

(2008) 06 GUJ CK 0019
In the Gujarat High Court
Case No : Criminal Appeal No. 950 of 2007

State of Gujarat

APPELLANT

Vs

Javedkhan @ Jahidkhan Azizkhan Pathan

RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Arms Act, 1959 — Section 25(1)(AA), 27, 29
Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 439
Evidence Act, 1872 — Section 123, 124, 125, 30
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 123
Prevention of Terrorism Act, 2002 — Section 34

Citation : (2008) 3 GLR 2453

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : JM Panchal, Special Public Prosecutor and KJ Panchal, for the Appellant; Aziz An Alvi, for Opponent 1, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.—Present appeal is preferred by the appellant - State of Gujarat u/s 34 of the Prevention of Terrorism Act, 2002 (hereinafter referred to as "the POTA") challenging the judgment and order dated 26th April, 2007 passed by the learned Special Judge (POTA) in Criminal Misc. Application No. 1338 of 2007 in POTA Case No. 2 of 2005 releasing the respondent herein - original accused (hereinafter referred to as "the accused") on bail during the trial of POTA Case No. 2 of 2005.

2. Facts leading to the present appeal in nutshell are as under:

Subsequent to the arrest of five boys from Ahmedabad on 03.04.2003, an FIR came to be registered with DCB, Crime Branch Police Station on 04.04.2003 being DCB I-CR No. 6 of 2003 for the offences punishable under Sections 120(B), 121, 121A, 123 of the Indian Penal Code and Section 25(1)(AA), 27 and 29 of the Arms Act. Investigating agency i.e. Crime Branch, Ahmedabad also invoked

provisions of POTA, 2002 on 19.04.2003. The allegations in the said complaint was with respect to larger conspiracy and it was alleged in the said complaint that with a view to take revenge and avenge the killings of Muslim community and damaged caused, a conspiracy was hatched. As a part of that conspiracy persons were sent to Pakistan for taking terrorist training; arms and ammunitions were kept in possession and funds were raised and were sent to Hawala through one Sarif Khan (real brother of the respondent - accused) who is also absconding and is in Pakistan. The respondent - accused who was already undergoing sentence of life imprisonment came to be arrested by the Investigating agency, Crime Branch, Ahmedabad on 14.12.2004 by way of transfer warrant in connection with aforesaid offence being DCB I-CR No. 6 of 2003 (POTA Case No. 12 of 2003). Investigating agency filed supplementary charge-sheet against four accused including respondent - accused on 19.02.2005. The case against the respondent accused in the charge-sheet is that as a part of larger conspiracy property viz. Green bungalow was acquired and developed for carrying out terrorist activities and the respondent - accused is the real brother of absconding accused - Sarif Khan, at present alleged to be stationed at Pakistan. It is also alleged in the charge-sheet against the respondent - accused that before three years of December, 2004 amount of Rs. 25 lacs was extorted at the behest and at the instance of respondent accused by original accused No. 2 - Mustakali Saiyed from the owners of the petrol pump situated at Green bungalow. Out of said amount, Rs. 20 lacs was sent to Sarif Khan in Pakistan and rest of the amount i.e. Rs. 5 lacs was given to absconding accused and real brother of the respondent - accused when he came to India surreptitiously, by changing his look (in attire of Maulvi) at the time of murder of Harin Pandya, Ex-Home Minister of State of Gujarat. It was further alleged that the said amount was given for training for Jehadi conspiracy. Thus, it is alleged that by remaining in Jail, respondent - accused has actively operated his network with a view to accomplish the goal and object of the conspiracy.

It appears that Central Review Committee constituted under POTA (Repeal) Act, 2004 reviewed the case against the respondent - accused and formed opinion that no prima-facie case exists against the respondent - accused under the POTA. It appears that opinion of Central POTA Review Committee and procedure etc. are presently subject-matter of challenge before the Hon"ble Supreme Court and by interim order the Hon"ble Supreme Court has directed not to proceed further with the prosecutions of the person exonerated by the Review Committee till further orders of the Hon"ble Supreme Court. It is also reported that thereafter the Hon"ble Supreme Court has been pleased to refer the matters pending to larger bench for adjudication of question of applicability of POTA Review Committee.

3. The respondent- accused preferred Criminal Misc. Application No. 1338 of 2007 in POTA Case No. 2 of 2005 before the Special Court(POTA) at Ahmedabad u/s 49 of the POTA Act read with Section 439 of the Criminal Procedure Code for releasing him on regular bail. It was contended on behalf of the applicant that he

has been exonerated by the Central POTA Review Committee and that nothing incriminating has been recovered or discovered from the accused. It was further contended that there is nothing on record to even remotely link the accused with the conspiracy case as alleged by the prosecution. It was also contended that he has been wrongly arraigned as an accused in the present case on account of he being brother of Sarif Khan who is absconding since many years and who is wanted in many criminal cases in Ahmedabad. It was further contended that admittedly he was in jail undergoing sentence and therefore, there was no question of he being committed any offence as alleged and /or being part of conspiracy. It was also submitted that as he was in judicial custody since more than two years so far as the present case is concerned, rigor contemplated u/s 49(6) of POTA shall not come in his way, therefore, it was requested to release him on bail. It was also contended on behalf of the accused that other co-accused who were charge-sheeted along with the accused are already released on regular bail and the accused is on stronger and better footing than other co-accused and therefore, it was requested to release the accused on bail on the ground of parity.

4. The application was opposed by the prosecution. It was submitted that looking to the seriousness and gravity of the offence alleged and role played by the accused while remaining in jail, he should not be released on bail. It was further submitted on behalf of the prosecution that there is ample material against the accused inclusive of statement of one Sairabano and other secret witnesses connecting the accused with respect to larger conspiracy. It was also further submitted that criteria for releasing the accused u/s 439 of the Cr.P.C. cannot be made applicable in the POTA case and same is required to be considered considering seriousness and gravity of the offence and role played by the accused. Therefore, it was requested to dismiss the said application.

5. After considering rival submissions made on behalf of the respective parties, learned Special Judge (POTA) by her impugned judgment and order dated 26.04.2007 allowed the said application releasing the accused on regular bail mainly on the ground of parity by observing that role of the accused cannot be said to be more than that of one Mustakali Saiyed or H.N.Jhala, co-accused who were charge-sheeted along with accused, subsequently released on bail. It was also further observed by the learned Special Court that there is extremely thin evidence on the aspect of any sort of agreement to conspire to strike terror against the people of Hindu community. That as more than one year period is passed and rigor of Section 49 of POTA would not be applicable and therefore, the Court has not to satisfy itself that there are grounds of believing that he is not guilty of committing said offences. Being aggrieved and dissatisfied with the impugned judgment and order dated 26.04.2007 passed by the Special Court (POTA), in Criminal Misc. Application No. 1338 of 2007 in POTA Case No. 2 of 2005 releasing the accused - original accused No. 4, the appellant - State of Gujarat has preferred present appeal u/s 34 of the POTA.

6. Mr. Jayant Panchal, learned Special Public Prosecutor has appeared on behalf of the State. He has vehemently submitted that learned Special Court has committed an error in releasing the respondent - accused on bail. It is further submitted that looking to the seriousness of the charges and offences alleged to have been committed by the respondent - accused, the learned Special (POTA) Court ought not to have released the respondent on bail. It is submitted that even while remaining in Jail, the respondent - accused has operated conspiracy which was against national security. It is submitted that even there is confessional statement of the very respondent - accused which is admissible in the evidence under the POTA which established the important role played by the respondent - accused in commission of the offence, therefore, respondent - accused was not required to be released on bail. It is further submitted that apart from the confessional statement of the respondent - accused even statement of one Sariabano recorded u/s 164 of the Cr.P.C., there is case made out against the respondent - accused considering extra judicial confession before the said Sariabano. It is submitted that allegations against the respondent - accused is that while remaining in Jail he has operated larger conspiracy and provided information to original accused No. 2 - Mustakali Saiyed and respondent - Javed Khan asked him to collect amount from the owners of the petrol pump situated at Green Bungalows before three years of December 2004 i.e. December, 2001. He extorted Rs. 25 lacs from the owners of the petrol pump and out of Rs. 25 lacs, Rs. 20 lacs was kept by the said advocate - original accused No. 2 and he in part sent it to Mumbai. It was also alleged that aforesaid amount was subsequently sent to one Sarif Khan at Pakistan who is real brother of the respondent - accused. It is submitted that it has come on record and it is alleged that out of the aforesaid amount, Rs. 6 lacs was sent to Mumbai to one Thakore in December, 2004 by way of Hawala. It is further submitted that it has come on record and it is alleged that Rs. 5 lacs was paid to Sarif Khan brother of the respondent who came to Ahmedabad during the period when Mr. Harin Pandya, Ex.Home Minister, State of Gujarat was assassinated and he came as Mualvi. It is further submitted that said Sarif Khan who is also absconding paid aforesaid amount to one Mufti Sufiyan who is also absconding in many cases. It is submitted that respondent accused is part of larger conspiracy to strike terror in the Country. It is submitted and it is alleged that Green Bungalows was acquired by the respondent accused and developed for carrying out terrorist activities; arms and ammunitions were found and persons were send to Pakistan for terrorist activities. It is also further submitted that it is also alleged that funds were raised and collected and thereafter, sent to Pakistan through Hawala. It is submitted that respondent - accused is real brother of Sarif Khan who is hardcore terrorist and sharp shooter attached with one Latif gang and said Sarif Khan is absconding and presently stationed at Pakistan. It is therefore, submitted that looking to above learned Special Court ought not to have released the accused on bail. It is submitted that larger conspiracy is established and there are ample evidences on record. It is submitted that learned Special Court has not properly appreciated following aspects while releasing the respondent - accused

on bail: (1) antecedent of the accused; (2) seriousness / gravity of the offence; (3) national security (4) larger conspiracy to strike terror (5) respondent - accused originally belongs to Rajasthan and there are no relatives belonging to State of Gujarat.

7. Mr. Panchal, learned Special Public Prosecutor has also further submitted that the learned Special Court has erred in coming to the conclusion that transcript of intelligence input on record of the telephonic conversation has not come on record therefore, exist no prima facie case against the accused. It is submitted that the learned Special Court ought to have appreciated the contention raised on behalf of the prosecution that in view of the provisions contained in Section 123 to 125 of the Indian Evidence Act, intelligence input is taken as secret information by the investigating agency therefore, investigating agency cannot be compelled to disclose the same. It is also further submitted that for allowing the application filed by the respondent - accused and releasing him on regular bail, the learned Special Court has considered the ground of parity that other co-accused have been enlarged on bail. However, by doing so, the learned Special Court has failed to appreciate that role played by the respondent - accused is different and that during the course of the investigation he has voluntarily confessed his involved in the commission of the offence, therefore, respondent - accused was not required to be released on bail on the ground of parity.

8. It is submitted that there is prima facie case against the respondent - accused and the role is very clearly disclosed from other material available on record of the case and at this stage while considering the application for bail they were sufficient to deny the bail. It is submitted that even the statement of secret witness - B- 49 also clearly discloses connection of the respondent - accused with the absconding accused visiting Ahmedabad prior to murder of Mr. Harin Pandya, Ex.Home Minister, State of Gujarat and he had supplied arms for taking revenge for killing the Muslims in the aftermath of Godhra. It is also submitted that statement of secret witnesses also discloses involvement of the respondent - accused in the alleged offences.

9. Mr. Panchal, learned Special Public Prosecutor has relied upon the decision of the Hon''ble Supreme Court in the case of State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, in support of his submission that present is a appeal u/s 34 of the POTA challenging the order of granting bail and therefore, this Court can examine the case on merits without any kind of fetters on its powers and it can come to an independent conclusions whether the accused deserves to be released on bail on considering merits of the case. Mr. Panchal, learned Special Public Prosecutor has also relied upon the decision of the Hon''ble Supreme Court in the case of Afzalkhan @ Babu Murthuzakhan Pathan v. State of Gujarat reported in 2007 (3) GLR 2283 in support of his submission that looking to the allegations against the accused pertaining the security of the State, learned Special Court ought not to have released him on bail. He has relied upon paragraph Nos. 12,16 and 17 of the aforesaid decision in support of his prayer to

allow the appeal and quash and set aside the impugned order passed by the learned Special Court.

10. The appeal is opposed by Mr. Alvi, learned Advocate appearing on behalf of the respondent - accused. It is submitted that in the facts and circumstances of the case and when it is specifically found by the learned Special Court that there is no evidence against the accused involved in larger conspiracy and direct involvement is not established and when the learned Special Court has released the accused on bail, same is not required to be interfered by this Court. It is submitted that admittedly when the alleged conspiracy had taken place accused was in jail and whatever is done same is not alleged to have been done by the accused. It is submitted that no benefit has been taken by the accused by extorting Rs. 25 lacs and there is no direct involvement of the accused. It is submitted that nothing is on record how the accused is involved against national security. It is submitted that as rightly observed by the learned Special Court, the respondent - accused would be on better footing than other co-accused who were already released on bail i.e. Mustakali Saiyed and H.N.Jhala, therefore, the learned Special Court has rightly released the respondent on bail on the ground of parity. It is further submitted by Mr. Alvi, learned Advocate that even Central POTA Review Committee has exonerated the respondent - accused. However, same is subject-matter before the Hon'ble Supreme Court and trial against the accused has been stayed by the Hon'ble Supreme Court and therefore, the learned Special Court has rightly released the respondent - accused on bail. It is further submitted that so far as alleged confessional statement of respondent - accused is concerned, it is required to be noted that same was retracted by the respondent - accused immediately, therefore, same cannot be relied upon. It is further submitted that therefore, there is no material and/or evidence against the respondent - accused involving the accused with respect to larger conspiracy and direct involvement of the respondent is not established. Therefore, the learned Special Court has rightly released the respondent - accused on bail which is not required to be interfered with in the present appeal. It is further submitted that as such respondent - accused has been falsely involved in the case only because he is real brother of Sarif Khan who is absconding. Therefore, it is requested to dismiss the present appeal.

11. Heard the learned Advocates appearing on behalf of the respective parties.

12. At the outset, it is required to be noted that respondent - accused is charged for the offences under Sections 120(B), 121, 121A, 123 of the Indian Penal Code and Section 25(1)(AA), 27 and 29 of the Arms Act and Sections 3(1)(a)(b), 3(3), 4, 20, 21(2)b, 22(3)(a)(b) of POTA. It appears that allegations against the respondent - accused are very grave and serious. It is to be noted that respondent - accused is undergoing life imprisonment for the offence of murder which is popularly known as Radika Gymkhana case. Respondent - accused is also alleged to have been involved in approximately ten cases of very serious offences. Respondent - accused originally belongs to Rajasthan and there are no

relatives in the State of Gujarat. Respondent - accused is real brother of one Sarif Khan a sharp shooter attached with one Latif gang who is also involved in so may cases of serious offences against national interest and security and who is at present stationed at Pakistan. The allegations against the respondent - accused is that while remaining in jail he has operated larger conspiracy and he provided information to advocate accused - Mustakali Saiyed and asked him to collect amount from the owners of the petrol pump situated at Green Bungalows before three years of December, 2004 i.e. December, 2001 who extorted Rs. 25 lacs from the owners of the petrol pump. It is alleged that out of Rs. 25 lacs, Rs. 20 lacs was kept by the said advocate and was sent to Mumbai in part and then sent to one Sarif Khan at Pakistan. It is also alleged that Rs. 6 lacs was sent to Mumbai to one Thakore in September, 2004. It is also alleged that an amount of Rs. 5 lacs was paid to Sarif Khan when he came to Ahmedabad at the time of murder of Mr. Harin Pandya, Ex.Home Minister, State of Gujarat, who came as Mualvi. It is alleged that amount was given to Sarif Khan in the name of Jihad to help Muslim youths to fight against the Hindus and it is alleged to have handed over to Mufti Sufiyan who is also absconding accused till date. Thus, it is alleged that even while remaining in jail, he has operated larger conspiracy and he has played important role in commission of the offence and larger conspiracy was to create terror in the Country and fundings and sending youths to Pakistan for training of terrorist activities after riots.

13. In the confessional statement, the respondent - accused has admitted the role played by him in commission of the offence and larger conspiracy. However, subsequently the respondent - accused has retracted from the same. Evidentiary value of the same is not required to be gone into at this stage while considering bail application. In the case of Afzalkhan (supra) while dealing with the aspect of confessional statement of the accused under POTA, the Hon''ble Supreme Court has observed that the question as to whether irregularity, if any had been committed in recording the confessional statement of the accused or the same otherwise would not inspire confidence before a court of law is a matter which would fall for consideration of the learned trial Judge at trial. It is further observed by the Hon''ble Supreme Court relying upon another decision in the case of State of Tamil Nadu through Superintendent of Police, C.B.I./S.I.T. v. Nalini and Ors. reported in AIR 1999 SC 2640 that irregularity made in recording the statement may be held to be curable and admissible in evidence. It is further held by the Hon''ble Supreme Court in the aforesaid decision that under a special statue like POTA or TADA confession of a co-accused could not be taken into consideration even for the purpose of Section 30 of the Evidence Act and it is not necessary to examine that aspect of the matter at the stage of bail. Even otherwise, considering the statement of one Sairabano recorded under Sections 161 and 164 of the Cr.P.C., involvement of respondent - accused in the larger conspiracy is established. There is extra judicial confession of the respondent - accused before the said Sairabano who happens to be lover of the said Javedkhan and looking to the said statement, it appears that Rs. 5 lacs was

extorted from the owners of the petrol pump situated at Green Bungalows, which was sent to Pakistan for terrorist activities after riots. Even involvement of the respondent - accused in larger conspiracy in committing offence is established from the statement of secret witnesses i.e. B-49, B-50, B-53 and B-54 and same are not required to be discussed in detail at this stage while considering bail application.

14. While releasing the accused on regular bail, learned Special Court has observed that there is no statement prior to the arrest of the respondent - accused connecting him with conspiracy of POTA Case No. 12 of 2003. Statement of B-49 is recorded two days prior to the arrest of the accused where he has spoken of the thick connections of the accused with absconding accused - Sarif Khan and visit of Sarif Khan to Ahmedabad prior to the murder of Mr. Harin Pandya and having supplied arms for taking revenge for the killings of Muslims in the aftermath of Godhra. The learned Special Court has also observed that there does not appear to be any evidence in respect of Green Bungalow even in earlier charges and it comes out only in the statement of B-53 and B-54 which came to be recorded just prior to the arrest of respondent - accused. The learned Special Court has also observed that there is no transcript produced of telephonic conversations as was ensured by the prosecuting agency time and again even with the charge-sheet papers as it is the case on behalf of the prosecution that on the strength of intelligence input the telephonic conversations, tapes recorded gave shocking revelations. It is required to be noted at this stage that aforesaid aspects are required to be considered at the time of trial and not at the time of considering bail application. While releasing the respondent - accused on bail and while considering the statement of Sairabanu one of the witnesses who essentially was having relationship with Sharif Khan, the Special Court has observed that even if respondent - accused had played important role through jail he could not be prima - facie labelled for extortion of huge amount. The learned Special Court has committed an error while releasing the respondent accused on bail. By making above observations, the learned Special Court has not properly appreciated that the allegations are that the aforesaid amount which was extorted was used for Jehadi activities and was sent to Pakistan by way of Hawala and was given to one Sarif Khan and same is part of larger conspiracy.

15. Looking to the prima facie case on the basis of own confessional statement; statement of Sairabano and statement of some of the witnesses, establish prima facie involvement of accused operating larger conspiracy even while in Jail. Looking to the serious allegations against the respondent - accused involving respondent accused in grave and serious offences against national security and looking to the antecedent of the accused, respondent - accused was not required to be released on bail. At the stage of considering bail application, allegations of serious and grave nature are required to be considered.

16. This is an appeal u/s 34 of the POTA against the order passed by the learned Special Court releasing the respondent accused on bail. As observed by the

Hon''ble Supreme Court in the case of Salimbhai (supra) an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court and in view of express language used in Sub-section (1) of Section 34 of the POTA the appeal would lie both on facts and on law. Therefore, even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail while considering the merits of the case. In the case of Afzalkhan (supra), the Hon''ble Supreme Court has observed that while considering the bail detailed reasons touching the merit of the matter should not be given, which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. It is further observed by the Hon''ble Supreme Court that at the stage of bail, a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken. It is further observed in the said decision that when there are allegations against the accused persons pertaining to the security of the State, ordinarily, bail application in such cases should be rejected. In the case before the Hon''ble Supreme Court allegations against the accused was that they were parties to the larger conspiracy and it was alleged that one of the appellants - accused had gone for training to Pakistan and another had provided money and he had been in possession of large quantity of arms. The Hon''ble Supreme Court has observed that a strong prima-faice case has been made out against the accused and their release at this juncture may hamper smooth conduct of the trial since many witnesses are yet to be examined. It is further observed by the Hon''ble Supreme Court that one of the appellants hails from different State, it may be difficult to secure his presence if released on bail at the crucial juncture.

17. Looking to the allegations against the respondent - accused being part of larger conspiracy while remaining in jail; the allegations involving respondent - accused with respect to grave and serious offences against national security; antecedent of the respondent - accused and his alleged involvement in more than ten cases of serious offences; his real brother of the accused - Sarif Khan is absconding and at present stationed at Pakistan and looking to the statements narrated hereinabove (they are not required to be discussed at this stage), it appears to us that the learned Special Court has committed an error in releasing the respondent - accused on bail. Thus, on merits we are of the opinion that respondent - accused was not required to be released on bail. We are conscious of the fact that Central POTA Review committee has opined in favour of the respondent - accused but the said report is subject-matter before the Hon''ble Supreme Court. We are also conscious of the fact that learned Special Court has released the respondent - accused on the ground of parity considering the fact that other co-accused i.e. Mr. Mustakali Saiyed and Mr. H.N. Jhala are released on bail. But looking to the alleged role played by the respondent - accused and his antecedents and his own confessional statement (which might have been subsequently retracted) and the respondent - accused belongs to Rajasthan and

there are no relatives in the State of Gujarat, even on the ground of parity, respondent - accused was not required to be released on bail. Looking to the overall facts and circumstances of the case and considering above two decisions of the Hon''ble Supreme Court, we are of the considered opinion that impugned order passed by the learned Special Court releasing the respondent - accused on bail deserves to be quashed and set aside and the appeal deserves to be allowed.

18. For the reasons stated above, the appeal succeeds. Impugned judgment and order dated 26.04.2007 passed by the Special Court(POTA), Ahmedabad in Criminal Misc. Application No. 1338 of 2007 in POTA Case No. 2 of 2005 is hereby quashed and set aside. The appeal is accordingly allowed.