the appellants were in custody for 4 1/2 years and that charge was not framed and that the prosecution proposed to examine more than 140 witnesses and as such granted bail to the accused, on the said grounds.

20. In ***Vernon (supra),*** after observing that it is the difficult to form an opinion that there are reasonable grounds to believe that the accusation against the appellant of committing or conspiring to commit terrorist act was *prima facie* true and having regard to the long incarceration of the appellant enlarged the appellant on bail. In para 42 of the said judgment, the Apex Court had observed as under;

> *"42. In these two proceedings, the appellants have not crossed, as undertrials, a substantial term of the sentence that may have been ultimately imposed against them if the prosecution could establish the charges against them. But the fundamental proposition of law laid down in K.A. Najeeb (supra), that a bailrestricting clause cannot denude the jurisdiction of a Constitutional Court in testing if continued detention in a given case would breach the concept of liberty enshrined in Article 21 of the Constitution of India, would apply in a case where such a bail-restricting clause is being invoked on the basis of materials with prima facie low-probative value or quality."*

It is pertinent to note that the Apex Court whilst granting bail to the appellant therein had also taken into account the fact, that the appellant was earlier convicted involving offences, inter-alia under the 1967 Act and there were pending criminal case against him and that the allegations were on similar lines and accordingly imposed

appropriate conditions on the appellant therein.

21. In ***Areeb Ejaz Majeed (supra),*** this Court relied on ***Shaheen Welfare Association v. Union of India and Others***[9], and enlarged the respondent therein on bail, considering that he was incarcerated for more than 6 years and that the process of examining 51 witnesses had taken more than 5 years and admittedly 107 more witnesses were to be examined by the prosecution. It was also observed in para 36 of the said judgment that there is every likelihood of the trial continuing for the next few years; that there was no dispute about the fact, that even if convicted for the offence with which the respondent was charged, he could be sentenced for imprisonment for a period ranging between five years and life imprisonment and that the respondent therein, had already undergone more than 6 years as an undertrial. Accordingly, the appeal filed by the NIA challenging the bail granted to the respondent therein was dismissed and the bail granted to the respondent was confirmed.

9 1996 SCC (2) 616

22. It is not in dispute that the appellant herein was convicted in the German Bakery case and that death sentence awarded by the trial Court, was later converted to life imprisonment by this Court and that the appellant's appeal/application seeking suspension of sentence is pending before the Apex Court.

23. We have perused the evidence, *qua* the appellant i.e. the two statements. Admittedly, the said statements were recorded in 2010, a few days post the arrest of A1 and few days prior to the arrest of the appellant. Both the witnesses have alleged in the said statements, with respect to what transpired in the meeting held by the appellant in December 2006. Admittedly, the two witnesses statements were recorded in September and October 2010, with respect to a meeting held by the appellant in December 2006. Admittedly, neither of these witnesses had gone to Pakistan, pursuant to the instigation/incitement. It is the prosecution case that the appellant incited and instigated and as such is liable under Section 18 and 18B of UAPA. The punishment for both the said offences ranges between a minimum of 5 years and

upto life imprisonment. As noted above, the appellant has already undergone 13 years and 2 months incarceration. The prosecution intends to examine 30 more witnesses in the said case. As far as the submission of the learned counsel for the appellant that LET was declared as a terrorist organisation in 2008 and was not a banned organisation in 2006, when the alleged meeting took place, and as such the provisions of UAPA will not apply is concerned, the same will be considered by the trial Court, at the time of the trial and as such is not required to be gone into, at this stage.

24. As far as the judgments stated herein-above are concerned, it is not in dispute that in ***K. A. Najeeb (supra)*** and ***Angela Harish Sontakke v. State of Maharashtra***[10]***;*** delay of trial was considered to be a relevant factor while examining the plea for bail of the accused. In ***K. A. Najeeb (supra)*** , Section 43D (5) was invoked. In ***K. A. Najeeb (supra),*** a fundamental proposition of law was laid down that a bail-restricting clause cannot denude the jurisdiction of a Constitutional

10 (2021) 3 SCC 723

Court in testing if continued detention in a given case would breach the concept of liberty enshrined in Article 21 of the Constitution of India.

25. Considering the nature of evidence against the appellant and the fact, that the appellant is incarcerated on the basis of the aforesaid evidence for more than 13 years and also having regard to the punishment ultimately entailed for the said offences, the appeal is allowed on the following terms and conditions:-

ORDER

(i) The Appeal is allowed;

(ii) The order dated 4th October 2021, passed by the learned District Judge-2 and Additional Sessions Judge, Nashik below Exhibit – 406, in Sessions Case No.192 of 2010, rejecting the appellant's Bail Application, is quashed and set aside;

(iii) The Appellant be enlarged on bail on furnishing P.R.Bond in the sum of Rs.1,00,000/-, with two solvent sureties in the like amount;

(iv) The Appellant shall report to the office of the ATS, Nashik on the second Saturday of every month between 10:00 a.m. to 12:00 noon, till the conclusion of the trial.

(v) The Appellant shall inform his latest place of residence and mobile contact number immediately after being released and/or change of residence or mobile details, if any, from time to time to the trial Court as well as to the concerned Police Station, in writing;

(vi) The Appellant shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concrned with the case;

(vii) The Appellant shall co-operate in the conduct of the trial and shall attend the trial Court on every date of hearing, unless exempted

by the trial Court;

(viii) The Appellant shall not leave the jurisdiction of Nashik, without the permission of the trial Court;

(ix) An undertaking to the aforesaid clauses (ii) to (viii), shall be filed by the appellant, in the Registry of the trial Court, within one week of his release;

(x) If there is breach of any of the aforesaid conditions, the prosecution shall be at liberty to file an application seeking cancellation of the appellant's bail.

26. Appeal is allowed in the aforesaid terms and is accordingly disposed of.

27. It is made clear that the observations made herein are *prima facie,* and the learned Special Judge shall decide the case on its own merits, in accordance with law, uninfluenced by the observations made in this judgment.

28. All concerned to act on the authenticated copy of this judgment.

GAURI GODSE, J. *REVATI MOHITE DERE, J.*

29. After the judgment was pronounced, learned APP sought stay of this judgment.

30. The question of staying the judgment does not arise, since the appellant is in custody in connection with other case.

GAURI GODSE, J. *REVATI MOHITE DERE, J.*