IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1537 OF 2021

Vipul Amrutlal Patel s/o. Amrutlal Patel ..Applicant
Versus
The State of Maharashtra & Anr. ..Respondents

WITH
INTERIM APPLICATION NO. 1653 OF 2022
IN
CRIMINAL BAIL APPLICATION NO. 1537 OF 2021

Mr. Aabad Ponda, Sr. Advocate a/w. Aarif Khan a/w. Kavitha Prakash i/b. Gaurav Chaubey for Applicant.

Mr. H. S. Venegavkar, Spl. P. P. a/w. Harsh Dedhia for Respondent No.2-U.T.

Mr. Majeed Memon, Sr. Advocate a/w. Junaid Thange a/w. Tapish Jain i/b. Majeed Memon and Associates for Intervenor.

Mr. Vinit A. Kulkarni, APP for State/Respondent.

CORAM : SARANG V. KOTWAL, J.

RESERVED ON : 13 SEPTEMBER 2024
PRONOUNCED ON: 25 SEPTEMBER 2024

ORDER :

1. The Applicant is seeking his release on bail in connection with C.R.No.39 of 2018 registered with Nani Daman police station

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which has resulted in Sessions Case No.16 of 2018. The applicant is the accused No.12. He was arrested on 20.01.2020 and since then he is in custody. The investigation in this case is over and the charge-sheet, as well as, the supplementary charge-sheets are filed in this case. The sessions case has already commenced and as of today, the third prosecution witness is being examined by the prosecution. As per the chart given by the prosecution, they intend to examine minimum 70 witnesses on different aspects. They are the eye witnesses, pancha witnesses, the witnesses from the families of the deceased, the police witnesses, the expert witnesses, the medical officers, the telephone service providers' officers and the investigating officers. In short, the trial is not likely to get over within a reasonable near future.

2. The prosecution case is reflected in the Affidavit in reply filed on behalf of the Respondent No.1 in this application. The case pertains to the murder of Ajay Patel and Dhirendra Patel. On 01.04.2018, Ajay and Dhirendra had gone to Vapi to attend a family function and then they had gone to Silvassa. They were returning home in the evening. At about 9:00p.m., they reached

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near Vishal Bar and Restaurant. They were accompanied by Chhotubhai Patel who was Ajay's relative. Chhotubhai and Dhirendra got down from their Innova car to purchase beer. Ajay was sitting in the Innova car. At that time, 5 to 6 unknown persons came in a Scorpio car, Swift Car and on one motorcycle. Suddenly, those persons opened fire at Ajay. Ajay got down from the car and ran inside Vishal bar. Seeing this, Dhirendra followed him to help him. The assailants chased both Ajay and Dhirendra. They were having firearms like rifle, country made pistol, revolver etc. The assailants indiscriminately fired at them. Ajay and Dhirendra were shot dead. After that, the assailants came out of Vishal Bar and left the place in their vehicles. Chhotubhai went inside Vishal bar and found both Ajay and Dhirendra lying in a pool of blood. In the meantime, the owner of Vishal bar had informed the police. They reached the spot and found the dead bodies. The bodies were lying in the inner room of Vishar bar. Thereafter, the F.I.R. was lodged on the basis of the statement given by Chhotubhai. The articles like live rounds, 2 live 12 bore rounds, 2 empty cartridges of 9mm, 3 empty cartridges of 12 bore, 7 empty cartridge of 7.65 KF, 1 fired

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bullet, 1 lead of bullet and 1 bullet filled with lead were found at the spot. The panchanama of scene of offence was drawn in the presence of two panchas and these articles were seized.

3. There were CCTV cameras installed at Vishal Bar and Restaurant. The footage of the recording was checked. The incident was captured in the CCTV footage which showed faces of the assailants. But the assailants were not known to anybody and hence, were not identified by anybody including the informant and the owner of the bar. The three assailants seen in the CCTV footage were later identified as Mohamad Hasan, Rashid Murtaza and Nur Mojjam. The two others could not be traced and identified.

4. During the investigation, the Scorpio car involved in the incident was found abandoned outside the compound of Nano city, near Pramukh Sangam Society, Silvassa. Therefore, the CCTV footage from the said society was checked; which showed that the accused had left that society in a Fortuner car. The Swift car involved in the offence was recovered from the Kadaiya Industrial premises. During the investigation, it was revealed that the

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assailants and the other accused had proceeded towards Mumbai in that Fortuner car. Sajidali @ Salim Mangata Chaudhary, Mohammed Anish Yunus, Nur Mojjam, Rashid Murtaza, Shamsad Kamaruddin @ Samir and two unknown shooters had gone to Mumbai and then had escaped. The accused Jayprakash was seen in the CCTV footage of Toyota showroom at Vasai. According to the prosecution, the accused Jayprakash used that Fortuner vehicle for helping the other accused in going away from the spot.

5. In May and June 2018, the Investigating officer received some information about the accused Nur Mojjam. He was arrested from Allahabad. After his arrest, names of the other assailants were given by him naming them as Mohammad Hasan, Rashid Murtaza and Asalam Khan. They were arrested one after another.

6. It is the prosecution case that the accused Jayprakash dramatically surrendered himself before the Court at Daman and informed that he was the person who had conspired with others and had hired all the assailants to commit murder of Ajay. According to him, he had taken some amount from the deceased

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Ajay, who was demanding repayment of that amount. That led the accused Jayprakash to hire the killers to commit this offence. At his instance, one black coloured pulsar motorcycle was seized under panchanama. But it's registration number plate was fake and the engine number and chassis number were destroyed.

7. The affidavit in reply refers to the statements of witnesses showing roles played by different accused. According to the investigating agency, since the accused were arrested one after another, the charge-sheets were filed against the other accused and, therefore, there are number of charge-sheets on record.

8. The affidavit in reply mentions one more allegation involving the applicant. One of the accused Jayesh Kamli @ Rakesh had purchased a flat No.702 in Siddhivinayak Apartment, Khariwad, Nani Daman. The assailants stayed in that flat before the murder. The other accused used to visit that flat.

9. The next phase of the investigation showed that, in fact, the offence was committed at the instance of the main accused Suresh Patel @ Sukha. He had serious enmity with the deceased

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Ajay and, therefore, he had hatched the conspiracy. He had planned to commit murder of Ajay with the help of other accused. After the arrest of the other accused including the assailants, the main accused Suresh Patel made arrangements to provide financial assistance to the family members of the arrested accused. The accused Jayprakash was used by the main accused Suresh to take the blame for the murder. One more attempt was made to create some evidence to mislead the investigation. One back dated stamp paper was purchased purportedly to show that Jayesh Kamli had sold the said flat No.702 in Siddhivinayak Apartment to Jayprakash in the year 2016. However, that document which was created in the year 2019 could not be signed by Jayprakash as he was in custody.

10. One of the assailants Rashid Murtaza wanted to turn approver. His application was forwarded to the learned Sessions Judge and on his directions, Rashid Murtuza's statement was recorded by the learned C.J.M. at Daman. In that statement, he mentioned that the conspiracy was hatched by Suresh Patel to commit Ajay's murder. Rashid himself was working as driver for

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Jayprakash for a few days. He has given details of the conspiracy and the roles played by the other accused, as well as, the the present applicant.

11. On 25.10.2019, C.J.M., Daman issued search warrant in respect of Suresh Patel's premises. During the search, three folder files having handwritten and printout entries were recovered. Those entries showed that certain amount used to be given to the arrested accused per month. Their names were mentioned under the acronyms. The money was shown in the name of accused Jayprakash mentioned as 'P.K.' or 'PKY', Nur Mojjam was mentioned as 'MJM', Rashid Murtaza was mentioned as 'RSD', Mohammad Hasan was mentioned as 'HSN', Mohammad Anish Yunus was mentioned as 'ANS', Puranprakash Mishra @ Rahul Mishra was mentioned as 'RHL' and Ikrarkhan Aliyarkhan Pathan @ Chhotu was mentioned as 'Chht'. According to the prosecution case, all these amounts were provided by the applicant Vipul and Miten Patel in connivance with the main accused Suresh Patel. The handwritten entries were made by the applicant Vipul. There was one entry of the amount of Rs.10000/- for purchasing a back dated

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stamp paper which was to be used for showing execution of the sale deed of the flat No.702 of Siddhivinayak Apartment, from Jayesh Kamli to Jayprakash Pandey. The prosecution wanted to show that, thus, the applicant was a part of the conspiracy to commit the offence of murder, as well as, offence of forgery in creating false document and for purchasing a back dated stamp paper. There were statements of Chetan Mangela, Pritam Singh and Raj Panchal mentioning the role played by the applicant Vipul. The confessional statement of Rashid Murtaza also describes the applicant Vipul's role.

SUBMISSIONS ON BEHALF OF THE APPLICANT :

12. Learned Senior Counsel for the applicant made the following submissions:

The applicant was called by the police in November 2019 itself. He was brutally assaulted only because he was related to the main accused Suresh Patel. The applicant has filed Criminal Writ Petition No.5740 of 2019 before the Division bench of this Court in respect of illegal detention and assault. That petition is

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still pending. The search of the premises of the main accused Suresh Patel was conducted in October 2019 itself when the files and the folders were recovered, wherein the entries were allegedly made in handwritten and printout form by the applicant. In spite of that, the applicant was arrested only on 20.01.2020, which shows that those entries were innocuous and could not point to the allegations that the applicant was part of the conspiracy to commit murder of Ajay and Dhirendra. Even assuming that the applicant made those entries, it would not mean that the applicant was knowing that the main accused Suresh was conspiring with the other accused to commit murder of the deceased or that the applicant had taken any part in commission of murder. All those entries were made only after the murder. By that time, the conspiracy to commit murder had come to an end with the execution of conspiracy on 01.04.2018. The statement of Rashid now cannot be used against the applicant and other accused because Rashid had passed away in October 2022. There is a legal bar to use that confessional statement, under Section 30 of the Evidence Act. The statements in the charge-sheet given by Chetan

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Mangela, Pritam Singh and Rajkumar Lohar @ Raj Panchal do not show that the applicant was knowing about the conspiracy. What was discussed in the meeting, was not stated by these witnesses and there is nothing to show that the applicant himself was aware of what was discussed in the meeting. The entry showing money spent for purchasing a back dated stamp paper to create a forged sale deed is an innocuous circumstance. It does not have any connection with the offence of murder. At the highest, the applicant could be said to have been acting on the instructions of the main accused Suresh in giving money to the families of the arrested accused. The applicant was merely an employee and he had to follow the orders given to him by his employer. That would not mean that the applicant was a part of the conspiracy to commit murder. In any case, the applicant was merely making the entries. He was not making any payment and certainly he was not making any payment from his own money. The applicant was not shown as an accused in the first charge-sheet. He is roped in only because he was related to the main accused Suresh Patel. Learned senior counsel submitted that, in the present case, the applicant is in

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custody for a long period from 2020. More than four years have passed. About 70 witnesses are to be examined. The trial is not likely to get over in the near future. Therefore, the applicant deserves to be released on bail.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.1 :

13. Shri. Venegavkar, learned Special P. P. made the following submissions:

Since the assailants were not known in the vicinity or to any witnesses, it took some time for the investigating agency to find out the details of the offence and how the conspiracy was hatched to commit the offence. The first breakthrough came on 02.06.2018 when the first arrest was made in this case of Nur Mojjam. He was one of the shooters who had participated in the shooting at the two deceased. He was arrested on 02.06.2018. From his interrogation, the names of other accused transpired and they came to be arrested one after the other. The two other shooters Rashid Murtaza and Mohd. Hasan were arrested respectively on 23.06.2018 and 17.06.2018. One Aslam Khan was

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arrested on 27.06.2018. Initially, one of the co-accused Jayprakash surrendered before the Court and he was arrested on 30.06.2018. He misled the investigating agency by projecting as if he had hatched the conspiracy with the other accused to commit murder of the deceased Ajay. The initial theory of the investigating agency was that the co-accused Jayprakash had allegedly taken substantial amount from Ajay which he was demanding back. Getting fed up because of the constant demand and harassment, Jayprakash hatched the conspiracy, hired the assailants and thus the incident took place on 01.04.2018. However, after that, the other two co-accused Ikrarkhan Pathan and Mishra @ Rahul were arrested on 17.07.2019, by which, the investigation took a different turn and it was realised that the main accused in this case was Suresh Patel, at whose instance, this offence was committed. As different accused were arrested one after another, the charge-sheet and different supplementary charge-sheets were filed. The first charge-sheet was filed on 20.08.2018. After that, on a number of occasions the supplementary charge-sheets were filed; either after arrest of some accused or for the purposes of furnishing the documents recovered

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during the investigation. In all 10 charge-sheets, including the first charge-sheet, were filed. The last charge-sheet was filed on 25.01.2022.

14. During the investigation, the accused Suresh Patel's office was searched in October 2019. Some files and diaries from that office were seized. It is the prosecution case, that, the applicant Vipul was working with Suresh and he had maintained those diaries and the files and that he had made some important entries in that diary in respect of the financial transactions. The applicant Vipul was arrested on 20.01.2020. Broadly, the material against the applicant Vipul was that he was one of the conspirators and facilitators. He had attended various meetings in which conspiracy to commit murder of Ajay was hatched. He had provided the finances to the co-accused. Subsequently, after the arrest of the co-accused, he provided finances to the families of the arrested accused. He had provided money for purchasing a back dated stamp paper to create the evidence showing that Jayesh Kamli had sold the flat in question to Jayprakash. To establish this material against the applicant, learned Special P. P. relied on the

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statements of the witnesses Chetan Mangela, Pritam Singh and Rajkumar Lohar @ Raj Panchal. He submitted that there is F.S.L. report confirming that the handwriting in those entries is that of the applicant Vipul. In addition, there was CDR showing that the applicant was constantly in touch with the co-accused Miten Patel, Suresh Patel and Ketan Patel.

15. Lastly, Shri. Venegavkar relied on the statement of one of the shooters Rashid Murtaza which was recorded by the learned C.J.M., Daman under the directions of the learned Additional Sessions Judge, Daman. In that statement, Rashid had clearly mentioned the role played by the applicant Vipul.

SUBMISSIONS ON BEHALF OF THE INTERVENOR :

16. Learned senior counsel for the intervenor submitted that this is a ghastly murder. The victims are not only the two deceased Ajay and Dhirendra, but the real victims are their families because they are suffering. The widow of the victim Ajay has been pursuing these matters for so many years. She is living under constant fear. The deceased Ajay was threatened. There was an attempt on his

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life in the year 2017. The State failed to protect him which ultimately resulted in commission of his murder. The trial has started. If the applicant is released on bail, the witnesses would be under fear and there would not be a fair trial. On the material against the accused and the value of the evidence, he adopted the arguments of the learned Special P. P.

REASONS AND CONCLUSIONS

17. In the present case, the applicant was arrested on 20.01.2020. The third prosecution witness is being examined. The prosecution proposes to examine about 70 more witnesses. The trial is proceeding at a snail's pace. The charges were framed on 07.12.2022. The examination of the first witness started on 02.06.2023. After more than one year and three months only the third prosecution witness is in the box. There is only one Sessions Judge in that sessions division. He takes up trials only for three weeks in a month. For one week he has to attend a Court at Diu. He is the special judge for other special Acts like POCSO, NDPS, Prevention of Corruption Act, CBI cases etc. In all these cases there

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are under-trial prisoners. Therefore, it is not possible for him to conclude the trial at the earliest.

18. The Hon'ble Supreme Court in the case of *Javed Gulam Nabi Shaikh Versus State of Maharashtra and another*[1] has made the following observations:

> "19. If the State or any prosecuting agency including the Court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.
>
> 20. We may hasten to add that the petitioner is still an accused; not a convict. The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be.
>
> 21. We are convinced that the manner in which the prosecuting agency as well as the Court have proceeded, the right of the accused to have a speedy trial could be said to have been infringed thereby violating Article 21 of the Constitution.

19. From the observations of the Hon'ble Supreme Court, it is made clear that, even if the offence is serious, the consideration

1 Criminal Appeal No.2787 of 2024: decided on 03.07.2024

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would still be the right of the accused for speedy trial. In this case, as mentioned earlier, the trial has started much belatedly. It is progressing at a very slow pace. There is no possibility that it would get over soon.

20. In the case of *Balwinder Singh Versus State of Punjab & Anr.*[2], decided by the Hon'ble Supreme Court vide the order dated 09.09.2024, the trial had started and 21 witnesses were examined. 17 more witnesses were proposed to be examined. The Petitioner in that case was in custody for about four years. Direct role of shooting the victim was attributed to him. In that context, the Hon'ble Supreme Court made the following observations:

> "7. An accused has a right to a fair trial and while a hurried trial is frowned upon as it may not give sufficient time to prepare for the defence, an inordinate delay in conclusion of the trial would infringe the right of an accused guaranteed under Article 21 of the Constitution.
>
> 9. The incident in the present case occurred on 25.06.2020 and the petitioner was arrested soon thereafter on 26.06.2020. By now, 6 co-accused have been granted bail. As the prosecution wishes to examine 17 more witnesses, the trial is unlikely to conclude on a near date.
>
> 10. Considering the above and to avoid the situation

2 SLP (Cri.) No.8523 of 2024

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> of the trial process itself being the punishment particularly when there is presumption of innocence under the Indian jurisprudence, we deem it appropriate to grant bail to the petitioner – *Balwinder Singh.* It is ordered accordingly. Appropriate bail conditions be imposed by the learned trial court."

The facts regarding the conduct of trial in the present case show that it will not be concluded soon. Only the third witness is being examined. 70 more witnesses are to be examined. The Applicant is in custody for more than four years.

21. In this background of delay in conducting the trial, the material against the applicant will have to be seen. It is necessary to see the material referred to by all the parties; which concerns the present applicant Vipul.

22. Mr. Memon, learned senior counsel relied on the observations of the Hon'ble Supreme Court in the order dated 19.04.2022 in the case of *Ms. Y Versus State of Rajasthan and Anr.* in *Criminal Appeal No.649 of 2022.* It was held that, at the stage of granting bail the Court is not required to enter into a detailed analysis of the evidence in the case. Such an exercise may be undertaken at the stage of trial. But there is necessity of reasoned

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bail orders particularly in the matters involving serious offences.

Keeping these principles in mind, I am considering the rival submissions in respect of the material against the Applicant. Since the trial is in progress, the observations cannot be made causing prejudice to either of the parties.

23. The witness Chetan Mangela in his statement dated 10.01.2020 has stated that he was working in the office at Nani Daman owned by the main accused Suresh Patel, since 2017. In the same year, the applicant Vipul who was related to the accused Suresh had joined the office. One Miten Patel was also working with Suresh since past many years. He was working as a Manager in that office. He was also a business partner of Suresh. One Ketan Patel used to visit Suresh's office. Suresh was involved in many businesses including scrap trading, wine shops, cable network, construction etc. He was politically active. He was an influential person in that area. In June-July 2017, Jayprakash and Sajidali started visiting Suresh's office at Bhimpore. Sometimes, Mohd. Anish and Rashid also used to come to Suresh's office to hold long

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meetings with Jayprakash, Miten and Ketan. According to this witness Chetan, after the meeting, when they used to come out of the office, they kept discussing something privately and after that Miten used to discuss those things with the applicant Vipul. From February 2018 to March 2018, large sum of money was paid to Jayprakash and Sajidali by Miten either indirectly or in cash on the instructions of Suresh. The details of such payments used to be maintained by the applicant Vipul. Chetan has further stated that they did not use to involve Chetan in this secret transactions. After the murder of Ajay and Dhirendra, Chetan came to know that all the persons named by him were involved in the crime and after their arrest Suresh had instructed to pay money to the family members of the accused persons. Accordingly, the money used to be paid by Miten and the applicant Vipul. Two other persons namely Pritamsingh and Raj Panchal used to come to the office of Suresh Patel to collect those amounts. The Applicant Vipul and Miten used to make entries regarding those financial transactions maintained by them for daily expenses and those files were submitted to Suresh's wife. Such record was maintained till

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October 2019. After that the applicant and others stopped coming to the office. Miten and the Applicant Vipul used to contact Chetan on mobile phone.

This statement vaguely refers to the meetings in which discussion was going on privately and after that Miten used to discuss those things with the applicant Vipul. This may be an incriminating circumstance, but at this stage, it appears to be a weak circumstance.

24. Pritamsingh was another witness. After narrating the background, he has stated that between February and March 2018, about Rs.12,70,000/- were deposited in the account of Sajidali and Jayprakash by him. This money was given by Sajidali and Jayprakash themselves to this witness and he only used to deposit those amounts in various accounts. He used to keep record of the deposits. After the offence on 01.04.2018, he received a message from Sajidali and Jayprakash that they were going to abscond and that Pritamsingh had to take the responsibility of the business. In August 2018, Miten called this witness to Suresh's office at

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Bhimpore and directed to make payment to the family members of the arrested accused. This went on for every month and this witness used to disburse that amount to those family members of the accused.

25. The statement of Rajkumar Lohar supports the statement of Pritamsingh that such amount was being disbursed to the family members of the arrested accused. This witness himself used to come to Daman frequently and used to collect the money from Miten or the Applicant Vipul or from Pritamsingh and used to give Rs.50000/- to the family of the accused Hasan or used to deposit the amount in the bank account of the accused persons. He had also deposited Rs.30000/- in the bank account of the father of Mohd. Anish.

26. These statements mention that, money was distributed to the family members of the arrested accused and the applicant Vipul or Miten used to give that money. However, it is not the prosecution case that it was the applicant Vipul's money. He was distributing that money on the instructions of the main accused

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Suresh. He had made entries in respect of the distribution of those amounts.

27. I find force in the submission of learned senior counsel that the entries made by him would not by themselves mean that he was part of the conspiracy. He was working in the office of Suresh and he was doing it at his behest. He was keeping the account and was mentioning those entries.

28. Learned Special P. P., as well as, the learned senior counsel for the intervenor submitted that there was one entry about giving Rs.10000/- for illegal purpose of procuring stamp paper. According to them, this would indicate that the applicant was part of the conspiracy.

At this stage, it would not be proper to make any definite comments on the effect of this evidence because it may affect either of the parties during trial which has already commenced. Suffice it to say that these independent incriminating circumstances are in the nature of circumstantial evidence and the prosecution will have to piece them together to form a complete

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chain of circumstances against the applicant. At this stage, I do not want to cause prejudice to either of the parties. However, considering that the applicant is in custody for a very long period and these are the only circumstances against him, he deserves some benefit for consideration for grant of bail.

29. Before proceeding further to discuss the above circumstances, there is one more crucial aspect in this case, that is the confessional statement of one of the accused who was the actual assailant in this case. It is the statement of Rashid Murtaza. This statement is in detail and gives many details of the conspiracy and gives details of roles played by each of the accused. Before considering the value of this statement in the context of the case, briefly, reference is made to what he has stated in the statement. He was a resident of Uttar Pradesh. He was in need of money. He contacted Hasan as he told him that he had some work in Daman. Rashid went to Daman. He contacted Nur Mojjam. After that, he started staying in Flat No.702 of Siddhivinayak society. The accused Anish and other three accused namely Shamsad, Guruji, as well as, Nur Mojjam were staying in that flat including Rashid.

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The applicant and the accused Miten and Rakesh Kamli used to give them money for the expenses. The accused Jayprakash and Salim had met him there. Two more persons namely Kalia and Habbu joined them in that flat. Then he has stated about the conspiracy to commit murder of Ajay. Jayprakash called Hasan and told him that Ajay was going to Vapi on 01.04.2018 and they would not get another chance. Before the incident, the weapons were distributed to the shooters. Hasan was keeping track of Ajay since evening. Then he described the actual incident. He has described the roles played by the actual shooters. He has attributed that role to Nur Mojjam, Hasan, Kalia, Habbu and Rashid himself. He has described that the weapons were distributed to these accused including Rashid himself. Then he has described that, after the incident, the accused Anish collected the weapons from them. Then he described as to how they went to Aslam's office at Mumbai and then to Nashik. This was a crucial statement, as far as, the investigating agency was concerned. Lengthy arguments were advanced regarding value of this particular statement and as to whether it can be read in the evidence at all. To consider the

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effect of this statement, it must be noted before proceeding further that Rashid who had given this statement before the learned C.J.M., has passed away, as he was suffering from cancer, in October 2022. Therefore, now the question arises as to how far that statement can be relied on by the prosecution.

30. It is important to note the circumstances in which this statement came to be recorded. Rashid came to be arrested on 23.06.2018. As mentioned earlier, the charge-sheets were filed one after other on different dates and the case was committed before the Sessions Judge, Daman. It was pending before him vide the Sessions Case No.16 of 2018. On 23.04.2020, Rashid gave an application to the Superintendent of Sub Jail, Daman, expressing his desire to give a statement and to become Approver by giving his confession. That application is produced on record at Exhibit-69. The Superintendent forwarded that application to the Station House Officer, Nani Daman police station on 24.04.2020. The forwarding letter is produced on record at Exhibit-68. The Police Sub Inspector, Nani Daman police station, who was the investigating officer, submitted an application pointing out this

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development and prayed that the Court be pleased to take into consideration the plea of the accused to become an approver in the present crime, as per the provisions of the law, to facilitate investigation of the crime, in the interest of justice. A prayer was made for permission to the record confessional statement of the accused and give directions to the concerned authorities. This application was filed at Exhibit-67. The learned Sessions Judge, Daman, vide the order passed below Exhibit-67 on 18.05.2020 allowed that application and gave permission to the prosecution to record confessional statement of Rashid as statement of accomplice accused in Sessions Case No.16 of 2018 arising out of C.R.No.39 of 2018 of Nani Daman police station. The C.J.M., Daman was directed to record the confessional statement U/s.306(1)(4) of the Cr.p.c. as confessional statement and statement of accomplice accused and to send the recorded statement in a sealed packet to the sessions court. There were other consequential directions to follow the procedure. Significantly, there was no specific order granting pardon to the said accused Rashid, U/s.307 of the Cr.p.c. as the case was already

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committed before the Sessions Court. Pursuant to the order of the learned Sessions Judge, the learned C.J.M. recorded Rashid's statement on 20.05.2020 by following due procedure. Before recording the statement, Rashid was given 24 hours time for reflection. After recording the statement, the learned C.J.M., Daman had appended the certificate that he believed that the statement was made voluntarily. It is the case of the defence that, subsequently, his confessional statement was retracted. However, it is part of the charge-sheet and this statement particularly was subject of the arguments, as mentioned earlier. It will not be out of place to mention that, in all the previous bail applications and anticipatory bail applications, this statement was treated by both the sides as the statement of an approver.

In this context, when the Court questioned the learned Spl. P. P. as to whether pardon was granted either U/s.306 or U/s.307 of the Cr.p.c.; the categorical and emphatic answer given by Shri. Venegavkar was in the negative. He submitted that the order of tendering pardon to Rashid was never passed. Mr. Memon, who appears for the intervenor, also supported this

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statement. He added that, process of tendering pardon was aborted midway and the actual order of tendering pardon was not passed in this case. According to Shri. Venegavkar, this statement remains as a confessional statement recorded by the learned C.J.M. U/s.164 of the Cr.p.c.

31. Therefore, the question arises as to what is the evidentiary value of this statement and whether it can be relied on by the prosecution during trial and as to whether this could be a consideration for deciding the bail application. According to Shri. Venegavkar, the statement was recorded by the learned C.J.M., Daman after following due process and, therefore, it becomes a public document. It is admissible U/s.74 of the Indian Evidence Act and, therefore, it can be looked into. He submitted that, Section 74 of the Evidence Act deals with the public documents. According to Shri. Venegavkar, the statement recorded by the learned C.J.M. would be a public document and there is presumption U/s.80 of the Evidence Act. Section 80 of the Evidence Act reads thus:-

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> **“80. Presumption as to documents produced as record of evidence.**
>
> Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume - that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

32. It refers to the confession of an accused person taken in accordance with law; signed by the Magistrate. Then the presumption is that the document is genuine and the circumstances under which it was taken, purporting to be made by the person signing it were true and such confession was duly taken.

33. The learned Senior counsel for the applicant submitted that this only covers the procedure of recording evidence and genuineness of the document. But the evidentiary value of the

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contents will have to be considered separately. He submitted that there is a specific bar to use any such confession in the absence of the maker of the confession against the co-accused U/s.30 of the Evidence Act; if the trial is not a joint trial with the maker of the confession and other co-accused. Learned senior counsel relied on the Judgment of the Hon'ble Supreme Court in the case of *Baij Nath Sah Versus State of Bihar*[3] to contend that the statement recorded U/s.164 of the Cr.p.c. can only be used to corroborate or to contradict the witness vis-a-vis a statement made in the Court. In other words, it cannot be used as substantive evidence. A reliance was also placed on the Judgment of the Hon'ble Supreme Court in the case of *Raja alias Ayyappan Versus State of Tamil Nadu*[4], in which, it was observed in paragraph-28 that, Section 30 of the Evidence Act mandates that to make the confession of a co-accused admissible in evidence, there has to be a joint trial. If there is no joint trial, the confession of a co-accused is not at all admissible in evidence and, therefore, the same cannot be taken as evidence against the other co-accused.

3 (2010) 6 Supreme Court Cases 736
4 (2020) 5 Supreme Court Cases 118

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34. Section 30 of the Evidence Act reads thus:

> "**30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.**—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

Hence, from the language of the section, as well as, from the observation of the Hon'ble Supreme Court in the above cases, it is more than clear that unless there is a joint trial, the confession made by one co-accused cannot be used against the other co-accused. In this particular case, the maker of the confession, Rashid is no more and hence, there cannot be a joint trial with him, as far as, the applicant is concerned. Therefore, there is a specific bar for use of such confessional statement against the applicant during trial. The said statement cannot be used for any other purpose except for contradicting or corroborating the deposition of the witness, as mentioned in the case of *Baij Nath Sah(supra)*. In this case, there is no possibility of

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Rashid's deposition being recorded and, therefore, there cannot be any substantive evidence which could be corroborated by this confessional statement. Therefore, it is quite clear that this statement is not admissible and cannot be taken into consideration during trial.

35. The next question that would arise is to whether its admissibility has to be left to be decided at the stage of trial. In that context, the learned senior counsel for the applicant relied on the observations of the Hon'ble Supreme Court in the case of *State (By NCB) Bengaluru Versus Pallulabid Ahmad Arimutta and another*[5]. In paragraph-12, the observations indicate that the Hon'ble Supreme Court was considering the question of bail and in that context, the Hon'ble Supreme Court observed that the confession given U/s.67 of the N.D.P.S. Act, as per the case of *Tofan Singh V. State of T.N.*[6], was not admissible. Therefore, it was argued by the learned senior counsel for the applicant in this case that the question of admissibility of such confession was taken into consideration at the stage of bail.

5 (2022) 12 Supreme Court Cases 633
6 (2021) 4 SCC 1

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36. Learned senior counsel further relied on the case of *Ranjitsing Brahmajeetsing Sharma Versus State of Maharashtra and another*[7]. In paragraph-38 of the said judgment, it was observed that the Court has to consider the effect of the material on record to see whether on that basis the conviction was possible. It is also one of the considerations. The learned senior counsel, therefore, submitted that, in this case the admissibility, or otherwise, of the confessional statement of Rashid will have to be dealt with, in this bail application.

37. As there cannot be a joint trial of the applicant and the maker of the confessional statement, section 30 of the Evidence Act clearly bars use of that statement against the applicant. As rightly submitted by the learned senior counsel, Section 80 of the Evidence Act will not enable the Court to look into the contents of that confessional statement. Therefore, even for consideration of this bail application, this statement of Rashid will have to be kept aside and this application will have to be considered on the basis of other available material.

7 (2005) 5 Supreme Court Cases 294

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38. Learned Special P. P. Shri. Venegavkar relied on the observations of the Hon'ble Supreme Court in the case of *Mahipal Versus Rajesh Kumar alias Polia and another*[8]. Shri. Ponda, learned senior counsel appearing for the applicant also relied on certain observations from the same judgment. In that judgment, the Hon'ble Supreme Court referred to another judgment of the Hon'ble Supreme Court in the case of *Ram Govind Upadhyay v. Sudarshan Singh*[9] and quoted some paragraphs from that judgment. The sum and substance of those observations are that the order of bail bereft of any cogent reason cannot be sustained. While granting bail, the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations. Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail. At the stage of assessing whether a case is fit for grant of bail, the Court is not required to enter into a

8 (2020) 2 Supreme Court Cases 118
9 (2002) 3 SCC 598

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detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is the matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system.

Keeping these guidelines in mind, the material against the applicant will have to be considered. The Court, in the present case, cannot be oblivious to the fact that the trial has commenced and any firm opinion on the quality of material against the accused may impact the trial and may cause prejudice either to the prosecution or to the defence. In this view of the matter, I am only considering the question of grant or refusal of bail in the background of the fact that the applicant is in custody for a very long period and the trial is not likely to get over in a reasonably near future.

39. Thus, from the above discussion, it can be seen that

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there are individual incriminating pieces of evidence in this case against the applicant. They are circumstantial in nature. Therefore, the prosecution will have to link them together to form a complete chain of circumstances; unerringly pointing to the guilt of the applicant. At this stage, I am considering the bail application in the background that the applicant is in custody since 20.01.2020 and that the trial is not likely to get over soon. Therefore, at this stage at least, benefit of grant of bail can be given to the applicant on the basis of the above discussion.

40. The apprehension expressed by the learned Special P. P. and Mr. Memon about tampering of the evidence and potential threat to the victims' family can be taken care of by imposing suitable conditions.

41. The Hon'ble Supreme Court has already issued the directions to the trial Court to make an endeavour to dispose of the trial expeditiously. The applicant is expected to co-operate with the conduct of the trial. The learned Trial Judge is duty bound to follow the directions of the Hon'ble Supreme Court to make such an effort.

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42. Considering the above discussion, I am inclined to grant bail to the present applicant.

43. Hence, the following order:

O R D E R

i) In connection with C.R.No.39 of 2018 registered with Nani Daman police station, the Applicant is directed to be released on bail on his furnishing P. R. bond in the sum of Rs.50000/- with one or two sureties in the like amount.

ii) Before being released on bail, the applicant shall deposit his passport, if any, with the Investigating Officer.

iii) The Applicant shall not leave the jurisdiction of the Nani Daman police station without seeking permission from the Trial Court.

iv) The Applicant shall attend every date in the trial Court, unless exempted by the learned Trial Judge.

v) The Applicant shall attend Nani Daman police station between 4:00p.m. to 6:00p.m. on every Sunday till the conclusion of the trial.

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vi) The Applicant shall not tamper with the evidence or influence the witnesses in any manner.

vii) The Applicant shall co-operate with the expeditious disposal of the Trial.

viii) The Application is disposed of.

ix) With disposal of the bail application, the interim application is also disposed of.

(SARANG V. KOTWAL, J.)

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