

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 11TH DAY OF SEPTEMBER, 2020

BEFORE

THE HON'BLE MR.JUSTICE B.A.PATIL

CRIMINAL PETITION No.3585/2020

BETWEEN:

Kumaraswamy
(Mentioned as Kumaraswamy
@ Kumar @ Kiran in charge sheet)
S/o Shivaramaiah
Aged about 37 years
R/at Kaggere Village
Irakasandra Post
Chelur Hobli, Gubbi Taluk
Tumkuru District-572 117.

...Petitioner

(By Sri K.Shashi Kiran Shetty, Senior Counsel for
Sri Nishit Kumar Shetty, Advocate)

AND:

State of Karnataka
Represented by C.I.D. Police
(Malleshwaram P.S.), Bengaluru,
Represented by State Public Prosecutor
High Court Building,
Bengaluru-560 001.

...Respondent

(By Sri Ashok N. Nayak, Special Public Prosecutor)

This Criminal Petition is filed under Section 439 of Cr.P.C praying to enlarge the petitioner on bail in Crime No.37/2016 of Malleshwaram Police Station, Bengaluru City, for the offences punishable under Sections 411, 454, 457, 380, 381, 461, 166, 120B, 201 r/w 109 of IPC and Sections 115 and 23 of Karnataka Education and Section 13(1)(D), 13(2) of Prevention of Corruption Act and Section 3(1)(ii), 3(2), 3(4), 3(5) of KCOC Act.

This Criminal Petition having been heard and reserved on 04.09.2020 coming on for pronouncement of orders this day, the Court made the following:

ORDER

Petitioner - accused No.1 is before this Court seeking his release on bail in Crime No.37/2016 (Special C.C.417/2016) of Malleshwaram Police Station, pending on the file of Principal City Civil and Sessions Judge, Bengaluru, for the offences punishable under Sections 454, 457, 380, 201, 120B of IPC and under Sections 115 and 23 of Karnataka Education Act, 1983 and also under Section 3(1) (ii), 3(4) and 3(5) of Karnataka Control of Organized Crime Act, 2000 (hereinafter referred to as 'KCOC Act' for short).

2. I have heard the learned Senior Counsel Sri. K.Shashikiran Shetty for Sri.Nishit Kumar Shetty for the petitioner-accused and the learned Special Public Prosecutor Sri.Ashok N.Naik for respondent-State.

3. Brief facts of the prosecution case are that the Joint Director (Examinations), Pre-University Board, Bengaluru, lodged the complaint dated 21.03.2016 against unknown persons alleging that II PUC Annual Exams for the academic year 2015-16 were scheduled to be held from 11.03.2016 to 28.03.2016. On 21.03.2016, examination was conducted for Chemistry (New Syllabus) subject. It is further alleged that on 21.03.2016, it came to the knowledge that a facsimile question paper of II PUC Chemistry (New Syllabus) subject was leaked out prior to the commencement of the examination i.e. at about 7.29 a.m. Later when the leaked out facsimile question paper was compared with the question paper given for the examination of Chemistry Subject on 21.03.2016, it corroborated. Complainant requested the respondent –

Malleshwaram Police to investigate the matter. On 30.03.2016 the said case was transferred from respondent Police to CID, Bengaluru, and during investigation the CID Police found that leaked question paper was circulated through WhatsApp of mobile phones and traced the cellular mobile numbers from which the leaked question paper was circulated. Then, the CID Police enquired accused Nos.1 to 3 and subsequently; accused Nos.1 to 3 were arrested and their statements were recorded on 04.04.2016. Based on the voluntary statements of accused Nos.1 to 3, it was found by the CID Police that few others are also involved in circulating the leaked question paper for financial gain from beneficiaries. Based on the voluntary statement of accused Nos.5 and 8, it was found that the petitioner in the above petition was also involved in circulation of the leaked question paper for money. The further allegations that accused had sold the leaked question paper and had collected the money. On 11.04.2016 the CID Police requested the jurisdictional

Additional Chief Metropolitan Magistrate, Bengaluru, for inserting Sections 120B and 201 of IPC in the said crime i.e., Crime No.37/2016, which was permitted by the said Court. On 18.04.2016 the above petitioner was produced before the Court and he was remanded to judicial custody and even till today he is in judicial custody. On the basis of the complaint, a case was registered.

4. It is the submission of the learned Senior Counsel that this Court while dismissing the bail application in Criminal Petition No.3467/2019 dated 9.9.2019 directed the trial Court to expedite the trial within an outer limit of one year from the date of receipt of the copy of the said order, but as on date no progress has been made, even the charge has also not been framed. Under such circumstances, the trial may take some more time. It is his further submission that the prosecution has cited 229 witnesses and more than 5000 voluminous documents have been produced, it may consume lot of time to hold the trial. It is his further submission that out of 18 accused

persons, 17 accused persons have been already released on bail. He further submitted that accused No.2 is the prime accused and he has already been released on bail. On the ground of parity, the petitioner-accused is entitled to be released on bail. It is his further submission that the provisions of the KCOC Act is also not applicable to the present facts of the case. It is his further submission that if the trial is not completed within the noticeable time and no noticeable progress has been attained in the case of prosecution, then under such circumstances, the petitioner-accused is entitled to be released on bail. To substantiate the said contention he relied upon the decision in the case of **Ram Saran Pal Alias Lallu Vs. State of Uttar Pradesh** reported in **(2018) 13 SCC 260**. It is his further submission that when other accused persons have been released on bail including the main accused person, then under such circumstances, the petitioner is entitled to be released on bail. In order to substantiate the said contention he relied upon the decision of Co-ordinate

Bench of this Court in Criminal Petition No.6172/2015 disposed of on 31.10.2015. It is his further submission that he is ready to abide by the conditions imposed by this Court and ready to offer the sureties. It is the further submission of Senior Counsel that because of Covid-19 it is not safe to keep the petitioner-accused in judicial custody. On these grounds he prayed to allow the petition and to release the petitioner-accused on bail.

5. *Per contra*, it is the submission of the learned Special Public Prosecutor that petitioner-accused No.1 is a kingpin and he has played the vital role in the alleged offence. It is his further submission that the accused has been charged with economic offences of huge magnitude and when he being a kingpin for the entire transaction, it is he who used to enter the strong room of Sub-treasury office at Hanagal and used to take photograph of the question paper and has committed the alleged offence. Petitioner-accused is a habitual offender and in that light the parity ground cannot be extended to him. It is his

further submission that if the petitioner-accused is released on bail, again he may indulge in similar type of criminal activities. It is his further submission that earlier two times the present petitioner has approached this Court for grant of bail. This Court by considering the merits of the case has dismissed the petition. No new changed circumstances have been made out to release the petitioner-accused on bail. It is his further submission that the delay in trial of the case is only because of the reason that the accused persons who have been already released on bail have remained absent and have been absconding and even it is difficult for the Court to secure them and as such the trial has been delayed. It is further submitted that if the petitioner-accused No.1 is enlarged on bail, he may also abscond and he may not be available for the trial. On these grounds he prayed to dismiss the petition.

6. I have carefully and cautiously gone through the submissions made by the learned counsel appearing for the parties and perused the records.

7. It is not in dispute that the petitioner-accused approached this Court in Criminal Petition No.5590/2018 and subsequently in Criminal Petition No.3467/2019 and this Court by considering the merits of the case dismissed the petitions respectively on 19.2.2019 and 9.9.2019. It is the submission of the learned Senior Counsel for the petitioner-accused that the trial Court has been directed to expedite the trial within an outer limit of one year from the date of receipt of copy of the said order and even in spite of the direction the trial has not yet been commenced and even the charge has not been framed. It is his further submission that nearly 229 witnesses are to be examined and voluminous documents are to be got marked, it may take some more time to conclude the trial.

8. It is trite law that, merely on the ground that there is delay in trial, it cannot be a ground to release the petitioner-accused on bail, that too when earlier this Court has declined to release the petitioner-accused No.1 on bail

after considering the merits of the case on hand. This proposition of law has been laid down by the Hon'ble Apex Court in the case of **Gobarbhai Naranbhai Singala Vs. State of Gujarat & others**, reported in **(2008)3 SCC 775**, wherein at paragraphs-19, 21 and 22 it has been observed as under:-

“19. From a reading of the impugned order it is found that the learned Judge, who incidentally happens to be the same Judge who had declined to release the respondent on bail earlier, did not advert to any of the reasons given by him declining to release the respondent on bail. There was no change of circumstances. The reasons given by the learned Judge in the impugned order for grant of bail are untenable.

20. xxx xxx xxx xxx

21. The other reason given in the impugned order is that the trial of the case has not progressed/begun. We find from the record that between 2-6-2004 and 19-12-2005 the case was listed before the trial court 31 times and on each date, it had to be adjourned on the ground

that one or the other accused was not present. There are 16 accused in the case. It is not clear from the record whether the accused were not brought by the police from the jail or that they were on bail and had not appeared of their own, but the fact remains that the complainants were not in any way instrumental in delaying the trial between 2-6-2004 and 19-12-2005. It was brought to our notice that the only witness who has been examined so far has turned hostile. Trial was stayed by the High Court on 15-2-2007 at the instance of the appellant as Shri R.R. Trivedi, APP, to whom the case had been assigned for conducting the trial and was allegedly the counsel for the respondent in some other case earlier, continued to appear in the case in spite of the fact that he was replaced by another APP. It just shows that the trial was not progressing smoothly. In any case, the complainant party was in no way responsible for any delay in trial.

22. The third reason given by the High Court for grant of bail, that the respondent had been in jail for the last more than 2 years, is equally untenable in view of the observations

made by this Court in State of U.P. v. Amarmani Tripathi : (SCC p. 32, para 19)

“19. ... ‘14. ... the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are

allegations of tampering with the witnesses by the accused during the period he was on bail.'

9. On perusal of the ratio along with the factual matrix of the case on hand, the trial of the case has not been progressed/begin before the trial Court because of the reason that the accused persons who have been already released on bail either remained absent or absconding. When the remaining accused persons who are on bail either they have not appeared or remained absent or absconded, then under such circumstances the delay is not at the instance of the prosecution and in that light the petitioner-accused is not entitled to be released on bail.

10. Be that as it may. It is the specific contention of the learned Special Public Prosecutor that the other accused persons who have been enlarged on bail, some of them are absconding. Under such circumstances, when the petitioner-accused No.1 is concerned to be a kingpin in the alleged case, if the petitioner-accused No.1 is ordered to be

released on bail, there is every likelihood of he tampering with the prosecution evidence and he may abscond and may not be available for the trial.

11. It is trite law that the accused must be present for the purpose of trial and there should not be any apprehension of he being absconding or not available for the trial. The Hon'ble Apex Court has given various guidelines under what circumstances the bail can be granted to the accused. If there is likelihood of accused absconding or may not be available for the trial, is a good ground not to grant the bail. Even as could be seen from the earlier order of this Court dated 9.9.2019 in Criminal Petition No.3467/2019 the delay in the trial has also been urged as one of the ground and this Court by taking into consideration the reasons stated therein, has dismissed the petition. Now no new grounds have been made out to revive the bail application.

12. This Court while passing the order has ordered the following:

"The Court has to look into the allegations made in the case and if the offences are proved, the same would jeopardize the credibility of the educational system of the State in this Country and if such attitude is allowed to be continued, such as paper leakage, the same would ruin the educational system. Some meritorious students will be losing good opportunities, their future carrier will be ruined by such method. In this competitive world, merit is the main criteria, if it is side rooted by such methods i.e., methods adopted by the accused everybody will loose faith in the system of examination. Under such facts and circumstances, consideration of Article 21 of the Constitution of India i.e., personal liberty of the accused should not be looked into. On the other hand, the Court has to look at other angle and to safeguard this Country."

13. Looking from any angle when the petitioner-accused is the kingpin and it is hw who entered the strong

room of Sub-treasury at Hanagal and in the first instance took the photographs of the question paper and committed the alleged offence, the ground of parity cannot be extended to such accused persons. In that light also, the petitioner-accused is not liable to be released on bail.

14. Though this Court has directed the trial Court to expedite the trial within an outer limit of one year from the date of receipt of copy of the said order, the trial Court has not bothered to expedite the trial. How the trial has to be held in criminal case has been held by the Hon'ble Apex Court in the case of **Akil Alias Javed Vs. State (NCT of Delhi)** reported in **(2013) 7 SCC 125** and this Court in Criminal Petition No.201313/2016 dated 19.1.2017 has also issued directions. At paragraph No.41 point 14 of the decision of the Apex Court it has been observed as under:

“14. If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel the court can adopt any of the

measures indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case.

15. On perusal of the above said decision it indicates that in the event of non-co-operation of the accused or the witnesses with the trial for any other reason, if speedy trial is being affected, then the Court has to follow the procedure in the light of the observations made in the above said decision of the Apex Court. But in the case on

hand, when the accused persons have remained absent and some of the accused have been absconded, then the trial Court ought to have taken recourse to Section 309 of Cr.P.C. and would have proceeded in the matter. Even the trial Court has not bothered about the direction issued by this Court and to get the time extended by sending a requisition. That itself shows the carelessness and negligence on the part of the trial Court.

16. In that light, the Registry is hereby directed to issue show cause notice calling for explanation as to why the direction issued by this Court in Criminal Petition No.3467/2019 disposed of on 9.9.2019 has not been followed.

With the above observation the petition is ***dismissed***.

After receipt of the explanation, place this matter before this Court.

**Sd/-
JUDGE**

*AP/-