

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL MISC.APPLICATION (FOR ANTICIPATORY BAIL - BEFORE CHARGESHEET) NO. 6777 of 2023****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J. C. DOSHI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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AKRAM AMIN BAKALI
Versus
STATE OF GUJARAT

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Appearance:

MR ABHISHEKSINGH A BHADOURIA(12966) for the Applicant(s) No. 1

MR HK PATEL, APP for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE J. C. DOSHI**Date : 12/02/2024****CAV JUDGMENT**

1. By way of the present petition under Section 438 of the Code of Criminal Procedure, 1973, the petitioner has prayed to release him on anticipatory bail in case of his arrest in

connection with the FIR registered as Part -B C.R.No.11210061210073 of 2021 registered with Lal Gate Police Station, Surat.

2. Learned advocate for the petitioner would submit that the petitioner is arraigned as accused under section 3(1),(ii),3(2) and 3(4) of the Gujarat Control of Terrorism and Organized Crime Act, 2015 (for short '**GCTOC Act**'). He would further submit that in order to attract the provisions for which the petitioner / accused is arraigned, prosecution prima facie is required to prove terrorist act or organised crime said to have been committed by the petitioner / accused. He would further submit that section 2(e) of the GCTOC Act defines organized crime and section 2(h) defines terrorist act. He would submit that organized crime means any continuing unlawful activity including extortion, land grabbing, contract killing, economic offences, Cyber crimes having severe consequences, human trafficking racket for prostitution for ransom by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion or other unlawful means. He would further submit that terrorist act said to have committed if it is done with intention to disturb public order or threaten the unity, integrity and security of the State or to strike terror in the minds of people or any section of the people by doing an act using bombs, dynamite or any other explosive substance or inflammable material or firearms or other lethal weapons or poison or noxious gases or other chemicals or any other substance hazardous in nature in such a manner so as to cause

or likely to cause death or injury to any public functionary or any person or loss due to damage or destruction of property or disruption of any supplies or services essential to the life of the community or an act of detaining any person and threatening to kill or injure such person in order to compel the State Government to do or abstain from doing any act.

2.1. Learned advocate for the petitioner would further submit that though petitioner / accused is arraigned as accused for organized crime and terrorist act, no FIR ever registered against the petitioner, prior to registration of impugned FIR. No charge-sheet is filed against the accused. Referring to judgment of Hon'ble Apex Court in the case of **Mohamad Iliyas Mohamad Bilal Kapadiya v/s. State of Gujarat [2022 SCC Online SC 713]**, more particularly, para - 9 thereof, he would submit for invoking provisions of GCTOC Act, conditions which are required to be fulfilled is that such an activity should be prohibited by law for the time being in force or cognizable offence punishable with imprisonment of three years or more and that such activity is undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate and there must be more than one charge-sheet filed before the competent Court for such activity within a preceding period of ten years and the Courts have taken cognizance of such offence. Learned advocate for the petitioner submitted that in the present case, none of the conditions stated in the said judgment is fulfilled. The petitioner who is not named in the FIR is falsely arraigned in the offence.

2.2. Learned advocate for the petitioner has placed reliance on

judgment of Co-ordinate Bench in the case of **Idrish v/s. State of Gujarat [2012 SCC Online Guj 174]**, more particularly, para 5 whereby Co-ordinate Bench has referred to judgment of Hon'ble Apex Court in the case of **State of Gujarat v/s. Sandip Omprakash Gupta [Criminal Appeal No.2291 of 2022]**. The observations and findings of the Co-ordinate Bench is as under :-

"5. This Court has also taken into consideration the law laid down by the Honble Apex Court in the case of the State of Gujarat Vs. Sandip Omprakash Gupta passed in Criminal Appeal No.2291 of 2022 (Arising out of SLP (Criminal) No.6101 of 2021), wherein the Hon'ble Apex Court has observed as under:

"51. If the decision of the coordinate Bench of this Court in the case of Shiva alias Shivaji Ramaji Sonawane (supra) is looked into closely along with other provisions of the Act, the same would indicate that the offence of 'organised crime' could be said to have been constituted by at least one instance of continuation, apart from continuing unlawful activity evidenced by more than one chargesheets in the preceding ten years. We say so keeping in mind the following:

(a) ... xxx ... xxx.

(b) ... xxx ... xxx.

(c) ... xxx ... xxx.

(d) ... xxx ... xxx.

(e) ... xxx ... xxx.

(f) ... xxx ... xxx.

(g) However, we need to clarify something important. Shiva alias Shivaji Ramaji Sonawane (supra) dealt with the situation, where a person commits no unlawful activity after the invocation of the MCOCA. In such circumstances, the person cannot be arrested under the said Act on account of the offences committed by him before coming into force of the said Act, even if, he is found guilty of the same. However, if the person continues with the unlawful activities and is arrested, after the promulgation of the said

Act, then, such person can be tried for the offence under the said Act. If a person ceases to indulge in any unlawful act after the said Act, then, he is absolved of the prosecution under the said Act. But, if he continues with the unlawful activity, it cannot be said that the State has to wait till, he commits two acts of which cognizance is taken by the Court after coming into force. The same principle would apply, even in the case of the 2015 Act, with which we are concerned.”

6. Having heard learned advocate for the applicant and learned APP for the respondent-State as well as papers produced on record, it appears that the investigation is over against the present applicant and charge-sheet has been filed by the investigating officer against the present applicant. Since trial will take its own time to conclude, the presence of the applicant is not required in judicial custody and therefore, I am of the opinion that this is a fit case to exercise the discretion and enlarge the applicant on regular bail.

7. In the facts and circumstances of the case and considering the nature of allegations made in the FIR as well as aforesaid law laid down by the Hon'ble Supreme Court and without discussing the evidence in details as well as without going into details, prima-facie, this Court is of the opinion that this is a fit case to exercise the discretion to enlarge the applicant on bail."

2.3. Learned advocate for the petitioner submitted that in absence of any allegations which prima facie establish that person is indulged in any unlawful act, petitioner would be absolved from the prosecution under the said Act. In these circumstances, it is submitted that prosecution has failed to establish that there was prior unlawful activity or post unlawful activity with regard to petitioner is established and therefore, the petitioner may be granted anticipatory bail.

2.4. Learned advocate for the petitioner referred to judgment of the Hon'ble Apex Court in the case of **Moti Ram v/s. State of Madhya Pradesh [(1978) 4 SCC 47]** to submit consequences of pre-trial detention. The accused presumed innocent are subjected to the psychological and physical deprivation of jail life, usually under more onerous conditions than are imposed on convicted accused. Thus, pre-trial conviction should be avoided.

2.5. So far as prohibition under section 20(3) of the GCTOC Act is concerned, learned advocate for the petitioner relied on judgment of Hon'ble Apex Court in the case of **Union of India v/s. K.A.Najeeb [(2021) 3 SCC 713]**. He would submit that statutory restrictions provided under section 20(3) of GCTOC Act per se does not oust the ability of the constitutional Courts to grant bail on ground of violation of Part III of the Constitution which covers within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. It is submitted that in the present case since necessary provisions of constituting organized crime or terrorist act are missing against the accused which is prima facie established on reading FIR, statutory bar under section 20(3) of GCTOC Act would not be applicable, the Court being constitutional Court cannot evade to grant anticipatory bail if violation of Part - III of the Constitution is noticed.

2.6. Learned advocate for the petitioner submitted that in view of affidavit of Investigating Officer and other record what can be inferred that as per case of prosecution, present petitioner was

financing to the main accused and provided monetary backup to the accused, which even if proved, would not fall in the category of organised crime or terrorist act. It is submitted that since GCTOC Act is not applicable to the facts of the case, the petitioner may be enlarged on anticipatory bail.

2.7. In addition above, learned advocate for the petitioner would submit that the petitioner is ready and willing to co-operate in investigation. It is submitted that it is not established that petitioner would run away from investigation as well as trial as the petitioner is having movable and immovable property within Surat district. The petitioner is ready to abide any conditions which may be imposed by this Court. The petitioner would follow tripod test i.e. not to temper evidence, not to flee from justice and not to influence witnesses.

2.8. Learned advocate for the petitioner apart from authorities stated herein above, also relied on judgment of Bombay High Court in the case of **Surjitsingh Bhagatsingh Gambhir v/s. State of Maharashtra [2019 SCC Online Bom 1860]**, another judgment of Bombay High Court in the case of **Shabhana Praveen Inayatullah Shaikh v/s. State of Maharashtra [AIRONLINE 2021 BOM 2873]**, judgment of Kerala High Court in the case of **Vijay Babu v/s. State of Kerala [2022 SCC Online Ker 3158]**, judgment of Hon'ble Apex Court in the case of **State of Maharashtra v/s. Shiva Alias Shivaji Ramaji Sonawane [(2015) 14 SCC 272]**, judgment of Co-ordinate Bench in the case of **Sandip Omprakash Gupta v/s. State of Gujarat [2021 SCC Online GUJ 3012]** and judgment of Hon'ble Apex Court in the

case of **Bhadresh Bipinbhai Sheth v/s. State of Gujarat [(2016) 1 SCC 152]**.

2.9. Learned advocate for the petitioner also submitted that other accused who are named in the FIR as well as who are treated as main accused in the offence haven't been granted regular bail by the Special Court. Thus, principle of parity also attracts in the present case.

2.10. In view of above, it is submitted to grant anticipatory bail to the petitioner.

3. On the other hand, learned APP firstly questioned maintainability of the petition inter-alia on the ground that section 20(3) of the GCTOC Act clearly bars applicability of section 438 of Cr.P.C. in case under GCTOC and therefore, anticipatory bail application filed by the petitioner is not maintainable. He referred to judgment of Co-ordinate Bench in the case of **Dipakbhai Laxmanbhai Asoda v/s. State of Gujarat [Criminal Misc. Application No.23440 of 2022]** as well as in the case of **Romizkhan Mahmudkhan @ Rajbha Jat Malek v/s. State of Gujarat [Criminal Misc. Application No.775 of 2022]** to buttress his submission. He would further submit that apart from statutory bar under section 20(3) of the GCTOC Act, present petitioner is evading his arrest. The petitioner / accused is not co-operating in investigation. It is submitted that section 70 warrant has been issued by the learned Special Judge against the petitioner. Lookout notice is also issued against the petitioner which indicates that petitioner is not co-operating in

investigation and therefore, the petitioner may not be granted anticipatory bail.

3.1. It is submitted by learned APP that petitioner is one of the abettors of offence. He has harboured main accused at Bombay on 28.07.2021 and 29.07.2021 which is proved from investigation at first instance. Apart from that the petitioner has send Rs.2 lakh each on three occasion to wife of main accused - Ashraf Nagori and it is accepted and admitted by wife of accused - Ashraf Nagori. He has also send Rs.70,000/- through Google pay to facilitate to stay accused - Ashraf Nagori at Calcutta. These prima facie indicates that the petitioner has played major role in commission of offence. He is part of organised crime syndicate and when the petitioner has played major role in commission of offence and he is evading his arrest and not co-operating in investigation, anticipatory bail application of the petitioner may not granted.

4. Having heard learned advocates for the parties, let refer section 20(3) of the GCTOC Act, which reads as under :-

"20. Modified application of certain provisions of Code:-

(1) xxx

(2) xxx

(3) Nothing in section 438 of 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. On perusal of provisions of law, statutory provision contained under section 438 of the Code is not applicable in

relation to any case involving the arrest of any person accused of having committed an offence punishable under the GCTOC Act.

6. Co-ordinate Bench in the case of Dipakbhai Laxmainbhai Asoda has held in para 2,3 and 4 as under :-

"2. Perusal of the papers would indicate that this is an application for anticipatory bail under Section 438 of the Criminal Procedure Code. The applicant is arraigned in FIR being C.R.No.11188003210362 registered at Bhiloda Police Station, District:Aravalli for the offences punishable under sections 3(1)(i), 3(1)(ii), 3(2), 3(3), 3(4), 3(5) & 4 of the Gujarat Control of Terrorism and Organized Crime Act 2015.

3. Mr.Maulik Soni learned counsel for the applicant would submit that primarily the offenses are under the Gujarat Prohibition Act and therefore the applicant as a result of change of circumstances has approached this Court for successive application for anticipatory bail. Section 20(3) of the GujCTOC Act reads as under:

Section 20(3): Nothing in section 438 of the Code shall apply in relation to any case involved the arrest of any person accused of having committed an offence punishable under this Act.

4. The Court cannot therefore exercise discretion in the arena of granting anticipatory bail to the applicant."

7. Yet in another case between Romizkhan Mahmadkhan @ Rajbha Jat Malekh, amongst other reasons to reject anticipatory bail, the Co-ordinate Bench in para 5(1) has held as under :-

"[1] Having regard to Section 20(3) of the Gujarat Control of Terrorism and Organised Crime Act, it appears that the present application itself would not be maintainable, more

particularly since the legislature has excluded application of Section 438 of the Code of Criminal Procedure, to any person accused of having committed an offence punishable under the Act. "

8. There cannot be any reason to deviate from the observations and findings given by the Co-ordinate Bench in the case on hand.

9. There is no cavil that on 25.11.2021 warrant under section 70 has been issued by the learned Special Judge against the petitioner. The petitioner has yet not offered himself for investigation. It also appears that Ministry of Home Affairs, Government of India on 22.10.2021 has issued Lookout notice against the petitioner.

10. While dealing with the application under section 438 of the Cr.P.C., the petitioner can be released on bail in event of his arrest. The Court can pass order after considering the factors for consideration. The Hon'ble Apex Court in the case of **Bhadresh Bipinbhai Sheth Vs. State of Gujarat reported in AIR 2015 SC 3090**, has delineated the following factors and parameters that needs to be taken into consideration while dealing with the anticipatory bail.

“(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

- (c) The possibility of the applicant to flee from justice;*
- (d) The possibility of the accused's likelihood to repeat similar or other offences;*
- (e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
- (f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
- (g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because over implication in the cases is a matter of common knowledge and concern;*
- (h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;*
- (i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*
- (j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”*

11. It is needless to mention that grant of anticipatory bail under section 438 of Cr.P.C. is matter of judicial discretion which is to be exercised on circumspection and the Court has to satisfy that the application seeking bail has been made on bona fide grounds and there is no manipulation and maneuvering on the part of the petitioner for artificially creating the jurisdiction for the Court. The court may not exercise its discretion against established principles of law, rather the Court is required to follow them strictly. Discretion has to be guided by law, duly governed by rule and cannot be arbitrary and vague. The Court should not be spasmodic sentiment to unregulated benevolence. The Court cannot go by camouflage to evade the process of law.

12. Case on hand clearly indicates that the petitioner is evading process. The petitioner is running out of hand of law. He is not co-operating. Section 70 warrant against the petitioner is issued since 2021. Not only that Lookout notice is also issued against the petitioner. It is to be mentioned that the petitioner has not challenged issuance of warrant under section 70 of Cr.P.C. or lookout notice. At this state, I may refer to judgment of Delhi High Court in the case of **Sumer Singh Salkan v/s. Asstt. Director [2010 (6) ILR (Del) 706]**. Relevant para 11 of the said judgment reads as under :-

"11. Look-out-Circular has also been issued against the petitioner as the petitioner is an accused before the Court of M.M. and he has not appeared before the Court of M.M. If the petitioner gives an undertaking before the court for his appearance on a particular date, through his counsel, the Lookout-Circular issued against the petitioner shall be withdrawn within 24 hours of giving undertaking by the

petitioner. The questions raised in the reference are as under:

“A. What are the categories of cases in which the investigating agency can seek recourse of Lookout-Circular and under what circumstances?”

B. What procedure is required to be followed by the investigating agency before opening a Lookout-circular?

C. What is the remedy available to the person against whom such Look-out-Circular has been opened?

D. What is the role of the concerned Court when such a case is brought before it and under what circumstances, the subordinate courts can intervene?

The questions are answered as under:

A. Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.

B. The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.

C. The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

D. LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs."

13. As stated herein-above, the petitioner has neither challenged warrant under section 70 or Lookout notice, which suffice to say that the petitioner is evading arrest and even in these circumstances, the petitioner cannot be granted anticipatory bail.

14. In nutshell, the petitioner has failed to make out case for anticipatory bail.

15. For the reasons stated herein-above, the petition is dismissed.

SATISH

(J. C. DOSHI,J)