

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION NO. 21144 of 2019**

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UBED AHMED @ UBAID MIRZA @ OBED MIRZA S/O UZER ABDUL RAUF
MIRZA
Versus
STATE OF GUJARAT

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Appearance:

MR ASIM PANDYA, SENIOR ADVOCATE WITH MR.JAY S SHAH(7244) for
the Applicant(s) No. 1

MR MITESH AMIN, PUBLIC PROSECUTOR(2) for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

Date : 14/02/2020**ORAL ORDER**

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('the Code' for short), for regular bail in connection with FIR being C.R. No.I-04 of 2017 registered with ATS Police Station, District Ahmedabad, for offence under Sections 13, 17, 18, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 and under Sections 120(B), 121(A) and 125 of the Indian Penal Code.
2. The broad allegations as levelled against the applicant in the FIR are as under:
 - 2.1 Through human and technical resources of the ATS, it came to their knowledge that the applicant was radicalized by the philosophy of IS/ISIS by Safi Armar @ Al Hindi of Syria/Iraq and Abdullah Al Faizal of Jamaica. The applicant was discussing, advocating, disseminating ISIS ideology on social media or sharing social media links that supported ISIS ideology and talking about it to a few of

his friends including original accused No.1 Kasim. The applicant in some intercepted mobile/What's App communications talked about his wish/desire to buy a pistol, if available in reasonable price, about the possible generation of fund through smuggling of cigarettes, gold or old cars. Original accused No.1 was planning to carry out a lone wolf attack at Synagogue in Ahmedabad. The accused persons tried to support four youths from Hyderabad to cross Bangladesh border but they were caught in the year 2014 at Calcutta. Therefore, the FIR is lodged against the applicant and other accused person named in the FIR.

3. Heard learned Senior Advocate Mr.Asim Pandya assisted by learned advocate Mr.Jay Shah for the applicant and learned Public Prosecutor Mr. Mitesh Amin for the respondent State.

3.1 Learned Senior Advocate appearing for the applicant has contended that the applicant is a young advocate practicing in Surat. No antecedent is reported against the applicant. The family of the applicant is earning their livelihood by running a restaurant. The applicant is arrested on 25.10.2017 in connection with the FIR in question and investigation is over since long and as the applicant is in Jail since last more than two and half years, the applicant be enlarged on bail. It is also submitted that there are 95 witnesses, which are to be examined during the course of trial and, therefore, there is no possibility of the conclusion of the trial in near future. Hence, the applicant be enlarged on bail.

- 3.2 Learned Senior Advocate thereafter submitted that during the custodial interrogation, no incriminating material was recovered or discovered from the applicant. The entire case of the prosecution is based on social medial post and intercepted communications. Thus, there is no other incriminating material available in the investigation papers connecting the applicant with the incident in question and, therefore, this Court may exercise discretion in favour of the applicant.
- 3.3 At this stage, learned Senior Advocate submitted that the entire charge-sheet papers and the allegations levelled by the prosecution are required to be evaluated by keeping in view the ratio laid down by the Hon'ble Supreme Court in the case of **Shreya Singhal Vs. Union of India** reported in **AIR 2015 SC 1523** wherein it was held that discussion and advocacy of any idea, philosophy *per se* cannot constitute an offence and that, to ascertain whether any discussion or advocacy has assumed the nature of incitement, the Court is required to apply "the clear and Present Danger test". The question in every such case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring the substantive evils that Government has a right to prevent.
- 3.4 It is submitted by the learned Senior Advocate that in the present case, the applicant was under technical surveillance from the years 2013 to 2017

and during the period of four years, no attempt was made to commit any offence except discussion about how fund can be created by smuggling of cigarettes, gold or old cars and desire to buy a pistol.

3.5 Learned Senior Advocate would thereafter refer the definition of "Unlawful Activity" defined in Section 2(o) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "the Act" for short). It is submitted that the case of the applicant would not fall under the said definition and, therefore, Section 13 of the Act would not be applicable. Similarly, none of the ingredients like raising funds or attempt to raise funds, conspiracy against India or its territory, membership or support terrorist organization etc. under Sections 17, 18, 38 and 39 of the Act are in existence in the charge-sheet and, therefore, this Court can exercise discretion as envisaged in Section 43D of the Act for enlarging the applicant on bail.

3.6 Learned Senior Advocate further contends that delay in conducting the trial cannot be attributed to the present applicant and there was no fault on the part of the applicant in delaying the trial. The applicant has not received all the papers and, therefore, it is difficult for the applicant to defend his case before the trial Court. It is also submitted that merely because the applicant has withdrawn the application filed under Section 482 of the Code before this Court, it cannot be said that there is a prima-facie case against the

applicant.

- 3.7 Learned Senior Advocate appearing for the applicant thereafter submitted that in the charge-sheet papers, there is not a single chat or telephonic conversation between the applicant and co-accused or any other person relating to lone wolf attack or attack of any nature on Synagogue. It is further submitted that there is no evidence in the papers of the charge-sheet, which indicates that the applicant is directly or indirectly in touch with Safi Armar @ Al Hindi.
- 3.8 It is submitted that there is nothing on record to show that the applicant through personal meeting or social media or mobile communication has ever incited or advocated philosophy of Islamic State. In fact, the applicant is a follower of Islamic religion and he has every right to pursue, profess and propagate his religion under Article 25 read with Article 19 of the Constitution of India. It is also submitted that even if the incriminating evidence of witness Faisal is read, the applicant wanted to buy a pistol and few bullets in the year 2016. In fact, the applicant has never gone to meet Faisal for purchase of pistol. Thus, there is no recovery of any weapon from the applicant.
- 3.9 Learned Senior Advocate further submits that there is no material in the investigation papers with regard to helping and funding four youths from Hyderabad to join ISIS and, therefore, when there is no material implicating the applicant with the alleged incident and when the ingredients of the alleged offences are prima-facie not made out,

this Court may exercise discretion in favour of the applicant.

4. On the other hand, learned Public Prosecutor Mr.Mitesh Amin appearing for the respondent State has vehemently opposed this application and supplied a separate compilation of the charge-sheet papers. Learned Public Prosecutor has referred the statements of witnesses, namely, Nomaan Jameel @ Nomaad S/o. Mohd. Jameluddin, Mohd. Abdullah Basith S/o. Mohd. Abdul Arif, Maaz Hasan Faruk, S/o. Ajaz Moyuddin Vaseem, Abdul Abrar S/o. G. Abdul Rawoof, Shazia Parveen D/o. Late Mohd. Kafil Ahmed and other witnesses. Learned Public Prosecutor has referred the examination Reports dated 25.03.2019 and 26.03.2019 given by the Directorate of Forensic Science. Learned Public Prosecutor has also referred the What's App chats and other material from the charge-sheet papers. After referring to the same, it is contended that there is ample material in the charge-sheet papers, from which, it can be said that the applicant is involved in the alleged offence. Prima-facie, ingredients of the alleged offences are made out and when there is a prima-facie case against the applicant, this Court may not exercise discretion in favour of the applicant, more particularly, in view of proviso of sub-section (5) to Section 43D of the Act.
- 4.1 It is further submitted that the so-called delay in commencing the trial cannot be attributed to the State or the concerned trial Court. In fact, the applicant and other co-accused are responsible

for the same and, therefore, the applicant cannot take advantage of the delay. It is submitted that serious allegations are levelled against the applicant and looking to the punishment prescribed for the alleged offences and looking to the fact that there are all chances that the applicant would not be available at the time of trial, this Court may not exercise discretion in his favour. It is, therefore, urged that this application be dismissed.

5. Having heard learned counsel appearing for the parties and having gone through the material placed on record, it would emerge that the applicant is arrested in connection with FIR being C.R. No.I-04 of 2017 registered with ATS Police Station, District Ahmedabad, for offence under Sections 13, 17, 18, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 and under Sections 120(B), 121(A) and 125 of the Indian Penal Code. This Court has also perused the investigation papers as well as the separate compilation given by the learned Public Prosecutor. This Court has also considered the decision rendered by this Court in the case of ***Shreya Singhal Vs. Union of India (supra)***.
6. From the investigation papers, it is revealed that the Investigating Agency had recorded the statements of number of witnesses including the statements of Nomaan Jameel @ Nomaad S/o. Mohd. Jameluddin, Mohd. Abdullah Basith S/o. Mohd. Abdul Arif, Maaz Hasan Faruk, S/o. Ajaz Moyuddin Vaseem, Abdul Abrar S/o. G. Abdul Rawoof, Shazia Parveen

D/o. Late Mohd. Kafil Ahmed and other witnesses.

At this stage, this Court would like to refer the statement of witness Mohammed Zabiullah Khan @ Asif @ Zabi S/o. KA Ansar Khan, a relevant portion of which is reproduced as under:

"Once Kasim posted against Al-Queda on his FB, I opposed this as I was in favour of AQ at that time, so Kasim asked for providing my mobile number to get evidences against Al Queda. I provided my mobile number to Kasim A Abu Hamza using FB messenger, on which he added me in a WhatsApp group called "Ansar-ut-Tawhid fi Bilad al-Hind (AuT – Supporters of Monotheism in the Land of India)"; which was basically made by Shafi armar @ Abu yusuf to spread ISIS ideology in India. Besides Uben and Kasim; there were other people too in that group across India.; Both motivated me towards jihadi ideology and instigated to perform Hijrah to ultimately join ISIS through Pakistan, Afghanistan and Iraq."

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"Ubed asked me to give some ideas to carry out lone wolf attacks and gave the reference of Imam Al Awlaki[The AQ chief who was killed] that if there is defensive Jihad in a land, it is more pleasing in the sight of Allah to do Jihad than to do Da'wah. So I searched and told him that BL-18 is a toxin drug if we given to humans they will get heart attack and they will die and in 8 hours that drug will dissolve in blood so that even in postmortem they can't find that the person had died due to BL-18 so it will look the natural heart attack death. I also searched and shared him that injecting an empty injection will expand blood cells and will create a gap and air bubble in blood which will block the heart from pumping and the person will die in 15 to 20 minutes.

Ubed told me about one project of Rs:300 Crore (INR) to release the muslim youth lodged in Indian jails and were charged for terrorist activities. He told me that there is our one Jihadi group, which started the WAR in Burma and killed 9 Police men.

Ubed asked me to find out the information regarding intercepting Police wireless Walky Talky system, for which I searched and provided him the details that if positive terminal of one of the coils used in the FM Radio is connected with the negative terminal of the other one and if that FM radio is tuned to minimum frequency near 80 MHz then Police wireless can be intercepted. If the same FM radio is tuned to maximum frequency near 108 MHz then Wireless used at Airports can be listned.

Later he insisted me to find out various methods of funds raising for Jihad in India such as smuggling of gold with help of an air hostess, smuggling of cigarettes from Saudi to India through ports, smuggling of old cars in Chennai port, smuggling of gold etc. I found one contact by name Faruk Bhai, linked with Sultan Gold from Kutchh Gujarat for Gold smuggling, who could send the Gold through smuggling to Surat as Ubed wished. I gave his number to Ubed. We tried to fix the deal for car smuggling through agents in Ministry of Tamilnadu, but they demanded 35 lacs for that and we had no money so we dropped that plan."

7. This Court would also like to refer the relevant portion of WhatsApp chats, which is a part of charge-sheet papers and the same is reproduced as under:

"This is not a war for land or merger with any Taghoot. This war is for freeing the Ummah from the shackles of Kuffar and to establish the Law of Allah Azz wa Jal where there will be justice. Our war is against the

Indian army, the Murtad police of Kashmir, government of India, their officers and their political structure and every such individual who would collaborate with the Kuffar and tried to harm this jihad."

Ghazwathul Hind

It was narrated that Abu Hurairah said:
"The Messenger of Allah promised that we would invade India. If I live to see that I will sacrifice myself and my wealth. If I am killed, I will be one of the best of the martyrs, and If I come back, I will be Abu Hurairah Al-Muharrar.

Sunan an-Nasa'i"

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Sunday, August, 28, 2016

Ghazwathul Hind

In Kashmir it have been more than 50 Days of curfew by the Terrorist Indian Army.

70 people dead.

More than 7000 injured.

More than 450 people with eye wounds because of the use of pellet guns by Terrorist Indian Army.

Oh Brothers and Sisters!

Why are you still trying to solve all these issues you are racing through the so called peace talks. Allah (Swt) says in the quran:

"And fight those (who fight you) wheresoever you find them, and expel them from the place they had turned you out from. Oppression is worse than killing...."

(Surah Al-Bawarah: 191)

ISIS handlers have asked its modules and lone wolf attackers in India to use machetes and big chopping knives to target people.

New Delhi: Islamic State group's handlers have instructed its modules and lone wolf attackers in India to use machetes and big

chopping knives to target people, particularly foreign citizens.

According to the reports, ISIS handlers have asked its fighters to not risk illegally buying weapons and assembling explosive devices, but instead carry out hacking attacks in India.

Body: BL-18 is a toxin drug if we given to humans they will get heart attack and they will die and in 8 hours that drug will dissolve in blood so that even in postmortem they can't find that the person had died due to BL-18! So it will look like natural heart attack death

Body: Injecting empty injection will explain the blood cells and will create a gap and air bubble in blood which will block the heart from pumping and the person will die in 15 to 20 minutes."

8. Over and above the aforesaid, there is ample material in the investigation papers against the present applicant, from which, it can be prima-facie said that the applicant has committed the alleged offences and, therefore, the prosecution has made out a prima-facie case against the applicant.
9. The contention raised by the learned Senior Advocate appearing for the applicant that the ingredients of the alleged offences are not made out, cannot be believed looking to the material available in the investigation papers.
10. This Court has also considered the punishment prescribed for the alleged offences and the provisions contained in Section 43D of the Act. At this stage, this Court would like to refer the

provisions contained in Section 43D(5) of the Act, which provides as under:

"43D(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

11. From the reports/charge-sheet papers filed against the applicant, this Court is of the opinion that there are reasonable grounds for believing that the accusation against the applicant is prima-facie true and, therefore, looking to the proviso contained in the aforesaid sub-section, the applicant cannot be enlarged on bail pending trial.
12. Another contention is raised by the learned Senior Advocate appearing for the applicant that there is a delay in commencing the trial. However, from the material placed on record and from the submissions canvassed by the learned Public Prosecutor, it is revealed that the so-called delay in commencing the trial cannot be attributed to the State or to the concerned trial Court.
13. Learned Senior Advocate appearing for the

applicant has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of **Shreya Singhal Vs. Union of India (supra)** wherein the Hon'ble Supreme Court has held that discussion and advocacy of any idea, philosophy *per se* cannot constitute an offence and that, to ascertain whether any discussion or advocacy has assumed the nature of incitement, the Court is required to apply "the clear and Present Danger test".

Keeping in view the aforesaid decision rendered by the Hon'ble Supreme Court, if the facts of the present case as discussed hereinabove are carefully examined, it is revealed that the aforesaid decision would not render any assistance to the present applicant.

14. In view of the aforesaid discussion, this Court is of the view that the respondent State has made out a prima-facie case against the applicant. Serious allegations are levelled against the applicant and there is sufficient material against the applicant in the investigation papers and, therefore, as per the provisions contained in Section 43D(5), the applicant cannot be enlarged on bail. This Court has also considered the punishment prescribed for the alleged offences and the respondent State has shown apprehension that if the applicant is enlarged on bail, there are all chances that he will tamper with the evidence and would not be available at the time of trial.
15. Thus, in the facts and circumstances of the

present case, this Court is not inclined to exercise discretion in favour of the applicant. The application is accordingly dismissed. Rule is discharged.

(VIPUL M. PANCHOLI, J)

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