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Bail Application no. 1119/2020
FIR No.59/2020
P.S Crime Branch
State Vs. Safoora Zargar
U/s

04.06.2020

Vide order nos.5837-5927/D&SJ/NDD/2020 dt. 30.05.2020 & 5931-6021/D&SJ/NDD/2020 dated 01.06.2020 of Ld. District & Sessions Judge, Patiala House Court, New Delhi District, New Delhi, the undersigned has been deputed for duty today in pursuance to the directions of Hon'ble High Court of Delhi vide order no.R-1347/DHC/2020 dated 29.05.2020 and in continuation of the previous office order nos.4243-4333/D&SJ/NDD/2020 dated 01.04.2020, 4407-4426/D&SJ/NDD/2020 dated 10.04.2020, 4518-4608/D&SJ/NDD/2020 dated 15.04.2020, 5111-5200/D&SJ/NDD/2020 dated 03.05.2020 and 6364-6454/D&SJ/NDD/2020 dated 16.05.2020 to combat the pandemic of COVID 19.

Present: Sh. Irfan Ahmed, Addl. PP for the State.
Sh. Trideep Pais, Sh. Ritesh Dhar Dubey and
Ms. Sanya Kumar, Ld. counsel for applicant/accused Safoora Zargar.
DCP Sh. D. D. Negi with IO/ACP Lalit Mohan Negi.

An application U/s 439 Cr.P.C for grant of bail has been moved on behalf of the applicant/accused Safoora Zargar.

It is forcefully submitted by Ld. Counsel for the applicant/accused that the investigating agency is infact creating a false narrative to implicate innocent students, who do not approve of the government's policy or government legislation. It is submitted that free flow of ideas and dissent through peaceful protest constitutes the foundation of a vibrant and strong democracy. It is submitted that dissent cannot be stifled by resorting to state's coercive machinery. It is submitted that it is the basic and fundamental right of a citizen to protest and demonstrate, firmly entrenched in Chapter III of the Constitution of India.

It is submitted that the applicant/accused is an absolutely innocent lady who simply holds a divergent view on the citizenship amendment act. It is submitted that merely holding a divergent view is no offence and by no stretch of imagination, she can be brandished as a terrorist or targeted an anti-national.

It is submitted that the prosecution is alleging that the applicant/accused delivered inflammatory speech on 23.02.2020 at Chand Bagh which led to violence and rioting in North East Delhi. It is forcefully argued that on 23.02.2020 the applicant/accused has infact not delivered any speech at all, at Chand Bagh. It is pointed out that from the perusal of case FIR No. 60/2020 P.S Dayal Pur dated 24.02.2020, relied upon by the prosecution itself, it is evident that the violence at Chand Bagh started only at about 1.00 p.m on 24.02.2020. It is further pointed out that from the call detail records of the applicant/accused available on record, relied upon by the prosecution itself, it is evident that on 24.02.2020, she was not even present at Chand Bagh. It is forcefully argued that in her absence, the alleged violence, if any, cannot be attributed to the applicant/accused. It is submitted that although on 23.02.2020 the applicant/accused had visited the Chand Bagh site for a short period of time but on 23.02.2020, as per the prosecution case itself, no violence took place. It is submitted that the applicant/accused delivered a speech at Khureji on 23.02.2020 at about 4.00 p.m but that in itself was not at all provocative or inflammatory. Moreover, it even did not incited anybody to resort to violence. It is submitted that the applicant/accused was merely involved in peaceful protest against CAA, which is her fundamental right under Article 19 of the Constitution of India. It is submitted that stringent provisions of Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as UAPA) are not attracted simply because the applicant/accused holds a divergent view on a piece of legislation and she disagrees with the opinion of the Government and decides to peacefully protest against the Government measures. To get her protest registered/notice, it is further argued that, even if the applicant/accused intended to protest in presence of a foreign dignitary, by peaceful demonstration and protest, irrespective of the scale and magnitude of the protest, mere dissent or disapproval of the Government policy would not tantamount to inciting violence or intending to cause any 'disaffection against India'. It is forcefully argued that the provisions of UAPA are not at

all attracted in the case at hand.

It is submitted that the Hon'ble Apex Court in the matter of *Kedar Nath v. State of Bihar*, AIR 1962 SC 955 has elaborately dealt with the term 'disaffection' and has categorically observed that in order to bring any act within the mischief of 'Sedition', there must be material to show that the act is of such a nature that it would or have a tendency to create disorder or disturbance of public peace by resort to violence. It is submitted that 'violence' constitutes the gravamen of charge for unlawful activity. It is forcefully argued that from the material available on record, no act of whatsoever nature, is attributable to the applicant/accused which fomented or incited any violence. It is submitted that in the absence of any material available on record to show that applicant/accused is liable for any violence, the provisions of UAPA cannot be invoked as no unlawful activity, as defined u/s 2 (o), is attributable to the applicant/accused. It is further submitted that even there is no material available on record to show that the applicant/accused was involved in any kind of conspiracy to incite any violence or bring about any disaffection against this great nation. It is forcefully argued that in the absence of any clear, direct and proximate link between the alleged violence and the conduct of the applicant/accused, she is not liable for any penal action. In order to buttress the argument, Ld. counsel has placed heavy reliance upon the judgment of *Clarence Brandenburg v. State of Ohio*, 395 US 444 (1969), which has also been cited with approval by the Hon'ble Apex Court in the matter of *Shreya Singhal v. Union of India*. It is further argued that even if it is admitted for the sake of arguments that the applicant/accused intended to be heard at an international level or in presence of a foreign leader, that by itself would not tantamount to 'disaffection' for the purpose of Section 2(o) of UAPA. Ld. defence counsel has placed reliance upon the judgment of Hon'ble Delhi High Court in the matter of *Priya Pillai v. Union of India* (2015) 218 DLT 621.

It is further argued that even if it is accepted for the sake of arguments that she was present during the protest, then mere presence is

not sufficient to invoke the stringent provisions of UAPA. Ld. defence counsel has placed reliance upon *Muthu Naikar & Ors v. State of Tamil Nadu* (1978) 4 SCC 385; and *Musa Khan & Ors v. State of Maharashtra* (1977) 1 SCC 733.

It is further submitted that the applicant/accused has been mischievously arrested in the present case by the Special Cell to illegally curtail her liberty upon her release on bail in case FIR No. 48/2020, P.S Jaffrabad. It is submitted that the subject matter of case FIR No. 48/2020, PS Jaffrabad is identical with the instant case. It is submitted that registration of second FIR upon the very same facts is impermissible in law in light of the clear mandate of the Hon'ble Apex Court in the matter of *T. T. Anthony v. State of Kerala* (2001) 6 SCC 181.

Further, it is submitted that leaving aside all the legal arguments, the applicant/accused deserves bail on humanitarian grounds. It is submitted that the applicant/accused is 21 weeks pregnant. She is also reported to be suffering from Poly Cystic Ovarian Disorder and has a reported history of urinary tract infection. It is submitted that her condition becomes all the more vulnerable due to the pandemic Covid-19 situation. It is pointed out that Covid-19 cases have now been reported in all three jails of Delhi.

In order to support his arguments, Ld. defence counsel has placed reliance upon the following judgments :

1. *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* (2005) 5 SCC 294.
2. *Kedar Nath v. State of Bihar* AIR 1962 SC 955.
3. *Shreya Singhal v. Union of India* (2015) 5 SCC 1
4. *Clarence Brandenburg v. State of Ohio* 395 US 444 (1969)
5. *Priya Pillai v. Union of India* 2015 SCC OnLine Del 7987.
6. *Muthu Naicker and Ors v. State of Tamil Nadu* (1978) 4 SCC 385.
7. *Musa Khan and Ors v. State of Maharashtra* (1977) 1 SCC 733.
8. *T.T. Antony v. State of Kerala* (2001) 6 SCC 181.
9. *Ashok Sagar v. State (NCT) of Delhi* 2018 SCC OnLine Del 9548.
10. *Prabhakar Tiwari v. State of Uttar Pradesh* 2020 SCC OnLine SC

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11. *P Chidambaram v. Directorate of Enforcement* 2019 SCC OnLine SC 1549.
12. *Binayak Sen v. State of Chhattisgarh SLP (Crl)* 3378/2009.
13. *Mohd. Yasin Patel v. State Crl. M No 2299/2003 in Crl. A 585/2003.*
14. *Sheetal Sathe v. State of Maharashtra Crl. Bail. A. 853/2013.*
15. *Oma @ Omprakash and Anr v. State of Tamil Nadu* (2013) 3 SCC 440.

On the contrary, Ld. Addl. PP for the State has vehemently opposed the bail application arguing that there is enough material available on record to show that the applicant/accused was involved in Delhi riots and the prosecution has rightfully invoked the provisions of UAPA. It is forcefully argued that at this stage, the court is not required to dwell deep into the merits of the case. It is submitted that as per the provisions of Section 43(D) clause 5, there is a statutory embargo upon the power of the court to release the applicant/accused on bail. Ld. Addl. PP has drawn my attention to the copy of the whatsapp chat, collected during the course of investigation and statement of the witnesses recorded u/s 161 and 164 CrPC to justify the invocation of the provisions of UAPA in the instant case. It is forcefully argued that at this stage, it is not legally permissible for this court to ignore the incriminating material available on record. Ld. Addl. PP has placed reliance upon the judgment of the Hon'ble Apex Court in the matter of *National Investigating Agency v. Zahoor Ahmad Shah Wadali* 2019 5 SCC 1. Ld. Addl. PP has further drawn my attention to a copy of the seizure memo dated 26.02.2020 in case FIR No. 101/2020 P.S Khajoori Khas wherein the police has seized the following articles :

1. Two plastic crates red colour containing glass bottles, some filled with liquid and some are empty and their neck stuffed with cloth.
2. One plastic crate red colour containing bricks and stones.
3. Stones and bricks spread all over the roof of H. No. E-7, Khajoori Khas, Main Road Karawal Nagar, Delhi.
4. Eight empty plastic crates.

5. Three sling shot.

It is argued that viewed against the inflammatory speeches, the abovesaid recovery and the statement of the witnesses recorded u/s 161 and 164 CrPC, it is evident that Delhi riots were the result of a larger conspiracy to disrupt the normal functioning of the city and to overawe the government machinery by resorting to force and violence. It is forcefully argued that under these circumstances, the applicant/accused is not entitled for bail.

I concur with the Ld. defence counsel that free flow of ideas and dissent through peaceful protest constitutes the foundation of a strong and vibrant democracy. Exchange of ideas is infact the stepping stone for human evolution. However, the right of speech and expression and for that matter, protest or demonstration is not an absolute right and is infact subject to reasonable restrictions under Article 19 (2) of the Constitution of India.

In order to deal with the issue whether provisions of UAPA have been rightfully invoked in the instant matter or not, we would necessarily have to deal with the word 'disaffection against India' as prescribed in sub-clause 3 of Section 2 (o) of UAPA. The word 'disaffection' has not been statutorily defined in any statutory provisions.

Dealing with the interpretation of the word 'Sedition', as prescribed u/s 124 A of the Indian Penal Code, Hon'ble Apex Court has dealt with the acts which are proscribed and have a tendency to cause 'disaffection against India' and has observed herein as under in the matter of Kedar Nath v. State of Bihar AIR 1962 SC 955:

"The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or

spoken, etc. which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress [vide (1) Bengal Immunity Company Limited v. State of Bihar and (2) R.M.D. Chamarbaugwala v. Union of India. Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to **create disorder**, or **disturbance of law and order**, or **incitement to violence**".

Therefore, evidently, law frowns upon any act which has a tendency to create disorder or disturbance of law and order or incitement to violence. Therefore, mere violence is not the gravamen of charge u/s 2 (o) of UAPA. Any activity which has a tendency to create a disorder or disturbance of law and order to such an extent that the entire city is brought to its knees and the entire government machinery is brought to a grinding halt, such an activity would obviously be treated as an unlawful activity within meaning of Section 2 (o) of UAPA.

I concur with the Ld. Addl. PP that at this stage, the court is not required to test the merits of the prosecution case. I am not discussing in detail the particulars of the prosecution witnesses so as not to unnecessarily prejudice the ongoing investigation and the safety and security of the witnesses is also one of my primary concerns. However from the statement recorded u/s 161 and 164 CrPC coupled with the whatsapp chat available on record, it can be safely inferred that there is prima facie evidence to show that there was a conspiracy to atleast blockade the roads (chakka jaam). As per the provisions of section 339 of The Indian Penal Code, causing wrongful restraint to even a single individual is a penal offence. Section 141 clause 3 provides that any assembly of five or more persons is designated as 'unlawful', if its common object is to commit any offence.

From the material available on record, one cannot ignore the case of the prosecution that the accused persons have conspired to cause disruption of such an extent and such a magnitude that it would lead to disorderliness and disturbance of law and order at an unprecedented scale. Therefore, I cannot but disagree with the Ld. defence counsel that the provisions of UAPA could not have been validly invoked in the case at hand.

Further, I cannot also agree with the Ld. defence counsel that applicant/accused is only liable for her individual acts and the speeches delivered or the acts of the other members of the group cannot be read against her. In my considered opinion, if there is prima facie evidence of existence of a conspiracy, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all. (Reliance is placed upon *Jayendra Saraswati Swamigal v. State of Tamil Nadu AIR 2005 SC 716*). Therefore, mere absence at the spot or absence of any overt act would not help the cause of the applicant/accused.

Further, even if no direct violence is attributable to the applicant/accused, she cannot shy away from her liability under the provisions of the said Act. When you choose to play with embers, you cannot blame the wind to have carried the spark a bit too far and spread the fire. The acts and inflammatory speeches of the co-conspirators are admissible u/s 10 of the Indian Evidence Act even against the applicant/accused.

I concur with the Ld. Addl. PP that at this stage, the court is not concerned with the sanctity of the material available on record, however, considering the material available on record, it cannot be said that there is no prima facie case made out against the applicant/accused. Thus, the statutory embargo under provisions of Section 43(D)(5) is attracted in the instant case.

I am afraid that the contention regarding the impermissibility of registration of the second FIR would also not help the cause of the

applicant/accused. In the case at hand, during the course of investigation, a larger conspiracy is discernible and a second investigation by way of a separate FIR to unravel the entire conspiracy sounds not only logical but is perfectly legal. (Reliance is placed upon the judgment of the Hon'ble Apex Court in the matter of *Ram Lal Narang v. State (Delhi Administration)* 1979 (2) SCC 322. The judgment in the matter of T. T. Anthony can be distinguished on facts).

As a cumulative effect of the aforesaid discussion, I do not find any merits in the bail application, the same is accordingly dismissed.

However, keeping in view the precarious medical condition of the applicant/accused, the concerned Jail Superintendent is requested to provide adequate medical aid and assistance to the applicant/accused.

A copy of the order be accordingly sent to the concerned Jail Superintendent for compliance.

Copy of the order be given dasti to the concerned parties.

(Dharmender Rana)
Roster Judge
ASJ-02/NDD/PHC/ND
04.06.2020