

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO.350 OF 2023

Mohammed Irfan Rehmatali Shaikh
Age about 50 Years, Occ – Tailor,
Permanent address – Room No 9/7,
Razzak Chawl, Opp – Golden Bakery,
Kherwadi Road, Bandra (East),
Mumbai – 400051.
(Presently lodged in Taloja Jail)

... Appellant

Versus

State of Maharashtra
(Through ATS, Kalachowki Police Station,
In CR No UAPA 18 of 2021 u/s 18, 19, 20
of UAPA r/w S 302 r/w S 115 of IPC And
Ss 201, 120 B, 34 of IPC.
In Special Case No.100274 of 2022)

...Respondent

Mr. Majeed Memon, Senior Counsel a/w Mr. Mateen Qureshi,
Mr. Khalil Girkar and Mr. Tapish Jain i/b Majeed Memon and
Associates, for the Appellant.

Ms. S. S. Kaushik, A.P.P for the Respondent – State.

PSI – Mr. Suryakant Ambre and HC Mr. Satyawar Lad from ATS are
present in Court.

***CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.***

DATE : 29th AUGUST 2023

ORAL JUDGMENT (Per Revati Mohite Dere, J.):

1. At the outset, learned counsel for the appellant seeks leave to amend the prayer clause. He also seeks leave to carry out amendment in the second set. Leave granted. Amendment to be carried out forthwith.

2. Heard.

3. Admit. Learned A.P.P waives notice on behalf of the respondent-State.

4. By this appeal, preferred under Section 21 of the National Investigation Agency Act, ('NIA Act'), the appellant seeks quashing and setting aside of the impugned order dated 8th July 2022, passed by the learned Special Judge under MCOCA, TADA, POTA & NIA, City Civil and Sessions Court, Mumbai in Bail Application (Exhibit – 3) in NIA Special Case No.274 of 2022, by which, the appellant's application (Exhibit 3) seeking his enlargement on bail, came to be

rejected by the said Court. Accordingly, the appellant seeks his enlargement on bail in connection with C.R. No.18 of 2021, registered with the Kalachowki Police Station, Mumbai, for the alleged offences punishable under Sections 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 ('UAPA'); Sections 115 r/w 302, 201, 34 r/w 120B of the Indian Penal Code.

5. Mr. Memon, learned senior counsel for the appellant submits that taking the prosecution case as it stands, no offence as alleged is disclosed as against the appellant. He submits that there is no material in the charge-sheet to show that the appellant, a tailor had any knowledge that Zakir Husain (accused No.1) was involved in any terrorist activity and as such it cannot be said that there are reasonable grounds for believing that the accusations against the appellant are *prima facie* true and as such the bar of Section 43-D of the UAPA would not apply. He submits that the appellant came in contact with Zakir, during the lock-down, when Zakir helped the appellant to commute for his work, since Zakir would ply rickshaw in the

suburbs of Mumbai. He submits that as Zakir had helped him during the lock-down to enable him to continue with his work (tailoring job), he permitted Zakir to stay with him on the intervening night of 17th September and 18th September 2021. Learned senior counsel submits that Zakir had informed the appellant that he had misplaced his wallet and mobile phone and that as one of his close relatives was to get married in Uttar Pradesh and he needed money to purchase the ticket, he was excepting an amount of Rs.50,000/- from Western Union Money transfer. He submits that on the request of Zakir, since Zakir had disclosed to the appellant that he had misplaced his wallet and mobile and had no identity card for purchase of rail ticket, the appellant gave his identity card for receiving the amount from Western Union Money transfer and also his mobile phone for the said purpose. He submits that the appellant had absolutely no reason to believe that Zakir had any intention to use the said amount of Rs.50,000/- for any other purpose i.e. terrorist activity, other than what was stated to him.

6. Learned APP opposes the appeal. Learned APP has tendered a compilation of certain documents and statements, evidencing transfer of Rs.50,000/- from U.S.A into the appellant's bank account.

7. Perused the papers. It is the prosecution case that on 13th September 2021, ATS received information from secret sources that accused No.1 – Zakir alongwith one person i.e. Anthony @ Anwar, residing in the neighbouring country are indulging in terrorist activities. The said Zakir is alleged to have been acting on the instructions of the said person i.e. Anthony for striking terror in Mumbai, Maharashtra and other places and for facilitating the said act, they were collecting people. Pursuant thereto, Police Inspector – Navnath Ghuge, attached to Kalachowi Unit of ATS, lodged an FIR, which was registered vide C.R. No.18 of 2021 as against Zakir (accused No.1) and Anthony, alleging offence punishable under Section 18 of UAPA. Pursuant thereto, investigation commenced and the police started searching for Zakir. On 18th September 2021 Zakir came

to be arrested from the house of the appellant. Admittedly, the appellant had not been named in the FIR by the police. It appears that the appellant was called for interrogation, soon after the arrest of Zakir on 18th September 2021, and was arrested only on 30th September 2021. It appears that in the interregnum, Zakir made a disclosure statement under Section 27 of the Evidence Act, pursuant to which, Zakir produced Rs.50,000/- cash and a chit, on which it was written 'Zakirbhai' and one memory card from the appellant's house. The said articles were recovered on 29th September 2021. It is pertinent to note, that the appellant has not disputed the fact, that Zakir stayed with him in the intervening night of 17th and 18th September 2021, the finding of the articles from his residence at the instance of the accused No.1 – Zakir on 29th September 2021; and of receiving Rs.50,000/- from U.S.A.

8. *Prima facie*, we are of the opinion, that if the appellant had the intent or knowledge that Zakir was engaged in terrorist activities, it was well within his domain to destroy/remove the articles,

which were kept by Zakir in his house, however, the same was not done. As far as, 205 calls being exchanged between the appellant and accused No.1 – Zakir over a period of one year is concerned, it cannot be said to be incriminating *per se*, since the appellant admits knowing Zakir, since lockdown, as Zakir had helped him. Mere exchange of CDR's between the accused No.1 – Zakir and the appellant, would not connect the appellant with the alleged offences or said to be incriminating, more particularly, when there is no other evidence to connect the appellant with the alleged offences.

9. Learned APP although has tendered a compilation of documents and statements, has not been able to point out a single statement from the said compilation of witnesses to show that the appellant had the requisite knowledge that Zakir was indulging in terrorist activities, apart from pointing out the three admitted circumstances i.e. that Zakir stayed with the appellant in the intervening night of 17th and 18th September 2021; that there was recovery at the instance of Zakir from the appellant's house i.e. of

Rs.50,000/-, memory/sim card a chit on which it was written 'Zakirbhai'; and of a money transfer from one Rohan Habib from U.S.A to the bank account of the appellant. When questioned, the learned APP states that Rohan Habib, who sent Rs.50,000/- in the appellant's account, has not been made an accused. No doubt, there is a statutory embargo under Section 43-D(5) of the UAPA but that embargo *per se* does not act as an impediment to grant bail, in the event, the Court comes to a conclusion that there are no reasonable grounds to believe that the allegations are *prima facie* true.

10. Considering the material on record and having perused the statements, we are *prima facie* of the view that the circumstances relied upon by the prosecution are not of such a nature so as to sustain a reasonable belief that the accusations against the appellant are *prima facie* true and hence the bar under Section 43-D(5) of the UAPA will not apply. We have seen the statements of the prosecution witnesses tendered by the learned APP and have recorded our findings, as stated aforesaid. Infact, we may point out that the perusal of the statements

show that the allegations are as against accused No.1 – Zakir. The learned APP has failed to point out any material to show that the appellant was aware of the activities of Zakir or that the appellant had participated in any terrorist activity.

11. Considering what is stated aforesaid, we are satisfied that the appellant has made out a case for bail and as such the Appeal deserves to be allowed. Hence, the following order :

ORDER

- (i) The appeal is allowed;
- (ii) The impugned order dated 8th July 2022, passed by the learned Special Judge under MCOCA, TADA, POTA & NIA, City Civil and Sessions Court, Mumbai in Bail Application (Exhibit – 3) in NIA Special Case No.274 of 2022, stands quashed and set-aside;

(iii) The appellant be enlarged on bail, on executing PR Bond in the sum of Rs. 50,000/- with one or more sureties in the like amount, to the satisfaction of the learned Judge, NIA Court;

(iv) The appellant shall report to the office of the NIA, Mumbai Branch, Mumbai, on the first Saturday of every month from 10:00 a.m. to 12:00 noon, till the conclusion of the trial.

(v) The appellant shall not, either himself or through any other person, tamper with the prosecution evidence and give threats or inducement to any of the prosecution witnesses;

(vi) The appellant shall not leave the jurisdiction of NIA Court, Greater Mumbai, till the conclusion of the trial, without the prior permission of the NIA Court;

(vii) The appellant shall not leave India, without the prior permission of the NIA Court;

(viii) The appellant shall surrender his passport, if any, before the NIA Court, before his release.

(ix) The appellant shall inform his latest place of residence and mobile contact number immediately after being released and/or change of residence or mobile details, if any, from time to time to the Court seized of the matter and to the Investigating Officer of the concerned Police Station;

(x) The appellant to cooperate with the conduct of the trial and attend the NIA Court on all dates, unless exempted;

(xi) The appellant shall file an undertaking with regard to clauses (iv) to (x) before the NIA Court, within two weeks of his release;

(xii) If there is breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of the appellant's bail.

12. Appeal is allowed in the aforesaid terms and is accordingly disposed of.

13. It is made clear that the observations made herein are *prima facie*, and the learned Special Judge shall decide the case on its own merits, in accordance with law, uninfluenced by the observations made in this order.

14. All concerned to act on the authenticated copy of this judgment.

GAURI GODSE, J.

REVATI MOHITE DERE, J.