

Court No. - 46

Case :- CRIMINAL APPEAL No. - 6325 of 2019

Appellant :- Shakeel Ahmed

Respondent :- State of U.P.

Counsel for Appellant :- Prakhar Srivastava, Jitendra Prasad Mishra, Kamal Krishna, Shamsul Hasan

Counsel for Respondent :- G.A.

With

Case :- CRIMINAL APPEAL No. - 5282 of 2019

Appellant :- Mohammad Naseem

Respondent :- State of U.P.

Counsel for Appellant :- Jitendra Prasad Mishra, Abhishek Narayan Pandey, Raghuraj Kishore, Raj Raghuvanshi, Satya Prakash Singh, Shamsul Hasan, Sushil Kumar Dwivedi

Counsel for Respondent :- G.A.

With

Case :- CRIMINAL APPEAL No. - 5361 of 2019

Appellant :- Asif Iqbal @ Faroq

Respondent :- State of U.P.

Counsel for Appellant :- Rajiv Lochan Shukla, Ch. Dil Nisar

Counsel for Respondent :- G.A.

With

Case :- CRIMINAL APPEAL No. - 5470 of 2019

Appellant :- Dr. Irfan

Respondent :- State of U.P.

Counsel for Appellant :- Shahzad Alam, Mohd. Samiuzzaman Khan

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Syed Aftab Husain Rizvi,J.

(Order on Bail Application)

Heard Sri M.S. Khan and Mr. Arif Khan (through VC mode), Sri Rajiv Lochan Shukla, Ms. Qausar Khan, Sri Chaudhary Dil Nisar, Sri Jitendra Prasad Mishra, Sri Raj Raghuvanshi, Sri Prashant Prakash learned counsels for the accused appellants and Sri P.C. Srivastava, learned Additional Advocate General assisted by Sri Vikas Goswami and Sri Ankit Prakash, learned counsels appearing for the State respondents.

Application for suspension of sentence and grant of bail is moved on behalf of the accused appellants Shakeel Ahmed, Mohammad Naseem, Asif Iqbal @ Faroq and Dr. Irfan, who have been convicted in Sessions Trial No. 10 of 2007, arising out of Case Crime No. 157 of 2005, under Sections 302/120B, 307/120B, 153A/120B, 153B/120B, 295/120B, 353/120B IPC, Sections 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 r/w Section 120B IPC and Section 4 of the Prevention of Damage to Public Property Act, 1984 r/w Section 120B IPC, Police Station Ram Janmbhoomi, District Faizabad and the maximum sentence awarded to them is life imprisonment. The rest of the sentences are lesser sentences and all the sentences have been ordered to run concurrently.

On 05.07.2005, at about 9.15 in the morning, a marshal jeep bearing registration no. UP42T 0618 stopped near the Jain Temple at Ayodhya, whereafter a blast occurred in the jeep itself. Five heavily armed terrorists then attacked the premises popularly known as 'Ram Janmbhoomi Sthal' and the security forces retaliated. The firing continued for almost two hours and all five terrorists were silenced. One civilian identified as Ramesh Kumar Pandey also lost his life in the blast. A First Information Report came to be registered at 2.00 PM, vide GD entry No. 25, by PW-3 (Krishna Chandra Singh) in the incident. The First Information Report contains elaborate details of the manner in which the marshal jeep with the aforesaid registration number stopped near the Jain Temple followed with the explosion and the terrorists strike which followed thereafter. Various senior officers arrived at the place of occurrence and after firing from the side of the terrorists ceased for over half an hour, the combing operations commenced by the security personnels. Terrorists whose dead-bodies were found at the place of occurrence were armed with AK-

47 rifles and live cartridges, rocket launchers etc. Details of the firearms and the ammunitions carried by(*emphasis supplied by us*) each of the five terrorists have been specified in the FIR. The FIR apart from referring to the firearms and other ammunitions/cartridges etc. does not refer to any recovery of mobile phone from any of the slain terrorists.

Inquest was also conducted of all five deceased terrorists wherein also there is no reference to recovery of any mobile phone. The prosecution case primarily relies upon recovery of a Nokia handset bearing model no. 3220 RH 37, of which IMEI number is mentioned as 353780004532602. A recovery memo i.e. Ex.Ka.69, dated 05.07.05, has been relied upon by the prosecution as per which apart from the above relied IMEI number of the handset there was neither any SIM card in the handset nor any battery in it. The prosecution case further is that on surveillance and on the basis of call detail records, which were collected in the matter, SIM card No. 9891719808 was found to have been used from the recovered handset. The accused persons have been connected with the offence as conspirators to the crime essentially on the basis of the above referred Nokia mobile handset. It is also the prosecution case that in fact seven other SIM cards were operated from the same handset. All the accused persons have thus been connected with the crime in question on the basis of call detail records traceable to the handset in question as well as certain confessional statements made by the accused's. The prosecution case further is that on subsequent investigation it transpired that various other SIM numbers have also been used in the recovered handset and SIM card numbers issued to some of the accused have also been run on the recovered handset.

Trial Court on the basis of evidence led on record has delivered a detailed judgment holding that the prosecution has succeeded in establishing its case beyond reasonable doubt mainly relying upon the recovery of Nokia mobile handset.

On behalf of the appellants, it is urged that the recovery of Nokia mobile handset itself is not proved and following submissions are made in that regard:-

(i) Recovery of mobile handset has not been referred to either in the FIR, though other recoveries are mentioned in it, nor reference is made of recovery of handset in the inquest report although the prosecution case is that the handset has been recovered from the pocket of terrorists no. 3, who had been silenced in the incident.

(ii) It is submitted that there are 29 witnesses of fact who have deposed during trial but only three of them namely PW-14, PW-29 and PW-30 have referred to the recovery of mobile phone and none of the other witnesses have testified to such recovery.

(iii) On behalf of the appellants, reliance is placed upon GD entry No. 42, made at 11.30 PM on the date of incident, wherein the articles seized from the deceased persons have been mentioned. These recoveries are specified at the outset in the GD when the IO returned to the police station. The items recovered and referred to in GD entry at the outset are as under:-

"23.30

दाखिला 12 डिब्बा सर्व मुहर खुन आलूद व सादी मिट्टी एक बन्डल सर्व मुहर महमूले 4 झोला मय एक मन्की कैप एक बन्डल सर्व मुहर बम बिस्फोट से क्षतिग्रस्त मार्शल जीप के अवशेष एक बन्डल सर्व मुहर महमूले पुलिस पार्टी द्वारा फायर किए गये खोखा मय नमुना मुहर घटना स्थल सम्बन्धित मु०अ०सं० 157/05 से 166/05 तक धारा 147/148/149/307/ 353/153/153A/153B/295 I.P.C. 7 क्रि०ला० एमेन्डमेन्ट एक्ट व 4 लोक सम्पत्ति क्षति नि०अधि 25 A Act 5 विस्फोटक पदार्थ अधिनियम"

The recovery of mobile phone does not find mention at the place where other recovered items are specified. It is only at end of the entry no. 42 that its reference is added, in the last two lines before entry no. 43 begins, and the case of the defence is that this entry has been subsequently added in the GD in the blank space available between GD entry number 42 and 43.

(iv) The defence argument further is that notwithstanding the fact that recovery of handset itself is doubtful, even the subsequent mobile calls relied upon by the prosecution are substantiated only by the CDR's in respect of which there is no certificate produced in terms of Section 65B of the Indian Evidence Act, 1872.

Reliance is placed upon a judgment of the Supreme Court in Anvar P.V. Vs. P.K. Bashir 2014 (10) SCC 473 as also the subsequent judgment of the Supreme Court in Mohd. Arif alias Ashfaq Vs. State (NCT of Delhi), 2022 SCC online SC 1509, wherein the Court has held as under in paragraph 25 of the judgment:-

"25. Consequently, we must eschew, for the present purposes, the electronic evidence in the form of CDRs which was without any appropriate certificate under Section 65-B(4) of the Evidence Act."

On behalf of the accused appellants it is further contended that none of the accused appellants have any criminal history and have already undergone incarceration of more than eighteen years and as the hearing of the appeals may take some more time, therefore,

the accused appellants be enlarged on bail.

On behalf of the State, prayer made for grant of bail is strongly opposed by Sri P.C. Srivastava, learned Additional Advocate General, who contends that this case relates to a deadly terrorist strike in which innocent persons have lost their lives. It is contended that the implication of accused appellants have been established on the basis of recovery of Nokia mobile handset in which various SIM cards are used and are shown to be connected to them. Confessions of accused are also relied upon as having corroborated the prosecution case. Submission is that any challenge to the judgment in these appeals are bereft of any merits. On behalf of the State, learned Additional Advocate General further contends that paper books are since ready, therefore, instead of considering the prayer of accused appellants for grant of bail, the appeals itself be heard finally.

Learned Additional Advocate General also submits that the law with regard to the mandatory requirement of certificate under Section 65B of the Evidence Act has been crystallized later, whereas the evidence was collected in the facts of the present case much prior to it. It is urged on behalf of the State that some of the accused persons are found to have been in touch with persons across the border and their implication having been proved by the prosecution in the matter, their prayer for grant of bail deserves to be rejected.

We have heard learned counsel for the parties and have carefully perused the records placed before us.

At the outset we may note that though paper book has been prepared in these appeals, but many of the documents which are referred to at the stage of hearing have not been included in it. Reference can be made to the GD entry i.e. Ex.Ka.69, [which](#) is not included in the paper book. Other documents are also alleged to have been left out of the paper book prepared in the appeals.

Since the paper book prepared by the office in these appeals is not exhaustive, we deem it appropriate to direct the Registry to prepare a comprehensive paper book including other left out records in the form of supplementary paper book within a period of six weeks from today.

Though the argument of Sri P.C. Srivastava, learned Additional Advocate General that appeal itself may be heard finally appears to have force, but in the absence of comprehensive paper book the

hearing of appeals cannot commence as of now. We moreover cannot defer the consideration of pending applications for suspension of sentence and grant of bail, in view of the order passed by the Supreme Court in Writ Petition (Criminal) No. 205 of 2022 decided on 12.09.2022, wherein an observation has been made that in the event appellants file the bail applications, the same shall be listed before the Bench hearing the appeals within a period of four weeks. The order dated 12.09.2022 passed by the Supreme Court is reproduced hereinafter:-

"While we are not inclined to entertain the present writ petition under Article 32 of the Constitution of India, we observe that the petitioner would be entitled to move to the jurisdictional High Court(s) under Article 226 and Article 227 of the Constitution of India. If any such petition is filed, the same would be listed for hearing before the Court within a period of four weeks from the date of filing.

Similarly, in case, the petitioner files a bail application, the same would be listed before the Bench hearing the appeal, within a period of four weeks from the date of filing.

Recording the aforesaid, the writ petition is disposed of as not entertained, with liberty as stated. We clarify that we have not made any observations on merits.

Pending application(s), if any, stand disposed of." (emphasis supplied by us)

A period of more than one year has expired since the order of the Supreme Court and therefore, we are of the view that the prayer made by the accused persons for consideration of their first bail applications is liable to be considered since hearing of the appeal may take some more time as the comprehensive paper book is not ready and its preparation may require some more time.

We have perused the records and we find that this is a case of terrorist attack at an significant religious place, wherein five terrorists have been shot dead. An innocent person has also lost his life. The incident, therefore is grave and serious and has to be treated as an attack on the civilized society.

All four accused appellants have been implicated in the offence as conspirators. The aspect of conspiracy is asserted by the prosecution relying upon the recovery of a mobile handset from one of the terrorists, who had been silenced on the spot. The prosecution case is that the mobile handset recovered from the spot was used in various SIM card numbers and through a process of call detail records, all the four accused persons have been connected to the recovered mobile handset and thereby implicated

in the matter. The defence argument is that the recovery of handset itself is not proved and is planted. We are not required to return any definite finding on this aspect as detailed appraisal of the evidence led during trial, on such aspect, would be required at the time of hearing of the appeals. However, we do find that prima facie arguable points are raised in the appeal on the aspect relating to the factum of recovery of the mobile handset. Other legal issues have also been raised including evidentiary value of call detail records particularly as there is no certificate produced in terms of Section 65B of the Evidence Act. It is also admitted to the prosecution that none of the accused appellants have any criminal history and they are languishing in jail for the last more than 18 years.

We are also mindful of the fact that long period of incarceration during the pendency of appeal has been viewed with concern by the Supreme Court in a series of orders/judgments. Liberty of the individuals would have to be respected while balancing the competing interest of State to maintain order in the society.

In our view, without further commenting upon the merits of the case, it would be appropriate to enlarge all the accused appellants, namely, **Shakeel Ahmed, Mohammad Naseem, Asif Iqbal @ Faroq and Dr. Irfan** on bail in the above case on following strict conditions: -

- (i) All the accused appellants would report to the jurisdictional police station situated at their place of residence once in a week.
- (ii) None of the accused persons would leave the country without the leave of the court.
- (iii) Passports issued to the accused appellants, if any, shall be surrendered by them to the court concerned.
- (iv) The court concerned while releasing the accused appellants shall impose such further terms of security/surety as it deems appropriate.
- (v) Fine imposed shall be deposited within six weeks after release.

On acceptance of bail bonds, the lower court shall transmit photostat copies thereof to this Court for being kept on the record of these appeals.

Let all the appeals be listed for hearing on 04.12.2023.

Order Date :- 19.9.2023/RA