# Yasir Sayyed Anis Sayyed Vs The State of Maharashtra

**Court:** Bombay High Court

**Date of Decision:** July 23, 2014

**Acts Referred:** Arms Act, 1959 â€" Section 25, 3
Information Technology Act, 2000 â€" Section 66
Maharashtra Control of Organised Crime Act, 1999 â€" Section 18, 2(d), 3(1)(ii), 3(2), 3(4)
Penal Code, 1860 (IPC) â€" Section 120(B), 121, 122, 286, 295A
Unlawful Activities (Prevention) Act, 1967 â€" Section 13(1)(a)(b), 16, 18, 19, 2

**Citation:** (2014) ALLMR(Cri) 4205

**Hon'ble Judges:** A.M. Thipsay, J

**Bench:** Single Bench

**Advocate:** Mubin Solkar and Tahera Qureshi, Advocates for the Appellant; V.S. Mhaispurkar, APP, Advocates for the Respondent

## Judgement

A.M. Thipsay, J.
Heard Mr. Mubin Solkar, learned counsel for the applicant. Heard Mrs. V.S. Mhaispurkar, learned APP for the State. I

have carefully gone through the application, and the annexures thereto. The applicant is the Accused No. 13 in MCOC Special Case No. 4 of

2009, pending before the Special Court under the MCOC Act, at Mumbai. There are totally 23 accused in the said case.

2. The applicant is in custody since 4th October 2008. Admittedly, the trial has not commenced. Even the charge has not yet been framed.

3. The learned counsel for the applicant submits that the case of the present applicant is on par with that of Accused No. 9 Mohd Atik Mohd.

Iqbal and Accused No. 19 Afroze Firoz Mujawar @ Dastagir who were released on bail by this Court (Criminal Bail Application No. 1047/11

decided on 24th September 2012 and Criminal Bail Application No. 1608/12 decided on 4th December 2012, respectively). He, therefore,

submits that on the same reasoning and on the same basis, the present applicant also deserves to be released on bail.

4. Smt. V.S. Mhaispurkar, learned APP submitted that the applicant is alleged to have committed serious offences, and does not deserve to be

released on bail. She submitted that the case of the applicant is not on par with that of the accused No. 9 and accused No. 19 who have been

released on bail. She has drawn my attention to the entire material against the applicant as is found in the charge-sheet.

5. While dealing with the applications for bail filed by the accused No. 9 and accused No. 19, the facts of the case were noticed and mentioned in

the orders disposing of the said Bail Applications. It would be convenient to therefore mention the facts of the prosecution case here in the same

manner.

6. The prosecution case in brief, may be stated as follows:

That, on 26 July 2008, a series of bomb blasts occurred in Ahmedabad, State of Gujarat, causing wide destruction, panic and loss of human life.

The bombs - at least some of them - had been planted in motor cars. A few minutes prior to the blast, the television channels and media had

received an email, purportedly from an Organization called as ''Indian Mujahideen'' warning that such a series of blasts would occur. The

investigation into the case of the said bomb blasts was undertaken, and that has been carried out separately. Additionally, the Crime Branch of the

Mumbai Police also started searching for the persons who had sent the so called "terrorist email'' and the persons who had stolen the cars in which

bombs had been planted. It is this investigation which resulted in the arrest of the 23 persons, that has given rise to this case.

7. After investigation, a charge-sheet came to be filed. It is in respect of the following offences:

Offences punishable under sections 295A IPC, 505(2) IPC, 507 IPC, 506(II) IPC, 120(B) IPC, 121, 122 and 286 of the IPC, offences

punishable under section 25 read with section 3 of the Arms Act, offences punishable under the Explosives Act, and Explosive Substances Act

1908, the offences punishable under section 13(1)(a)(b), 16, 18, 19, and 20 of Unlawful Activities (Prevention) Act, 1967 (hereinafter for the

sake of brevity ""the UAP Act"") read with section 66 of the Information Technology Act, and the offences punishable under section 3(1)(ii), 3(2),

3(4) of the MCOC Act, 1999.

8. It is not in dispute that the present case is not in respect of the bomb blasts, that took place in the city of Ahmedabad and Surat. It is also not in

dispute that the case is also not in respect of the theft of the cars which were used for planting the bombs.

9. The case basically arises out of and because of the threatening email sent by the Organization ''Indian Mujahideen''. It is alleged that the said

Organization had given a threat to the police and that it had outraged religious feelings, thus creating tension between Hindus and Muslims.

10. As regards the role of the applicant in the alleged offences, it is nobody"s case that he is the person who had sent the email in question.

11. The substance of the allegation against him is, that he is a member of an Organized Crime Syndicate, and further that he is a member of a

Terrorist Organization within the meaning of clause (m) of Section 2 of the UAP Act.

12. The basis for claiming the applicant to be a member of an Organized Crime Syndicate, and also of a Terrorist Organization, is his alleged

association with some of the other accused in this case. This association is sought to be established on the basis of confessions of the co-accused

which have been recorded in accordance with the provisions of section 18 of the MCOC Act. 13 out of the total 23 accused are said to have

confessed, out of which eight are said to have implicated the applicant.

13. The confessions of the accused Nos. 6, 7, 8, 10, 11, 17, 20, 21 are said to be containing incriminating material against the applicant. With the

assistance of the learned counsel for the applicant and the learned APP, I have gone through the confessions of the said co-accused.

14. In his confession, the Accused No. 6 Asif Shaikh has named the applicant as one of the persons with whom the said co-accused had

discussions. These discussions were held apparently by being disturbed due to the demolition of Babri Masjid and the incidents of killing Muslims.

The object of these discussions is said to be propagating the idea of "Jihad". The only role attributed to the applicant in the said confession is that

he was present during such discussions. The confession indicates that the applicant had gone to Bangalore for taking the training for "Jihad" that

had been allegedly planned.

15. The confession of the Accused No. 10 Akbar Ismail Choudhary indicates that the present applicant and others were got mentally prepared for

"Jihad".

16. The confessions of the Accused No. 11 Anik Sayyed and Accused No. 17 Ahmed Bawa show that after the blast, a dinner party was

arranged by wanted accused Iqbal and Riyaz Bhatkal, and that the applicant was one of the invitees who had attended the said dinner party.

17. In his confession, the Accused No. 20 Fazal Rehman has named the applicant, and has said that he and others used to share the knowledge of

Quran and Hadith, and used to have discussions about "Jihad".

18. In his confession, accused No. 21 Anwar Bagwan has said that he and others had prepared the applicant and others for "Jihad".

19. The confession of the accused No. 7 Mohd Mansoor Asgar Peerbhoy shows that he was in contact with the accused persons Iqbal Bhatkal

and Riyaz Bhatkal, and also some other accused, including the applicant. This confession shows that the accused No. 7 Mohd Mansoor Asgar

Peerbhoy used to meet the applicant and other accused in a flat and discuss Quran and Hadith. According to him, in these discussions, Iqbal

Bhatkal used to talk of the plight of Gujarat Muslims.

20. In his confession, the accused No. 8 Mubin @ Salman Kadar Shaikh states that in the year 2007, he was taken to a flat by Anik and Asif

(Accused Nos. 11 and 6 respectively) where he was introduced to Mohd @ Iqbal Bhatkal and Ahmed Riyaz Bhatkal. That, at that time, the

applicant was also present in the flat along with others, and Anik introduced the applicant and others to the accused No. 8 Mubin @ Salman

Kadar Shaikh, and stated that they were also the members of the group.

21. It is not in dispute that except the confessions of co-accused, there is no other material on the basis of which the allegation against the applicant

is sought to be supported.

22. Undoubtedly, the confessions of the co-accused recorded under the provisions of section 18 of the MCOC Act would be admissible against

the applicant during his trial. They are to be treated as substantive evidence against the applicant.

23. However, the question is whether these confessions prima facie indicate that the applicant is an active member of ''Indian Mujahideen'' and/or

that he has committed any acts which would amount to any offence under the UAP Act and/or the MCOC Act.

24. In my opinion, the answer has to be in the negative.

25. It needs to be noted is that the basic allegation against the applicant is, of his being a member of ''Indian Mujahideen''. In the course of hearing,

it transpired that on the date of the alleged incidents, ''Indian Mujahideen'' was not a Terrorist Organization as contemplated under the UAP Act.

Clause (m) of section 2 of the UAP Act lays down that a Terrorist Organization means an Organization listed in the schedule, or an Organization

operating under the same name as an Organization so listed. Indian Mujahideen was added in the schedule only on 4 June 2010. The acts on the

basis of which the present case has been registered have all taken place prior to that. There is no allegation that the applicant continued to be a

member of the said Organization even after it was banned, and as pointed out by Mr. Solkar, such an allegation could not have been sensibly

leveled, inasmuch as the applicant is in custody since 4 October 2008.

26. The question is whether the applicant can be said to be a member of an Organized Crime Syndicate. The object behind an Organized Crime is

quite different from the object of a Terrorist Organization. It would be difficult to imagine that an organization can be fitted in both the categories by

virtue of the same acts, and in the same set of facts. It is extremely doubtful whether the Organization ''Indian Mujahideen'', as per the

prosecution''s own version about its aims and objects, can be called as Organized Crime Syndicate under the MCOC Act. Since I am dealing only

with the question of bail, a thorough discussion on what constitutes an Organized Crime Syndicate need not and should not be undertaken for the

present and the matter may be left at that. What, however, needs to be observed is that no continuing unlawful activity undertaken by the

Organized Crime Syndicate called as "Indian Mujahideen" in the preceding 10 years could be pointed by the learned APP. In any case, prima

facie there is no material to suggest any continuing unlawful activity as defined in Section 2(d) of the MCOC Act on the part of the said Organized

Crime Syndicate.

27. This is apart from the fact that mere presence during certain discussions held by the members of the said Organization, and even attending a

dinner party hosted by them, cannot, by itself, amount to the membership of an Organized Crime Syndicate, or for that matter, of a Terrorist

Organization. The issues which were allegedly being discussed by the members of the "Indian Mujahideen" were very broad, and it is possible for

a person to take part in such discussion, and even to express his or her own views on such matters. That would not make such a person a criminal

unless it would be shown that he has taken some active part towards achieving the so called objects of the Organization by unlawful means or by

resorting to violence. In the instant case, there is no such material against the applicant. Mere association with the members of the alleged

Organized Crime Syndicate, without any direct nexus to the actual activities of such Syndicate or participation in some form in the criminal activities

or offences being committed by such Syndicate, cannot attract criminal liability, even prima facie. Participating in the discussions undertaken by the

members of Indian Mujahideen, which are of some concern to the Muslims, will not, by itself, make a person a member of Indian Mujahideen; and

in any case, as aforesaid, Indian Mujahideen was not declared as a Terrorist Organization at the material time.

28. The only difference between the case of the accused No. 9 and accused No. 19 on one hand, and that of the present applicant on the other

hand, is that while the said two accused had not gone for "Jihadi" training, this applicant is said to have gone for such "Jihadi" training. Whether that

would make such a difference between the case of the applicant and that of the said two accused, would be discussed later.

29. Apart from the confessions of the co-accused, the only material against the applicant is the alleged recovery of certain incriminating articles

including a fire-arm with live cartridges from one room in which four persons - including the applicant - were present. The case of the Investigating

Agency is that the accused No. 6 Asif Shaikh, while in custody of the police disclosed certain information and led the police and the panchas to a

flat in which four persons including the applicant, were present. In the search of the flat and the personal search of the applicant and the other three,

among other things, a firearm, seven live cartridges and some prohibited or banned drugs, were found. In this regard, Mr. Solkar contended that

the accused No. 6 Asif had been arrested on 29th September 2008, whereas the memorandum cum seizure panchnama is dated 4th October

2008. The learned counsel contended that this material is on the face of it, unreliable as, firstly, after the apprehension of the accused No. 6 Asif,

the applicant and the other accused were not likely to stay in the flat in question, and secondly, the Accused No. 6 Asif would not be in a position

to make a statement on 4th October 2008 as to who would be in the flat when it would be visited on that date.

30. Without expressing any opinion on the merits of this contention, what needs to be observed is that in a room shared by three others, exclusive

knowledge regarding, or the exclusive possession of the incriminating articles, cannot be attributed to the applicant, and therefore is not the type of

material that would at once create a satisfaction about the existence of a prima facie case of the alleged offences against the applicant.

31. The application is vehemently opposed on behalf of the State. This is inspite of the fact that the case does not relate to the bomb blasts that

took place in Ahmedabad. These bombs had been planted in some car which had been stolen, and there is a separate case in respect of the theft

of the said cars, but the applicant is not an accused in that case also. The very fact that the applicant is not alleged to be an accused in the said

cases is significant, and undoubtedly, indicates that even according to the investigating/prosecuting agency, the applicant is not involved in the said

cases -even as a conspirator or an abettor.

32. The applicant is in custody for a period of more than 5 1/2 years, and the trial has not yet commenced. In spite of this position, the application

for bail is opposed with an amount of vehemence which is rather unjustified. In this case, initially, the accused No. 9 Mohd Atiq Mohd. Iqbal was

released on bail. Thereafter, the accused No. 19 Afroz Firoz Mujawar (Cr.B.A. No. 1608/12) had applied for bail, and though his case was

almost on par with that of the accused No. 9, but inspite of it, there was again a vehement opposition from the State, for bail. This had forced me

to write a few lines which did not form part of the order releasing the accused No. 9 Mohd. Atiq Mohd. Iqbal (who was released earlier) were

added. They may be reproduced here:-

It is well settled that while considering the question of bail not only the nature of allegation but also the nature and character of the material by

which it is supported, needs to be taken into consideration. Though the material in the charge-sheet is not to be meticulously evaluated, a limited

evaluation based on the broad probabilities of the case is required to be done even while considering a bail application, particularly when the

offences in question are falling under the special enactments curtailing the discretion of the court in grant of bail. In the instant case, the entire

material against the applicant is the confessions made by the co-accused before the police. Though such confessions are admissible by virtue of

Section 18 of the MCOC Act, the observations made by Their Lordships of the Supreme Court of India in State (N.C.T. of Delhi) Vs. Navjot

Sandhu @ Afsan Guru, , wherein Their Lordships had an occasion to consider the provisions under various special statutes which make the

confession to a police officer admissible in evidence, cannot be lost sight of. Their Lordships observed:-

Many questions do arise and we are unable to find satisfactory or even plausible answers to them. If a person volunteers to make a confession,

why should he be not produced before the Judicial Magistrate at the earliest and have the confession recorded by a Magistrate? The Magistrate

could be reached within the same time within which the empowered police officer could be approached. The doubt becomes more puzzling when

we noticed that in practical terms a greater degree of credibility is attached to a confession made before the Judicial Officer. Then, why should not

the investigating officer adopt the straightforward course of having resort to the ordinary and age old law? If there is any specific advantage of

conferring power on a police officer to record the confession receivable in evidence, if the intendment and desideratum of the provision

indisputably remains to be to ensure an atmosphere free from threats and psychological pressures? Why the circuitous provision of having

confession recorded by the police officer of the rank of SP (even, if he be the immediate superior of the IO who oversees the investigation) and

then requiring the production of the accused before the Chief Metropolitan or Judicial Magistrate within 48 hours? We can understand if the

accused is in a remote area with no easy means of communication and the Magistrate is not easily accessible. Otherwise, is there real expediency

or good reason for allowing an option to the I.O. to have the confession recorded either by the superior police officer or a Judicial Magistrate? We

do not think that the comparative ease with which the confession could be extracted from the accused could be pleaded as justification. If it is so,

should the end justify the means? Should the police officer be better trusted than a Magistrate? Does the magnitude and severity of the offence

justify the entrustment of the job of recording confession to a police officer? Does it imply that it is easier to make an accused confess the guilt

before a police officer so that it could pave the way for conviction in a serious office? We find no direct answer to these questions either in Kartar

Singh''s case or the latest case of People''s Union for Civil Liberty v. Union of India.'''' (Para 54 of the reported judgment).

33. Thus, that the case is based only on the confessions, is a factor that needs to be taken into consideration even at this stage. That the

confessions are not of the applicant, but of the co-accused, also cannot be lost sight of. In spite of the admissibility of the confessions as a piece of

evidence that the case is based only on confessions needs to be taken into consideration while evaluating the material in the charge-sheet more so

when the material against an accused would be consisting only of the confessional statements made by the co-accused in the case.

34. I have gone through the order passed by the learned Judge of the Special Court. The learned Judge initially referred to a judgment delivered by

this Court, and then referred to the judgment delivered by the Apex Court in the case of Ranjitsing Brahmajeetsing Sharma Vs. State of

Maharashtra and Another, , and reproduced paragraph Nos. 35 to 38, and 44 to 46 of the reported judgment. The learned Judge discussed the

contents of the email that was sent on behalf of the organization ''Indian Mujahideen'', and observed that the nature of offence committed by

sending the email was nothing less than actual execution of the bomb blast''. Apart from the question of correctness or propriety of this view, what

cannot be overlooked is that the learned Judge, did not consider that it was nobody''s case that the applicant had sent the said e-mail. He appears

to have concluded that the applicant was a member of an organized crime syndicate i.e. Indian Mujahideen only by relying upon the association of

the applicant with some other accused in this case who appear to have played a role in sending the e-mail in question, but by ignoring that

association from the confessions themselves, appeared to be for the purpose of discussing the perceived injustice on Muslims, for showing a

concern therefor, and for discussing and to give vent to the feeling that the muslims should revolt against the injustice.

35. As observed earlier, since the Indian Mujahideen was not a banned organization on the material date, there is no substance in the accusation of

an offence punishable under the UAP Act. To term such organization as an Organized Crime Syndicate, however, is difficult to digest and, in any

case, as already observed, there is no allegation -and at any rate material - to show a continuing unlawful activity by the so-called Organized Crime

Syndicate by name ''Indian Mujahideen''.

36. The real question that needs to be addressed to is ''whether the case of the applicant needs to be treated differently from that of the co-

accused Mohd. Atik Mohd. Iqbal (Accused No. 9) and Afroze @ Dustgir Feroz Muzawar (Accused No. 19) who have been released on bail''.

The only difference between their case and the case of the present applicant is that while those accused had not attended the training for Jihad that

was arranged in Karnataka, but the present applicant had gone to Karnataka for taking training for Jihaad. Indeed, this makes some difference

between the applicant''s case, and that of the said two accused, but in my opinion, this difference is not sufficient to deny bail to the applicant. In

the first place, that the applicant had undergone Jihadi training is to be borne out only from the confession of the accused No. 6 Asif Shaikh, and

no other accused who has confessed, states about it. What exactly was the training given to the applicant and others, in Karnataka is not clear and

if the concept of Jihad is kept in mind, it by itself cannot be presumed to be something bad or evil. The applicant''s association with some others -

apparently having extreme views (and some of them being criminal) - by itself would not amount to an offence particularly because it is clear that

the association was in the context of perceived injustice on muslims. The question is not whether injustice is/was indeed be done to the muslims, but

the question is whether it was bonafide so perceived by the applicant and other accused. Going by the confessions, such perception appears to be

genuine and real; and if such perception results in discussion of certain topics of common interest for all the muslims, that by itself would not amount

to an offence. In fact, the doctrine of ''guilt by association'' has been rejected by the Apex Court in a number of its authoritative pronouncements.

[See (i) State of Kerala Vs. Raneef, and (ii) Arup Bhuyan Vs. State of Assam, . In Arup Bhuyan Vs. State of Assam, after referring to the

pronouncement in State of Kerala Vs. Raneef, , and a number of decisions delivered by the U.S. Supreme Court, including the one in State of

Kerala Vs. Raneef, , Their Lordships laid down the following proposition of law.

Mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates

public disorder by violence or incitement to violence"".

Though in State of Kerala Vs. Raneef, Their Lordships of the Supreme Court were concerned with the provisions of TADA, the legal principle laid

down by their Lordships clearly needs to be kept in mind while considering the allegation against the applicant in the present case.

37. Thus, the case of the applicant would not be very different from that of the accused No. 9 and accused No. 19, even if those accused had not

attended the Jihaadi training, and the applicant had so attended, in the absence of any material to show what was the object behind the training

which is said to be the reading of Holy Quran and Hadith, acquiring knowledge about weapons, explosives, swimming, air gun firing, mobile

networking, etc. Acquiring knowledge of weapons and explosives by itself would not amount to an offence without any indication as to for what

purpose this was to be used particularly because the knowledge that was imparted during the training was also about Holy Quran and Hadith,

apart from swimming, knowing about mobile net-working, etc. Moreover, since the case against the applicant and other accused is based only on

the confessions made by accused persons, such confessions must be read in their entirety, and if they are relied upon, a feeling of injustice on

muslims as perceived by the applicant and some other accused, as reflected from the confessions, cannot be overlooked. The association between

the applicant and other accused including those who have committed serious offences has to be understood in this context. It is also significant that

inspite of his association with some other accused who are allegedly involved in serious offences, the applicant is not said to have aided and

abetted them in any manner in the commission of the said offences. Prima facie, therefore, the applicant''s association with them did not extend to

conspiring with them in respect of the serious offences allegedly committed by some other accused, and to abetting the commission of the said

offences.

38. It can certainly be said that there are reasonable grounds for believing that the applicant is not guilty of any offence under the MCOC Act

and/or the UAP Act.

39. Considering that the applicant is in custody for a period of more than 5 1/2 years, and that the trial has not yet commenced, it would be proper

to release the applicant on bail.

40. Application is allowed. Applicant is ordered to be released on bail in the sum of Rs. 50,000/- with one surety in like amount, or two sureties in

the sum of Rs. 25,000/- each, on the condition the applicant shall report to the trial court on every Monday till the conclusion of the trial. Should

the Court be closed on any given Monday, the applicant shall report to the trial court on the next working today.