

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3014 OF 2024

Abdul Samad Akbar Shaikh ...Applicant

Versus

The State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3024 OF 2024

Sabir Jamaluddin Pawar ...Applicant

Versus

The State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3074 OF 2024

1. Mohammad Muaz Nadeem Arif

2. Juhaid Abdul Malik Khan @ Juhaid

Malik

...Applicants

Versus

The State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3128 OF 2024

Javed Chandmiya Khan ...Applicant

Versus

The State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3154 OF 2024

Akbar Hasnani Akhtar Shaikh ...Applicant

Versus

State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3178 OF 2024

Abu Shema Abubakar Shaikh ...Applicant

Versus

State of Maharashtra ...Respondent

WITH

BAIL APPLICATION NO. 3179 OF 2024

1. Nadim Mubin Ahmed Shaikh
2. Kaif Firoz Sayyed
3. Zaid Ashraf Sayyed
4. Umair Sajid Shaikh
5. Aman Sajid Shaikh
6. Mohammed Kasim Rafik Sayyed
7. Mohammad Furkan Mohd. Usman
Shaikh

...Applicants

Versus

State of Maharashtra

...Respondent

Mr. Karim Pathan with Mr. Fazlurrahman Shaikh, Ms. Shane Ilahi Turkey, Mr. Fardeen Shaikh, Mr. Tabish Shaikh, for Applicant in BA No.3014 of 2024.
Mr. Sharin Pathan with Mr. Afin Pathan and Rafiq Gori, for Applicant in BA No.3024 of 2024.
Mr. Mihir Desai, Sr. Advocate with Mr. Rajay Gaikwad, Ms. Pritha Paul, for Applicant in BA No.3074 of 2024.
Mr. B.N.Tiwari, for Applicant in BA No.3128 of 2024.
Mr. Shahood Anwar for Applicant in BA No.3154 of 2024.
Ms. Gayatri Singh, Sr Advocate with Mr. Vijay Hiremath, Mr. Shahood Anwar, for Applicant in BA No.3179 of 2024.
Mr. Mubin Solkar with Mr. Tahir Hussain, Mr. Anaj Shaikh with Ms. Hemal Shah, for Applicant in BA No.3178 of 2024.
Mr. Kaushik Mhatre, Special PP for State with Mr. H. J. Dedhia, APP for the State.
PI Shri Rajendra Khedkar, Nayanagar Police Station present.

CORAM: N. J. JAMADAR, J.
DATED: 9th DECEMBER, 2024

ORDER:-

1. In these applications, the applicants, who are arraigned in CR No.34 of 2024 registered with Naya Nagar Police Station, Mira Road, Mumbai, for the offences punishable under Sections 307, 341, 141, 143, 147, 149, 427 and 109 of

the Indian Penal Code, 1860 (“the Penal Code”) and Section 4 read with Section 25 of the Arms Act, 1959, seek to be enlarged on bail.

2. Briefly stated, the prosecution case runs as under:

On the eve of the consecration of Lord Ram, at Ayodhya, on 21st January, 2024, Vinod Jaiswal, the first informant and his family members and relatives attended a devotional hems (*bhajan*) function. Thereafter, the first informant and his family members, relatives and friends proceeded for a drive in 3 to 4 four wheelers and 10 to 15 two wheelers. The first informant was driving Mahindra SUV car bearing registration No.MH-03/BW-2200. When the convoy reached in front of the McDonald’s on the way to Silver Park Road, there was a huge traffic jam. They decided to return home and took a U-turn. On the way home, they again faced huge traffic near Shivar Garden. A motorcyclist who was plying in front of the first informant took a turn towards Lodha Road. They all proceeded towards Lodha Road.

3. A Muslim boy accosted the first informant and asked him to wait for a few minutes. A mob of 50 to 60 persons armed with rods, sticks, batteries and weighing scales surrounded the first informant and his associates. They

started raising slogans. They attacked the vehicles. The first informant and his associates were also assaulted. Abuses were hurled. The windshields of the cars were broken. Bonnets were damaged. Members of the unlawful assembly removed the flags which the first informant and his associates were carrying on their cars and motorcycles. They desecrated the flags and the images of the deity pasted on the windshield of the vehicles. One of the members of the said unlawful assembly attempted a blow by means of knife on the throat of the first informant. The first informant took an evasive action. Yet, he sustained an injury below the right eye. The other members of the informant party namely; Sunaina Gupta, Ritik Gupta, Bablu Gupta, Yash Gupta and Pradeep Gupta also sustained injuries in the assault perpetrated by the members of the said unlawful assembly.

4. The first informant lodged a report against 50 to 60 unknown persons. Investigation commenced. On the basis of the images captured by CCTV, the investigating agency could identify the persons, who were the members of the said unlawful assembly. The applicants and co-accused came to be apprehended. Test Identification Parades were held. The accused were identified by the prosecution witnesses. Post

completion of the investigation, charge-sheet came to be lodged on 13th April, 2024.

5. I have heard Mr. Karim Pathan, the learned Counsel for the applicant (A13) in BA/3014/2024, Mr. Sharin Pathan, the learned Counsel for the applicant (A17) in BA/3024/2024, Mr. Mihir Desai, the learned Senior Advocate for the applicants (A12 and A14) in BA/3074/2024, Mr. Tiwari, the learned Counsel for the applicant (A20) in BA/3128/2024, Mr. Shahood Anwar, the learned Counsel for the applicants (A2, A5 and A11) in BA/3154/2024, Ms. Gayatri Singh, the learned Senior Advocate for the applicants (A1, A6, A7, A10, A15, A16 and A18) in BA/3179/2024, Mr. Mubin Solkar, the learned Counsel for the applicant (A21) in BA/3178/2024 and Mr. Kaushik Mhatre, the learned Special PP for the State, in all the applications, at some length.

6. The learned Counsel took the Court through the report under Section 173 of the Code of Criminal Procedure, 1973, documents annexed with it and the material on record. Mr. Mhatre, the learned Special PP, tendered a compilation of documents on which the prosecution proposes to rely in opposition to the prayer for bail.

7. Instead of noting the submissions canvassed by the Counsel for the applicant(s) in each of the applications, separately, I deem it appropriate to first note the broad submissions on behalf of the applicants and, thereafter, the specific submissions qua the particular applicant(s) – accused, wherever required.

(i) Firstly, the learned Counsel for the applicants made an endeavour to draw home the point that the incident had occurred at the spur of the moment. There was no premeditation. Laying emphasis on the allegations in the FIR and the statements of witnesses to the effect that, as there was huge traffic on both the flanks of Golden Nest Circle to Silver Park Road, the convoy of the informant party proceeded towards Lodha Road, it was submitted that the residents of the locality, where the incident occurred, had no inkling that the informant party would enter the said road.

(ii) Secondly, it was forcefully submitted by the Counsel for the applicants that since the first informant and the injured had not known the accused from before and there was a huge mob, which had allegedly accosted and attacked the informant party, there is no material to connect the applicants with the alleged offences. Reliance on the

identification of the accused in the Test Identification Parade was stated to be infirm for two reasons. One, the Memorandums of Test Identification Parade simply record that a particular witness identified a particular accused without attributing any role or part played by that accused. Such identification without ascribing any particular role is of no assistance. Two, there was delay of over a month in holding Test Identification Parade.

(iii) Thirdly, as most of the accused are the residents of the said locality, their mere presence at the scene of occurrence, by itself, is not sufficient to implicate them by invoking the principle of constructive criminality. Reliance on the CCTV footages to fix the identity of the accused is also unsustainable as, at the most, the CCTV footages show the presence of few accused at the time and place of the occurrence. In the absence of a particular overt act attributable to a particular accused, his mere presence at the scene of occurrence does not incriminate him.

(iv) Fourthly, the learned Counsel made a concerted effort to demonstrate that the applicants cannot be roped in by invoking Section 149 of the Penal Code as the prerequisites to

invoke constructive criminality thereunder have not been fulfilled.

(v) Fifthly, it was urged that the complicity of the applicants as the members of the unlawful assembly in prosecution of the common object of which the alleged offences were committed may be required to be appreciated in the light of the then prevailing circumstances and fractious atmosphere. Therefore, the implication of the applicants as the members of the unlawful assembly when, according to the prosecution, a huge mob had indulged in rioting, without evidence of any overt act, cannot be a sustainable ground to deprive the personal liberty of the applicants, who are in custody for almost a year.

(vi) Lastly, the learned Counsel further submitted that an effort has been made to arraign the accused for the offence punishable under Section 307 of the Penal Code though there is not a shred material to show that there was an attempt to commit murder. None of the prosecution witnesses have suffered any grievous injury. All have suffered minor and superficial injuries.

8. Mr. Mhatre, the learned APP, stoutly resisted the prayer for bail.

(i) Taking the Court through the allegations in the FIR, the supplementary statement of the first informant and the statements of the injured and other witnesses, and co-relating those statements with the panchnama of the CCTV footages, Mr. Mhatre urged that the gravity of the situation can be gauged from the fact that a huge mob of persons charged upon the members of the informant party almost from all sides, the vehicles were damaged by means of dangerous weapons which the members of the unlawful assembly were carrying and the first informant and the injured were assaulted. The utterances and exhortations of the accused party also reflect the object with which the members of the unlawful assembly were actuated. The flags and the stickers on the vehicles bearing the images of the deities were desecrated. All these facts cumulatively manifest the common object with which each member of the said unlawful assembly, including the applicants, was animated with.

(ii) Mr. Mhatre joined issue on the aspect of identification by submitting that the victims were scared for their life. And, therefore, their inability, during the course of the identification parade, to state the exact role played by each of

the accused does not detract materially from the prosecution case. In such a grave situation, it is not inconceivable that the victims may miss to identify few of the perpetrators. A proper explanation for the delay in holding the Test Identification Parade has been offered.

(iii) Mr. Mhatre further submitted that it is trite law that no overt act is required qua each member of the unlawful assembly to invoke constructive criminality. At the heart of the constructive liability is the existence of a common object, which, in the case at hand, is evident from the acts and conduct of the accused and the attendant circumstances. Reliance was placed on the decisions of the Supreme Court in the cases of *Yunis alias Kariya etc. vs. State of MP*¹ and *State of Maharashtra vs. Kashirao and others*².

(iv) It was further urged that the submission on behalf of the applicants that the offence punishable under Section 307 of the Penal Code has not been *prima facie* made out is based on an incorrect impression of law. Existence of an injury, much less a fatal injury, is not a *sine qua non* for an offence punishable under Section 307 of the Penal Code. To lend support to this submission, Mr. Mhatre placed reliance on a

1 AIR 2003 SCC 539.

2 AIR 2003 SCC 3901.

decision of the Supreme Court in the case of *State of MP vs. Saleem alias Chamaru and another*³.

(v) Lastly, Mr. Mhatre urged with tenacity that the submission that there was no premeditation as the informant party had entered Lodha Road unannounced, is belied by the swiftness with which a huge mob of more than 50 to 60 persons assembled armed with deadly weapons. From the exhortations of the members of the unlawful assembly, it becomes evident that the objection of the accused party was to the very passage of the informant party from the said locality. Such a stand cannot be countenanced. Reliance was placed on an order passed by Madras High Court in the case of *Ramasamy Udayar vs. The District Collector and others*⁴, wherein it was observed that merely because one religious group is dominating in a particular locality, it cannot be a ground to prohibit celebration of religious festivals or procession of other religious groups through those roads. Viewed through this prism, according to Mr. Mhatre, the offences are of grave nature and, therefore, none of the applicants deserves to be enlarged on bail.

3 AIR 2005 SCC 3996.

4 W.A.Nos.743 & 2064 of 2019.

9. I have carefully perused the material on record and given anxious consideration to the submissions canvassed across the bar. At this stage, meticulous documentation and evaluation the material pressed into service against the accused is not at all warranted. A broad view of the matter is required to be taken keeping in mind the parameters which inform the discretion to grant or refuse bail.

10. Few broad features that emerge are: On the eve of consecration of the deity of Lord Ram at Ayodhya, a convoy of vehicles flying flags entered a locality predominantly inhabited by Muslims. The first informant and the prosecution witnesses are in unison on the point that Lodha road which passes through the said locality was not the preferred route and they were required to take detour on account of the traffic on main road. Altercation ensued. A huge mob of more than 50 to 60 persons surrounded the informant party. Their vehicles were damaged. Members of the informant party were assaulted. The flags and images of the deity were desecrated. Evidently, the members of the informant party had not known the alleged members of the unlawful assembly from before. Thus report came to be lodged against 50 to 60 unknown persons. On the basis of

the images captured by CCTV and the other corroborative material in the form of CDR and the Test Identification Parade, the applicants are arraigned as the members of the said unlawful assembly.

11. In the backdrop of the aforesaid broad prosecution case, the element of identity of each of the accused as a member of an unlawful assembly in prosecution of common object of which the offences were committed assumes critical salience. A determination on this issue will also have to factor in the circumstances like the natural presence of the residents and the persons in the establishments on the street, which was congested one, the presence of passers by and passive witnesses. Undoubtedly, overt act by each of the members of the unlawful assembly is not an essential ingredient of the constructive criminality under Section 149 of the Penal Code. Nonetheless, there ought to be *prima facie* material to show that the particular accused was a member of the unlawful assembly and either shared the common object in prosecution of which the offences were allegedly committed or knew that such offences were likely to be committed. An inference as to whether a particular member was actuated by and animated with such common object can

be drawn on the basis of the manner in which the offending acts were perpetrated, the weapons with which the members were armed and the utterances and exhortations by the members.

12. In the case of *Kashirao* (supra) on which reliance was placed by Mr. Mhatre, it was enunciated that an object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commit and the result therefrom. Though no hard and fast rule can be laid down as to the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary.

13. In the case of *Yunis Kariya* (supra) it was postulated that even if no overt act is imputed to a particular person, when the charge is under Section 149 IPC, the presence of

the accused as a part of unlawful assembly is sufficient for conviction.

14. At this stage, a profitable reference can be made to a Four-Judge Bench judgment of the Supreme Court in the case of *Masalti vs. The State of UP*⁵ wherein after referring to a previous pronouncement in the case of *Baladin v. State of Uttar Pradesh*⁶, the Supreme Court enunciated that what has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly, and he entertained alongwith the other members of the assembly, the common object as defined by Section 141 I.P.C. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

15. In the case of *Taijuddin vs. State of Assam and others*⁷, on which reliance was placed by Ms. Gayatri Singh, the learned Senior Advocate for the applicants, after referring to

5 AIR 1965 SC 202.

6 AIR 1958 SC 181.

7 Cri.Appeal No.1526/2021.

the decision in the case of *Subal Ghorai vs. State of West Bengal*⁸, the Supreme Court observed that the Court must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. There must be reasonable direct or indirect circumstances which lend assurance to the prosecution case that they shared common object of the unlawful assembly. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. This has to be based on the conduct of the members and the behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations.

16. A reference to the aforesaid decisions is necessitated in the fact of this case, even at this stage, as the prosecution alleges that there were more than 50 to 60 persons. *Prima facie*, it appears that premeditation or a prior meeting of mind to attack the members of the convoy cannot be inferred as the very entry of the informant party into the said locality

8 Cri.Appeal No.1526/2021.

was a matter of chance. Keeping in view this backdrop, the material pressed into service against the accused deserves *prima facie* appraisal.

17. To begin with, there is material to show that the four wheelers were extensively damaged. As regards the injuries suffered by the members of the informant party, *prima facie*, it appears that the first informant had sustained a laceration over the right cheek and swelling, abrasion and trauma over other parts of the body. Sunaina Gupta had sustained a CLW over forehead and a laceration over left eyebrow, in addition to an abrasion over left shoulder. All injuries were simple. Rest of the witnesses had sustained simple injuries.

18. In the light of the aforesaid nature of the injuries suffered by the members of the informant party, the claim of the prosecution witnesses that a number of members of unlawful assembly simultaneously assaulted the members of the informant party armed with multiple weapons may warrant appreciation at the trial.

19. At this stage, the question as to whether an offence punishable under Section 307 of the Penal Code is made out, is not required to be delved into elaborately. Undoubtedly, a bodily injury sufficient to cause death is not an ingredient of

an offence punishable under Section 307 of the Penal Code. Reliance placed by Mr. Mhatre on the decision of the Supreme Court in the case ***Saleem alias Chamaru*** (supra) is impeccable. In the facts of the case at hand, the pivotal question which would warrant adjudication at the trial would be whether each of the applicants shared the common object to commit the offence punishable under Section 307 of the Penal Code.

20. On the aspect of the identity of the applicants as the members of unlawful assembly, the prosecution primarily relies upon the images captured in the CCTV. Fahad Shaikh (A5) and Abdul Rashid Qureshi (A11) are not seen in the video recordings. Images of accused Nos.1, 2, 6, 7, 10, 12, 14, 15, 16 and 18 have been captured in the CCTV camera as a part of the mob. Few of them have been captured running, gesticulating or giving exhortation. Sabir Pawar (A17), the applicant in BA/3023/2024 is seen attacking the Mahindra SUV car and instigating others. Abdul Samad Shaikh (A13), the applicant in BA/3014/2024, is seen damaging the car and raising the slogans. *Prima facie*, it does not appear that in the CCTV cameras have captured any of the applicants assaulting the first informant by means of the knife, as

alleged, or for that matter, any of the injured witnesses. That brings to the fore the question of constructive criminality.

21. The prosecution also banks upon the identification of the applicants in the Test Identification Parade. As noted above, the identification of the accused by the prosecution witnesses does not appear to be with reference to the role of the particular identified accused in the alleged occurrence. The aspect as to whether the delay erodes the sanctity and veracity of the Test Identification Parade, and the weight to be attached to the mere identification in the Test Identification Parade, sans ascribing a particular role, are matters for trial.

22. Another aspect which deserves consideration is the element of caution which is required to be observed where a huge mob has allegedly indulged in rioting and there are a number of victims/injured. In such a situation, though, as a rule, it is the quality and not quantity of evidence that matters, the plurality of evidence and element of corroboration are looked for, as a matter of caution. In the case at hand, the alleged rioting was committed by more than 50 to 60 persons. Where the guilt of the accused would hinge upon their identity as the members of the unlawful assembly, who shared the common object to commit the

alleged offences, their further detention as under-trial prisoners appears tenuous.

23. As regards, Abu Shema Abubakar Shaikh (A21), the applicant in BA/3178/2024, the indictment is that after the occurrence, the applicant had posted a video containing comments which had the propensity to promote enmity between different groups on the grounds of religion and were prejudicial to maintenance of harmony.

24. Mr. Solkar, the learned Counsel for the applicant, submitted that for the said post, the applicant was arrested in CR No.35/2024 registered with Naya Nagar Police Station, Mira Road, for the offences punishable under Sections 153A and 505(2) of the Penal Code and Section 66(C) of the Information Technology Act and has since been released on bail by the learned Magistrate on 31st January, 2024. There is no material to indicate that the applicant was a member of the unlawful assembly which had indulged in rioting armed with deadly weapons at Lodha Road. Yet, the applicant came to be arrested in this crime on 29th September, 2024 sans any nexus with the said occurrence.

25. Mr. Mhatre, the learned APP, countered the submissions of Mr. Solkar. It was urged that there are

statements of two witnesses which clearly incriminate the applicant. Mohammad Muslim Chauhan, with whom the applicant had a conversation on phone, immediately after the occurrence, states about the role of Abu Shema Abubakar Shaikh (A21). Mr. Mhatre made a strenuous effort to draw home the point that the element of conspiracy is also *prima facie* made out by the statement of the Abdul Qureshi.

26. On a careful reading of the material pressed into service against Abu Shema Abubakar Shaikh (A21), I find substance in the submission of Mr. Solkar that for the alleged post on 22nd January, 2024, the applicant has already been arraigned in CR No.35/2024, and was released on bail. *Prima facie* the said post does not give any indication of conspiracy. So far as the statement of Abdul Qureshi, it is suffice to note Abdul Qureshi has not been arraigned as an accused though he claimed to have indulged in the rioting. Issues of admissibility and reliability of the evidence of Abdul Qureshi who *prima faice* appears to be privy to the alleged offences, and Mohammad Muslim Chauhan, who can be said be the person before whom, Abu Shema Abubakar Shaikh (A21), allegedly made an extra-judicial confession, would be matters for trial. Likewise the admissibility and reliability of the

transcript of the audio recording of the conversation between Abu Shema Abubakar Shaikh (A21) and Mohammad Muslim Chauhan would be matters in issue.

27. The aforesaid consideration, as regards the *prima facie* complicity of the applicants is required to be weighed alongwith other parameters. Evidently, the investigation is complete for all intent and purpose. The applicants appear to have roots in society to tie them down to their place of abode and avocation. Possibility of fleeing away from justice appears remote. In the backdrop of the nature of the offences and the genesis thereof, the possibility of tampering with evidence and threatening the witnesses also appears remote.

28. The applicants have been in custody since January, 2024. Having regard to the nature of the occurrence, the number of the accused, the number of witnesses and especially the nature of the evidence the prosecution may be required to adduce, it appears extremely unlikely that the trial can be concluded within a reasonable period. The further detention of the applicants as under-trial prisoners thus appears unwarranted. I am, therefore, inclined to exercise the discretion in favour of the applicants.

29. Hence, the following order:

: O R D E R :

- (i) Applications stand allowed.
- (ii) Abdul Samad Akbar Shaikh, the applicant in BA/3014/2024, Sabir Jamaluddin Pawar, the applicant in BA/3024/2024, Mohammad Muaz Nadeem Arif and Juhaid Abdul Malik Khan @ Juhaid Malik, the applicants in BA/3074/2024, Javed Chandmiya Khan, the applicant in BA/3128/2024, Akbar Hasnani Akhtar Shaikh, the applicant in BA/3154/2024, Abu Shema Abubakar Shaikh, the applicant in BA/3178/2024 and Nadim Mubin Ahmed Shaikh, Kaif Firoz Sayyed, Zaid Ashraf Sayyed, Umair Sajid Shaikh, Aman Sajid Shaikh, Mohammed Kasim Rafik Sayyed, Mohammad Furkan Mohd. Usman Shaikh, the applicants in BA/3179/2024, be released on bail in CR No.34 of 2024 registered with Naya Nagar Police Station, Mira Road, Mumbai, on furnishing a PR bond in the sum of Rs.30,000/-, each, and one or two sureties in the like amount each, to the satisfaction of the trial Court.
- (iii) The applicants shall mark their presence at Naya Nagar Police Station, Mira Road, on the first Monday of every

alternate month between 11 am to 1 pm for a period of three years or till the conclusion of the trial whichever is earlier.

- (iv) The applicants shall not tamper with the prosecution evidence. The applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.
- (v) On being released on bail, the applicant shall furnish their contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (vi) The applicants shall regularly attend the proceedings before the jurisdictional Court.
- (vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicants and co-

accused and the trial Court shall not be influenced by any of the observations made hereinabove.

Applications disposed.

[N. J. JAMADAR, J.]