

IN THE COURT OF SH. AMITABH RAWAT, ADDITIONAL SESSIONS
JUDGE-03, SHAHDARA DISTRICT, KARKARDOOMA COURT, DELHI

FIR No. 59/2020

PS : Crime Branch (being investigated by Special Cell)
U/s. 13/16/17/18 of Unlawful Activities (Prevention) Act, 1967
u/s.120B/124A/302/307/353/186/212/395/427/435/436/452/109/
114/147/148/124A/153A/34 IPC u/s. 25/27 Arms Act
State vs. Asif Iqbal Tanha

02.09.2020 (At 9.45 PM)

ORDER

1. Vide this order, I shall dispose off the bail application under Section 439 Code of Criminal Procedure read with Section 43-D (5) of the Unlawful Activities (Prevention) Act, 1967 moved on behalf of the applicant/accused Asif Iqbal Tanha.
2. Arguments on bail application were heard on behalf of applicant/accused Asif Iqbal Tanha by Sh. Siddharth Aggarwal, Ld. Counsel for accused and for prosecution by Sh. Amit Prasad, Ld. Special Public Prosecutor. After the matter was reserved for orders, written submissions on behalf of applicant/accused was received through mail.
3. I have perused the application, reply, written submissions, judgments, case file and case diaries.
4. Ld. Counsel for the accused had argued that accused is innocent and 24 years old. It was further submitted that in the present case, Umar Khalid has been mentioned but he has never been arrested. Moreover, invocation of Unlawful Activities (Prevention) Act, 1967 is bad in law as there is no unlawful association or terrorist organization with which accused is associated. Student Islamic Organization (SIO) or Jamia Coordination Committee (JCC),

ever since, its creation has never been banned. It was also argued that any protest against the CAA/NRC is constitutionally valid. It was also forcefully argued that regarding violence on 13 to 15th December 2019, two FIR No. 242/19, P.S. New Friends Colony & 298/19, P.S Jamia Nagar were registered. In FIR No. 298/19, accused have been granted bail and the said order was not challenged. In the present FIR, accused was arrested on 19.05.2020 and sent to JC on 26.05.2020. It was also submitted that accused was not a member of JCC whatsapp group uptill of 24.02.2020 and therefore, the messages on 23.02.2020 are not relevant to him. Moreover, providing of SIM card to Safoora Zargar is denied and is not a material help and is not the basis of claim for conspiracy and acquiring the SIM card is not a big deal. There has been no recovery of money trail and no payment has been ascribed to the accused from any objectionable source. The accused was not present at Jafrabad Metro Station. The accused has no connection with Bhim Army. His premises was not searched. There is no evidence collected against the accused. No incriminating material or arms or ammunition was recovered from him. It is prayed that accused may be granted bail.

Ld. Counsel for applicant/accused has filed and relied upon following judgments :-

- i) *Superintendent, Central Prison Fategarh v. Ram Manohar Lohia* (1960) 2 SCR 821 (51);
- ii) *Iftexhar Zakee Shaikh v. State of Maharashtra* 2020 SCC OnLine Bom 244;
- iii) *Arup Bhuyan v. State of Assam*, (2011) 3 SCC 377;
- iv) *State of Kerala v. Raneef* (2011) 1 SCC 784;
- v) *Indira Das v. State of Assam* (2011) 3 SCC 380;
- vi) *Jyoti Babasaheb Chorge v. State of Maharashtra*, 2012 SCC OnLine Bom 1460;
- vii) *Sanjay Lalita v. State of Assam, Bail Appln. 4089/2019*;
- viii) *Akhil Gogoi v. State of Assam, Bail Appln. 930/2020*;
- ix) *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602;

- x) Kedar Nath v. State of Bihar, 1962 Supp (2) SCR 769 (5J);*
- xi) Ashok Sagar v. State, 2018 SCC OnLine Del 9548;*
- xii) Kehar Singh & Ors. v. State (1988) 3 SCC 609;*
- xiii) Bhagwal Sarul Lal Bhishan Lal v. State (1964) 2 SCR 378.*

5. On the other hand, as per the prosecution reply, it was stated that present FIR was registered on 06/03/2020 on source information as received in the Crime Branch that the communal riot incidents of 23rd to 25th of February 2020 in Delhi were preplanned and the same were hatched by one Umar Khalid, a student of Jawahar Lal University (JNU) and his associates, all linked with different-different groups. As per preplanned conspiracy, Umar Khalid gave provoking speeches at various places and appealed the minority gathering to block roads and other public places during the visit of Mr. Donald Trump, Hon'ble President of United States of America on February 24/25, 2020, so that a propaganda may be flashed at international platform that the Minorities in India are being tortured. Women and elderly were used as front/shield behind other persons who mobilize for conspiracy and situation was created to cause tension and riots. More than 750 FIRs were lodged and more than 50 innocent lives were lost and public and private properties worth crores were destroyed. Various protest sites were organized and chakka -jam done. Different organizations were involved and the conspiracy is multi-layered and deep-rooted.

Sh. Amit Prasad, Ld. Special Public Prosecutor had argued that provisions of UA (P) Act, 1967 has been rightly attracted to the present case. The order dated 04.06.2020 passed by Ld. Predecessor of this court had given a finding that provisions of UA (P) Act is attracted in the present case. Though the Hon'ble Delhi High Court granted bail, yet it was on humanitarian grounds. Thereafter, extension of remand was given on 15.06.2020 and the said order was also not challenged by the accused. Ishrat Jahan challenged the said order

dated 15.06.2020 and the Hon'ble High Court of Delhi upheld the said order. Thus, the invocation of UA (P) Act was automatically upheld as extension granted under the said Act was held valid. Extension has been granted thereafter on a couple of occasion. It was stated during the arguments that the mention of Jafrabad in the reply was a typographical error as it was Jamia. It was further argued that based upon the statement recorded of the witnesses under Section 161 Cr.P.C & 164 Cr.P.C further prove the involvement of the accused in the conspiracy of riots leading to the loss of lives and properties in riots in North-East Delhi. He was a one of the conspirators and was actively involved with other accused persons in the conspiracy. It was also stated that since there is sufficient material for establishing a prima facie case against the accused, hence, the embargo under Section 43D of UA(P) Act shall also apply.

It was prayed that application be dismissed.

Ld. Special Public Prosecutor has relied upon a judgment in *Fasih Mahmood Vs. State of (NCT of Delhi), 2016 SCC OnLine Del 1073 & National Investigation Agency Vs. Zahoor Ahmad Shah Watali, 2019 5 Supreme Court Cases 1.*

6. (a) In the present case, accused Asif Iqbal Tanha was arrested on 19.05.2020 and later remanded to judicial custody on 27.05.2020. The accused is in judicial custody since then.

(b) The investigation in the present case is still continuing.

(c) Ld. Counsel for accused had argued that the accused has a right to protest against any law and that is protected by Constitution of India. The said assertion is correct to the extent that freedom of speech and expression grants him the power to oppose any legislation and to peacefully protest. However,

such a right under Article 19 of the Constitution of India is subject to reasonable restrictions. Thus, what has to be seen is the context, manner of expressing the dissent and various acts associated with it. It has to be some acts in pursuance of a conspiracy by various means.

(d) Secondly, as per the prosecution, the present case is of preplanned, multi-layered and deep-rooted conspiracy by blocking the roads and chakka-jam and other means at preplanned sites, inciting people, disturbing law and order, creating communal tension, etc. leading to the riots in Delhi. The said riots resulted in loss of lives and properties by using firearms, petrol-bombs, sling shots, stones, acid bottles and other dangerous articles gathered at various places. Various groups and individuals coordinated and placed part in the conspiracy.

In Section 2(o) of the Unlawful Activities (Prevention) Act, 1967, the relevant clause is causing or intending to cause disaffection against India. Where conspiracy is done to create disorder or disturbance of law and order at an unprecedented scale against the State itself and to cause loss of lives and properties, then such acts would qualify to be an unlawful activity under Section 2 (o) of UA (P) Act, 1967 attracting Section 13 of the said Act. The reason being that it is an action which causes or is intended to cause disaffection against India.

Moreover, acts done threatening the unity of India or for striking terror in the people or any section of people by use of means to cause or likely to cause death or injuries to persons or loss of or damage to property and for raising funds for the said purpose, would cover it under Section 15 to 18 of the Act. Thus, the provision of Unlawful Activities (Prevention) Act, 1967 has

been rightly invoked in the present case.

Moreover, the Ld. Predecessor of this court had also given a finding about the correct applicability of the Unlawful Activities (Prevention) Act, 1967 in the bail order dated 04.06.2020 of another co-accused Safoora Zargar in the present case. Later, extension of period of investigation and extension of remand have been done in the present case. In fact, one order dated 15.06.2020 by the Ld. Predecessor of this court granting extension of time to investigate the present case against another co-accused Ishrat Jahan under Section 43D of Unlawful Activities (Prevention) Act, 1967 was challenged before the Hon'ble High Court of Delhi and that order was upheld vide order dated 31.07.2020. This also points to the correct applicability of the Unlawful Activities (Prevention) Act, 1967 to the present case.

(e) Section 43D of the Unlawful Activities (Prevention) Act, 1967 provides as under:

43D. Modified application of certain provisions of the Code-
(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:—

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that—

(a) the reference in sub-section (1) thereof—

(i) to “the State Government” shall be construed as a reference to “the Central Government or the State Government”,

(ii) to “order of the State Government” shall be construed as a reference to “order of the Central Government or the State Government, as the case may be”; and

(b) the reference in sub-section (2) thereof, to “the State Government” shall be construed as a reference to “the Central Government or the State Government, as the case may be”.

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(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.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.]

The proviso to Sub-Section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail by laying

down that if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UA(P) Act, is prima facie true, such an accused person shall not be released on bail or on his own bond.

(f) In the present case, as per the case of the prosecution, there was a conspiracy hatched to cause communal riots in Delhi. The said conspiracy was multi-layered and deep-rooted. Various groups and organizations came together and forged linkages to create communal tension, do chakka-jam at preplanned sites. Protest against the CAA was organized at various sites in Delhi with the objective of causing riots which took place mainly in the North-East Delhi. For achieving the said objective, firearms, petrol bombs, stones, sling shots and other dangerous articles were gathered at various places in North-East Delhi. The same is also reflected in the seizure memo in FIR No. 101/20, Police Station Khajuri Khas, Delhi. As part of the preplanned conspiracy, the children and ladies were sent to block the main sites to create and tension and leading to riots in the area. The riots ensued, resulting in heavy loss of lives, injury and loss of properties. The conspiracy began quite early and accused was coordinating in reference to SIO and JCC.

As has been correctly stated by the Ld. Special Public Prosecutor, there are statements of protected witnesses under Section 161 Cr.P.C & 164 Cr.P.C. The said statements do reflect role of many accused persons including accused Asif Iqbal Tanha regarding the protest sites and how everything was being planned. The statements clearly point out the role of the accused Asif Iqbal Tanha as also other co-accused persons and various actions taken by them in pursuance of the conspiracy. He was part of conspiracy for doing chakka-jam leading to the riots. His name comes out in the statements of the witnesses as

one of the main coordinators in the entire conspiracy. The details of the statements of these witnesses are not spelt-out in detail as the case is at the stage of investigation.

Moreover, at this stage of investigation and upon the consideration of the bail application, the statements under Section 161 Cr.P.C & under Section 164 Cr.P.C have to be taken as such. Their merits or credibility can't be gone into at the present stage. Considering the statement of such witnesses regarding the role of the accused Asif Iqbal Tanha and other accused persons whose conduct is also highlighted by various statements, I have no hesitation to hold that there are reasonable grounds for believing that the accusation against the accused is prima facie true and thus, the embargo under Section 43D (5) of the UA (P) Act, 1967 will apply.

7. Since the present case is of a conspiracy resulting in riots, there are various individuals, organizations and groups which are inter-linked and from the statements working in tandem. Thus, the statements or acts by the other co-conspirators in furtherance of the common object of the conspiracy will be admissible against the present accused Asif Iqbal Tanha, and the statements and evidence will have to be read in entirety since it is a case of conspiracy. Moreover, the assertion that the accused himself physically and directly did not resort to violence as understood in common parlance would not be germane in the context of various acts committed by different individuals including the accused in the conspiracy of riots.

8. In view of the above discussion, at this stage, I do not find any reason to grant bail to the accused/applicant Asif Iqbal Tanha. Consequently, the bail application of the applicant/accused Asif Iqbal Tanha stands dismissed.

Application is accordingly disposed off.

9. Reader of the court is directed to send the copy of this order to all the parties i.e. counsel for applicant/accused, Ld. Prosecutor and IO in terms of the office order no.2204-2221/D&SJ,Shd/KKD/ Delhi dated 20.04.2020 of the Ld. District & Sessions Judge, Shahdara District, Karkardooma Courts, Delhi.

(AMITABH RAWAT)
Addl. Sessions Judge-03
Shahdara District, Karkardooma Courts,
Dated: 02.09.2020