IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1870 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JEHANGIR MARZBAN PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 1870 of 2003

MR JB PARDIWALA for Petitioner No. 1

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 30/04/2003

CAV JUDGEMENT

1. Rule. Service of Rule is waived by ld. PP Mr. Oza for the State. With the consent of the parties, the

matter is taken up for final hearing today.

1-A. This application is filed by the applicant-accused under Section 439 of Cr.P.Code for releasing him on bail in connection with I. CR No.169 of 1995 registered at Shahpur Police Station, Ahmedabad City on 25.11.1995 for the offences punishable under Sections 467, 468, 469, 471 and 201 of IPC and under Sections 25(1A), (1-AA), 1(B),3 and 29 of the Arms Act and section 9 of the Explosive Act.

2. Undisputedly, the applicant is in judicial custody since 7.12.1995 in connection with the aforesaid offences. He has been chargesheeted along with other co-accused on 26.11.1996. Initially, the case of the present applicant and the co-accused was committed under Section 209 of CrPC to the Court of Sessions by ld. Metropolitan Magistrate, Ahmedabad City, but after hearing the application preferred praying discharge from the said offence punishable under Section of 25(1-AA) of the Arms Act, the ld. Sessions Judge, discharged the accused of the offence under Section 25(1-AA) of the Arms Act. The ld. Sessions Judge ultimately remanded the proceedings back to the Court of ld. Chief Metropolitan Magistrate, Ahmedabad as other offences are triable by the ld. Magistrate.

3(i) I have carefully considered the allegations and gravity of the offence pointed out from FIR lodged by the Deputy Supdt. of Police, ATS, Ahmedabad. On the day of registration of the alleged offence, the petitioner was dealing in Arms through the firm named M/s B.D.Patel & Sons, at Mirzapur, Ahmedabad. Initially, the father of the applicant accused late Mr. Marzban Patel was carrying on business of arms and ammunition under different licences issued by the competent authority under the Arms Act. Said firm was a proprietary firm and business was proprietary firm business. After the death of Mr. Marzban Patel- Sole Proprietor- in the year 1993, dealer licences came to be transferred in the name of mother of the applicant accused Mrs. Freny M.Patel. Till 1993, father of the applicant accused was solely managing the business but after transfer of the licences in the name of mother of the applicant accused Mrs. Freny M.Patel, the applicant accused was managing the business under Power of Attorney executed by Mrs. Freny M.Patel. It is submitted that the business under four different licences has been inherited by the applicant accused.

3(ii) After arrest, for the first time in the year

1995, Show Cause Notices were issued in the name of the licence-holder i.e. Mrs. Frency M.Patel calling upon to show cause as to why licences issued in her name should not be invoked or cancelled on the ground of alleged violation of the conditions attached with the licences. In response to the query raised by this Court, it has been pointed out that hearing of said SCNs have been concluded way back in the year 1996-1997, but the neither the applicant nor his mother have been communicated about the decision on this issue. So, it can be inferred reasonably that the authorities have yet to take final decision on this issue.

4. As on the date of hearing of the present application, the applicant has completed about 7 years & 8 months in the prison as an undertrial prisoner in connection with the present offence and other offences registered against him along with other co-accused. According to the respondent State, the applicant was found involved in 32 different offences including the offence punishable under Section 120-B of IPC R/w other relevant provisions of the IPC and Arms Act. However, it is not a matter of dispute that the applicant has been granted bail in 14 offences and in other 13 offences, he has been acquitted by the competent court. In respect of 4 offences, he has been discharged by the Court after hearing the complainant State of Gujarat. The present bail application is in reference to the 33rd offence wherein he has been kept in judicial custody as an undertrial prisoner for want of formal order of bail. It is submitted that all the accused persons arrested under this very crime registered at Shahpur Police Station, have been enlarged on bail except the applicant accused. Therefore, it is argued by ld. counsel Mr. Pardiwala for the applicant accused that in view of the grounds mentioned in the memo of the application, this Court should exercise discretion in favour of the applicant accused and he should be enlarged on bail. The applicant is ready to abide by any condition which may be imposed by the Court while releasing him on bail.

5. The applicant was immediately arrested and was chargesheeted for the offence punishable under section 25(1-AA) of the Act which is exclusively triable by the Court of Sessions. But after hearing, the ld. Sessions Judge while dealing with the discharge application preferred by the applicant accused, vide order dated 3.5.2002, discharged the accused observing that weapon involved in the case does not fall within the definition of "prohibited arm" as defined under Section 25(1-AA) of the Act.So, he sent back the case to the ld.

Metropolitan Magistrate for trail as other offences allegedly committed by the accused are triable by the ld. Metropolitan Magistrate. Before the ld. Magistrate could try the the accused, State of Gujarat preferred Criminal Revision Application No.285/2000 in this Court challenging the order of discharge passed by the Presiding Judge of the Fast Track Court of City of Ahmedabad. That revision application is still pending. No formal stay has been granted by this Court so far as the order of discharge is concerned. It is now settled by the decision of the Apex Court in the case of Subhash Ramkumar Bind @ Vakil and another v/s State of Maharashtra, reported in 2003 Cr.LJ P.443 that 9 mm pistol or .38 Bore revolver are not "prohibited arms" within the meaning of section 2(1), 27(3) of the Act (54 of 1959). It is submitted that the applicant accused first in point of time was arrested on 1.11.1995 and in connection with the offences in question in respect of which present bail application is preferred, was arrested on 7.12.1995. So, as on the day of application, he has completed 7 years & 4 months in judicial custody as an under-trial prisoner in connection with the aforesaid offence. Approximately, 35 witnesses are to be examined and the applicant is not able to see the commencement of the trial in a near future in view of pending revision application preferred by the State. It is submitted by ld. counsel Mr. Pardiwala for the applicant accused that out of 22 accused arraigned in this offence, 19 are on bail, two of them have expired and the applicant accused is the only person who is craving for bail especially when he has been enlarged on bail by the Supreme Court in a case where he has been held guilty of the offence punishable under the Arms Act, in view of the period already undergone by the applicant accused in judicial custody/prison.

6(i) Ld. PP Mr. Oza has strongly resisted the bail plea and has placed reliance on the facts averred in the affidavit-in-reply filed by the Investigating Officer who is at present Asstt. Commissioner of Police, Special Branch, Vadodara. According to Mr. Oza, accused had preferred application for bail being Cri.Misc. Application No.424/2003 which came to be rejected by the ld. Addl. Sessions Judge on 10.3.2003. Prior to this, he had preferred bail application being Cri.Misc.Application No.4561/2002 which came to be withdrawn on 30.4.2002, but the applicant accused was granted liberty to move this Court afresh after the decision on the application for discharge from the one serious offence punishable under the Arms Act. Mr. Oza has hammered on two major aspects that the accused is a

person who has been convicted for the offence punishable under the TADA and is an accused against whom the State Government in the public interest, has exercised the powers under Section 268 of CrPC. So, the status of the present applicant is of habitual offender and, therefore, in the interest of security and safety of the citizen of the State, the Court should not exercise discretion in favour of the present applicant. It is also submitted that if the applicant is enlarged on bail, he may indulge in the same type of illegal activities of supply of arms and ammunitions to the habitual and hard-core criminals, though Mr. Oza has accepted that in none of the case pending against the present applicant, he has been found involved in using the fire arm. The another apprehension expressed by Mr. Oza is that the accused may abscond and may not be available for any of the trials which are pending against him.

6(ii) Ld. PP has further submitted that in view of number of cases pending (10 trials) and the quantum of punishment, the applicant accused may be tempted to jump the bail. The present applicant was having connection with a gang of hard-core criminals (Latif Gang) and, therefore, he would be able to tamper with evidence and he may try to influence the witnesses, if enlarged on bail.

6(iii) By referring Sections 323 and 325 of CrPC, Mr. Oza has submitted that merely because the case is sent back to ld. Metropolitan Magistrate for trial by the Court of Sessions (Presiding Judge of Fast Track Court), it cannot be said that after evaluating the evidence and other set of facts which may be brought to the notice of the ld. Metropolitan Magistrate, shall not refer the case to the ld. Chief Metropolitan Magistrate for more severe punishment and in turn ld. Chief Metropolitan Magistrate may commit the case to the Court of Sessions for punishment which may be higher or more graver than the one which he is empowered to impose in view of the provisions of sub-section (4) of section 29 of the CrPC. According to Mr. Oza, therefore, this Court while exercising the discretion, should not conclude that the accused may not be imprisoned for more than 3 years as the trial at present is pending with the ld. Metropolitan Magistrate. So, the quantum of sentence which may be passed in the present case is not certain and, therefore, on this count, the Court should not exercise the discretion in favour of the applicant accused. There is a scope for evaluation of period of sentence by ld. Chief Metropolitan Magistrate and in turn by the Court of Sessions. There is ample scope of

success by State of Gujarat in the revision application preferred and pending before this Court. I am afraid, such second reference or recommittal under Section 325 of CrPC, cannot be made. Finding if recorded that the offence is exclusively triable by the Court of Sessions, the effect would be of committal under Section 209 of CrPC and the same would lead the case to a denovo trial.

6(iv) Mr. Oza has placed reliance on the order passed by the State of Gujarat in exercise of powers under section 268 of CrPC in reference to the decision reported in the case of Anirudhasinh Mahipatsinh Jadeja v/s State of Gujarat & Others, reported 2003 GLH (U.J.) (February Issue) P.1 and has submitted that the bail plea of the present applicant accused should be rejected.

7. I have considered the rival contentions raised by the ld. counsel appearing for the parties and above-referred set of facts, relevant provisions of law pointed out. It would be proper to hold that the delay caused in concluding the trial wherein the applicant has not been granted bail, would positively make him entitled to file a fresh application for bail irrespective of previous rejection. This application cannot be said tobe an application which falls in the category of successive application without any material or change in circumstances in view of ratio of the decision in the case of Smt. Akhatari Bi v/s State of M.P. reported in 2001 AIR SC Weekly P. 1236. It is true that the grant of bail is a discretionary jurisdiction of the Court and the same is to be exercised with great care and caution by balancing the right of liberty of an individual and in reference to the larger interest of the society including the victim and, therefore, where the bail application has been resisted on the ground of interest of society in general, the Court can not exercise discretion unless appropriate reasons are assigned. Unless the Court is able to assign or indicate reasons, the order of bail in favour of the accused cannot be passed. While considering the bail plea advanced by the accused who is found involved in more than one cases, the effect of previous conviction, gravity of offence, whether offence can be said to be heinous or whether the punishment prescribed for the same is imprisonment for life and the quantum of punishment for the offence for which the accused is seeking bail, are all relevant factors. Simultaneously, this Court should also consider the scope of tampering with evidence, influencing the witnesses and likelihood of the accused jumping the bail.

8. The submission of Mr. Oza, pointing out the fact of notification issued by the State Government under section 268 of CrPC, that the same should be construed as an important embargo, needs appreciation being a basic objection raised. The powers of the State Government to exclude certain persons from the operation of section 267 CrPC is an independent power which categorises the person - detenu who can be excluded from the attendence in the Court and these powers are exceptional in nature as ordinarily the accused are to be produced before the concerned courts at the relevant dates. While dealing with the bail application if moved by a person, put in that category of a prisoner or a detenu, the Court hearing bail plea may not be able to insist the presence of the accused or such applicant accused may not be brought before the Court so as to submit his case in person. The jail authority or detaining authority comes under indirect immunity of the obligation of producing that accused before the Court. Similar privilege is available for the purpose mentioned in clause (a) & (b) of Section 267 of CrPC. It is settled that it would not apply to a situation where it is necessary to produce a person for the purpose of investigation before any agency engaged in the investigation. A production warrant issued under section 267 must not constitute a detention order authorising detention in prison. Section only envisages the production of the accused detained in prison before the Court. Scheme of Section 268 of CrPC confers powers on the State and no doubt this provision has to be construed strictly wherein the accused has been arrested and continued tobe in jail for more than say about 5 years without any commencement of trial, he could be released on bail inspite of the order passed by the Government under Section 268 of CrPC directing the authorities that the accused should not be moved out of jail in public interest. The provisions of section 268 CrPC do not impose any legal disability on the powers of the criminal court, but it empowers the State Government to exclude certain persons from operation of Section 268 of CrPC. Therefore, the notification issued as regards to any person or class of persons shall not be removed from prison, is not relevant when bail plea raised by such a person or detenu is under consideration in exercise of the powers vested in criminal court under section 437, 439 of CrPC or any other special enactments. Ratio propounded in the decision in the case of Veersing v/s State through CBI, reported in 1991(2) Delhi Lawyer P.26, helps the present applicant because of similarity of facts. In the said case, accused Veersingh was arrested and chargesheeted with other accused persons for the offences punishable under sections 120B, 302, 307, 34

of IPC and section 25(C) of the Arms Act and the order under Section 268 of CrPC was issued by the President. So, this submission of Mr. Oza is not found acceptable.

9. When the present applicant is an undertrial for more than seven years and except the applicant, all the surviving co-accused have been enjoying bail till the termination of trial and I am told that most of them and practically all of them are also named as an accused in number of offences allegedly committed by a gang, the present applicant should not be discriminated. It is true that the status of the present applicant at the relevant point of time was of a Arm Dealer and so he ought to have acted with more responsibility and great caution while dealing with the arms and ammunition either allegedly sold or supplied by him or by his family firm. But this would not disentitle him from praying for bail pending trial when he has been acquitted in number of such or similar cases registered during that relevant period. Ld. counsel Mr. Pardiwala has also satisfactorily submitted that as and when the original offender was apprehended, then in most of the cases, on the statement of the co-accused so arrested, or any other most interested witness like the police officer etc., he has been linked with that crime. It is not the say of the prosecution that in the present case, he was found with any lethal weapon or such ammunition so he can be linked with the offence punishable under Section 25(1-AA) of the Act and, therefore only, he has been discharged by the Sessions Court and now relegated to the ld. Metropolitan Magistrate for trial. Submission advanced by ld. PP Mr. Oza, in light of the scheme of sections 323 & 325 of the CrPC are not well-founded and these submissions are based on hypothesis framed in view of the phraseology of these two sections. In the present case, in view of the nature of the offence mentioned in the police chargesheet, the accused was committed to the Court of Sessions in exercise of the powers vested with the Court under section 209 of CrPC and the Sessions Court found that the offence exclusively triable by the Court of Sessions, prima facie, has not been committed as mentioned in the chargesheet and, therefore, the ld. Sessions Judge discharged the accused from that very offence. So, the case of the present applicant cannot be sent again to the Court of Sessions in exercise of the powers vested under section 323 of CrPC.

10. Section 325 of CrPC empowers Magistrate or Metropolitan Magistrate to send a case to another Court on the ground that he cannot pass sentence sufficiently severe for want of powers. In that eventuality, the

Magistrate cannot straightway commit the case to the Court of Sessions. Bare reading of sections 323 & 325 of CrPC show that they are general in nature, but some part of section 325 of CrPC provides for the case of special category.Under Section 323 of CrPC, when a Magistrate finds that the case should be committed at any point of time during the proceedings before signing the judgment that the case is one which ought to be tried by the Court of Sessions, then he has to commit the said case to that Court. As contained in chapter: XVIII, this can be done at any stage of the trial, but before signing the judgment. The Sessions Judge cannot frame charges against the accused while remitting the case under section 228 of the CrPC to a Magistrate who in exercise of the powers under Section 323 of CrPC has committed the case to the Court of Sessions. On the other hand, when the accused is discharged who has been committed to the Court of Sessions under an order under section 209 of CrPC, the Sessions Judge may frame the charge against the accused mentioned on the ground mentioned in the order passed and transfer the case for trial to the ld. Chief Metropolitan Magistrate. The present case is a case transferred to ld. Chief Metropolitan Magistrate and in turn at present pending with ld. Metropolitan Magistrate. It is rightly argued that while considering the bail plea, the quantum of punishment which the ld. Metropolitan Magistrate may inflict, should be considered relevant and not the hypothesis that the ld. Metropolitan magistrate, after recording evidence, is likely that he may assign reasons at any time before signing judgment and shall commit the case either to the Court of Sessions as provided under Section 323 of CrPC or to the ld. Chief Metropolitan Magistrate as provided under sub-section (1) of Section 325 of the CrPC. If the case is sent to award more severe or adequate punishment, than the reasons assigned and opinion expressed in that regard by the ld. referring Magistrate who has conducted the trial, shall have to be considered by the ld. Chief Metropolitan Magistrate/ Metropolitan Magistrate. Even if it is accepted for the sake of arguments that there is some scope of such reference by ld. Metropolitan Magistrate to the ld. Chief Metropolitan Magistrate provided under Section 325(1) of CrPC, even then the maximum punishment which can be inflicted in the present case, would be of 7 years. At one point of time, Mr. Pardiwala has submitted that the resistance put forward by the State of Gujarat in the present application amounts to an attempt by the State Government to see that the illegitimate confinement continues for more period. As the present applicant has undergone the period of incarceration of more than 7 years as an under-trial

prisoner, the bail Court also cannot assume that the trial Court may inflict the punishment with a direction that the accused should undergo punishment separately and not concurrently. On the contrary, it is relevant that the Apex Court, irrespective of the pendency of number of trials against the present applicant accused, has granted bail in a case where he has been held guilty, considering the period of incarceration undergone by him. Therefore, the submission of ld. PP Mr. Oza is not found acceptable that even there is a scope that the applicant accused may be sentenced to suffer R/I for life because it is likely that in turn, against this case will go to the Court of Sessions under the provisions either of Section 323 or Section 325 of CrPC. Only with a view to consider the arguments of ld. PP Mr. Oza, I have considered the decision of this Court in the case of Narendra Amrutlal Dalal v/s State of Gujarat, reported in 1978 CrLJ P.1193. Of course, this decision deals with the transfer and retransfer of cases under Section 228(1) of CrPC, but it also deals with the nitty-gritty of the provisions of sections 323 & 325 of CrPC. There is no apprehension of jumping the bail by the accused. I am convinced that irrespective of this apprehension, other co-accused have been enlarged on bail by the competent court. The applicant is inhabitant of Gujarat and was carrying on business since years and till date competent authorities have neither cancelled nor revoked the licences issued as Arms & Ammunition Dealer. His passport has expired and stringent conditions if imposed can take care of the situation. Normally, such arguments are advanced in all the cases where offence is either serious or offence committed is sensitive in nature. As mentioned herein above, he has been granted bail in 14 different cases at present pending against him. It is true that the severity of punishment tempts the accused to jump the bail, but unless this apprehension is well-founded, or atleast, is prima facie, found genuine, should not refuse to exercise the discretionary jurisdiction. It is not the say of the prosecution that the co-accused of the present applicant against whom the government had passed the orders in exercise of the powers under Section 268 of CrPC, have jumped the bail. This can be considered as relevant fact in appreciating this part of submission.

11. The apprehension expressed that accused if enlarged on bail, may tamper with evidence or may further indulge in similar activities, is found to be mere allegation. If list of witnesses shown in police challan is seen, it is apparent that most of the witnesses are police personnels or government officials and so far as

the present applicant is concerned, the most of the evidence which is important in nature, is documentary in nature. Affidavit-in-reply filed by the Investigating Officer, does not state convincing facts under which it can be reasonably inferred that the applicant will be able to tamper with evidence if enlarged on bail. When such plea is advanced, then before exercising the discretion in favour of the applicant, the Court should mainly consider two aspects,namely (i) scope and/or capacity to tamper with evidence by the applicant accused, and (ii) whether any condition if imposed while granting bail, is able to take care of the situation. On both the counts, balance tilts in favour of the present applicant accused. The present applicant accused is facing accusation because of irregularity or illegality committed by him in the capacity of a trader dealing with Arms & Ammunition. By putting a condition whereby he can be directed not to deal in such or similar type of business either with his mother or in any other capacity, this situation can be taken care of. The State Government also is able to take appropriate decision by placing under suspension the licences issued. Non-passing of the order or atleast non-communication of the decision taken by the appropriate authority would not come in the way of the present applicant in getting the bail. He can be asked to report to the concerned police station regularly with a further restriction on his movement so that his daily activities even either can be watched or regulated by limited force of intelligence. Personal liberty of an individual has always remained in prime consideration. If bail is rule and jail is exception is not a good law today, but when the Apex Court has granted the present applicant a bail in a case where he has been convicted in view of the period of sentence undergone by him, it would be injustice to the applicant if the present bail application is rejected merely on the ground that he has yet to face number of trials. One fact should not be lost sight of that in all other cases where the present accused is facing trial, he has been granted bail. Ratio of the decision of the Apex Court in the case of Akhataribai (supra) squarely applies to the fact of the present applicant and helps the present applicant accused. The applicant, in view of the facts circumstances discussed herein above and the privilege flowing from Article 21 of the Constitution of India, it is held that he is entitled to bail. The ratio of the decision in the case of Ram Pratap Yadav v/s Mitra Sen Yadav, reported in 2003(1) GLr P.514 would not, in any way, come in the way of the present applicant for grant of bail.

12. For the reasons aforesaid, this application is allowed and the applicant accused Jehangir Marzban Patel is hereby ordered to be released on bail in connection with Crime Register No. I. 169 of 1995 registered at Shahpur Police Station on his executing a bond of Rs. 1,00,000/ (Rs. One Lakh only) with one surety of the like amount to the satisfaction of the lower Court and subject to the conditions that he shall,

(a) not take undue advantage of his liberty or abuse his liberty;
(b) not act in a manner injurious to the interest of the prosecution;
(c) maintain law and order;
(d) mark his presence before Shahpur Police Station twice in a week on every Monday & Thursday between 8.00 a.m. to 5.00 p.m. till further orders;
(e) not leave the local limits of Districts Ahmedabad & Gandhinagar without the prior permission of this Court till further orders;
(f) furnish the address of his residence at the time of execution of the bond and shall not change the residence without prior permission of this Court;
(g) surrender his passport, if any, to the lower court within a week and shall also file an undertaking to the effect that he shall not apply for fresh passport or renewal of the passport without the intimation to the ld. Chief Metropolitan Magistrate, Ahmedabad city;
(i) pending trial of present case, if the applicant is found involved or named in FIR in any other case in connection with the offence punishable for imprisonment of the period exceeding THREE YEARS, he shall report to the concerned police station at the earliest and preferably within 72 hours.
(j) shall not indulge in any business concerning the Arms & Ammunition or explosives, even if the licences issued to the firm by the Competent Authority are continued.

13. If breach of any of the above conditions is committed, the ld. Judge of the Court concerned will be free to issue warrant or take appropriate action in the matter.

14. Bail before the Lower Court having jurisdiction to try the case.

15. Rule is made absolute. Yadi to the concerned Court as well as police station. Direct Service is permitted.

Dt : 30-4-2003 [C.K.BUCH,J.]
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