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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA) 04CR156A
)
vs.
BHAVESH KAMDAR, Buffalo, New York
February 23, 2009
Defendant. 10:45 a.m.
- - - - - X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HUGH B. SCOTT
UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

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THE CLERK: This is United States versus Bhavesh Kamdar, case No. 04CR156. This proceeding is scheduled for a detention hearing. Assistant United States Attorney Anthony Bruce is appearing for the government; and Joseph Sedita, who is present with Mr. Kamdar, and also present is Mr. Killian is present for the Probation Department.

MAGISTRATE JUDGE SCOTT: Good morning.

MR. SEDITA: Good morning, Judge Scott.

MAGISTRATE JUDGE SCOTT: This is apparently a case that Judge McCarthy conducted an initial appearance on, I believe, on this case and it is sent here for a detention hearing. And, apparently, Judge McCarthy did not detain pending the outcome of the detention motion that was apparently made before him; is that correct?

MR. BRUCE: That's a fact, Judge.

MR. SEDITA: I don't know if the motion was formally made.

MAGISTRATE JUDGE SCOTT: All right. Today it's scheduled for a detention hearing. Are you ready?

MR. BRUCE: I am, Judge.

1 MAGISTRATE JUDGE SCOTT: You may proceed.

2 MR. SEDITA: Your Honor, there is a preliminary
3 matter I would like to address.

4 MAGISTRATE JUDGE SCOTT: Okay.

5 MR. SEDITA: Has the Court been furnished with a
6 copy of the confidential pretrial services bail report?

7 MAGISTRATE JUDGE SCOTT: I believe so, I was
8 looking at the minutes first. Go ahead.

9 MR. SEDITA: Your Honor, the document has been
10 tampered with.

11 MAGISTRATE JUDGE SCOTT: Tampered with?

12 MR. SEDITA: Yes, it has, your Honor.

13 MAGISTRATE JUDGE SCOTT: Okay. You wish to be
14 heard?

15 MR. SEDITA: I do, your Honor.

16 MAGISTRATE JUDGE SCOTT: Go right ahead.

17 MR. SEDITA: Your Honor, the first page of this
18 purports to be a report by Tina Blackman, United States
19 Probation Officer, bearing the date February 19th, 2009. That
20 would be last Thursday, that would be the date that we appeared
21 before Judge McCarthy. And that first page states that it is
22 respectfully recommended that the defendant be detained pending
23 the resolution of the instant offense. Going to the next page,
24 your Honor, we see the commencement of the actual pretrial
25 services agency report from the Eastern District of New York.

1 MAGISTRATE JUDGE SCOTT: All right.

2 MR. SEDITA: Mr. Kamdar, by prearrangement with
3 the United States, although he wanted to come directly to
4 Buffalo, flew into New York and was met by special agents of
5 the United States. It was understood that he would be
6 arrested, that he would be taken to court and that he would be
7 processed there. The processing included appearance before the
8 pretrial services agency in New York. On Thursday when we came
9 here I called for Ms. Blackman in the morning. I was advised
10 at that time that because there had been a full pretrial
11 services agency report and investigation previously that none
12 would have to be made here in the Western District of New York,
13 don't bother to come in, see you in court where we were joined
14 by Zenaida Piotrowicz. The defendant -- where are you? The
15 defendant never laid on eyes upon Tina Blackman, never at any
16 time. He did appear in court there and he did appear with the
17 pretrial services agency, the report. Now, if you would, your
18 Honor, please turn to the second last page and the last page of
19 the document in front of you. The second last page ends with
20 an assessment of danger. The following factors indicate the
21 defendant poses a danger to the community, unidentified. The
22 last case bears the signature of Amina Adossa-Ali and the date
23 February 18th, 2009, the date that he came into New York,
24 surrendered and was processed.

25 MAGISTRATE JUDGE SCOTT: Okay.

1 MR. SEDITA: Now, I'm going to ask this be marked
2 as a court exhibit, your Honor. It is the bail report from the
3 United States Pretrial Services Agency signed by Amina
4 Adossa-Ali on the 18th of this month (inaudible). I hand to
5 your Honor and direct the Court's attention to the last two
6 pages. The Court will note that there is a recommendation on
7 the last page for moderate bond made by Amina Adossa-Ali, the
8 investigating officer before whom the defendant appeared in New
9 York City in the United States District Courthouse on the 18th.

10 MAGISTRATE JUDGE SCOTT: Yeah, it's different.

11 MR. SEDITA: It's diametrically opposed, your
12 Honor. And it has been tampered with. That portion, if you
13 see the one that has been given to you, your Honor, it bears
14 the signature block of Miss Amina Adossa-Ali and the
15 recommendation has clearly been whited out.

16 MAGISTRATE JUDGE SCOTT: Mr. Bruce.

17 MR. BRUCE: First of all, it hasn't been tampered
18 with. There was a pretrial services report prepared in the
19 Eastern District of New York -- and if I say anything wrong, I
20 invite Mr. Killian to jump in. There was a pretrial services
21 report prepared in the Eastern District of New York. The
22 defendant was released in the Eastern District of New York
23 pursuant to that pretrial services report. There is a lot of
24 background here and a lot of it I think Mr. Sedita and I
25 disagree about it, although I thought we had an agreement

1 coming in.

2 MAGISTRATE JUDGE SCOTT: I'm not really concerned
3 about any of that, I'm concerned about why I'm looking at two
4 different documents with two different prints on it, that is
5 all I want to hear about right now.

6 MR. BRUCE: First of all, as I understand it, the
7 document from the Eastern District was transmitted to the
8 Western District of New York for their purposes in preparing
9 their own recommendation, their own independent recommendation,
10 I might add, to this Court. And they've done just that.
11 They've incorporated in part the Eastern District's report and
12 made their own recommendation. Oddly enough when I showed up
13 in court on Friday, Ms. Piotrowicz handed me the report that I
14 have in my hand.

15 MAGISTRATE JUDGE SCOTT: Which one is that?

16 MR. BRUCE: That is the one that Mr. Sedita claims
17 has been tampered with. I know that under ordinary
18 circumstances, I'm required to turn these back to the Probation
19 Department at the conclusion of the hearing and then I can use
20 them when we start again today. By accident I took this with
21 me. I've had it with me all weekend, trust me, I haven't
22 fiddled around with it.

23 MAGISTRATE JUDGE SCOTT: That is not what's being
24 suggested. I just want to know --

25 MR. BRUCE: Because what the Court has in front of

1 it is Ms. Blackman, and by obvious extension, the
2 recommendation of the Probation Department here in the Western
3 District of New York, which I submit is a better condition or
4 better position to judge this case for detention purposes than
5 a probation officer --

6 MAGISTRATE JUDGE SCOTT: I'm still not with you,
7 Mr. Bruce. I'm going to ask again, why are they different?
8 Let's see if I get an answer. What is the reason for this?

9 PROBATION: Judge, Ms. Blackman reviewed the bail
10 report along with supporting documents and made an independent
11 recommendation to your Honor on February 19th. This is her
12 recommendation, her recommendation never was the recommendation
13 of the other district.

14 MAGISTRATE JUDGE SCOTT: That doesn't tell me why
15 this is different. I'm going to keep asking the question until
16 somebody answers it.

17 PROBATION: That I don't know, Judge.

18 MAGISTRATE JUDGE SCOTT: Why am I looking at a
19 document that, you know, I don't like to have to deal with
20 things like this. Why is this document different from the one
21 that is given to this Court as an official copy of a document
22 from the Eastern District of New York and it's entirely
23 different, it leaves out the recommendation, that is all I want
24 to know. How did that happen? Where is Ms. Blackman?

25 PROBATION: Judge, she is in Batavia at a

1 training. No, it's not Mr. Sedita.

2 MAGISTRATE JUDGE SCOTT: This is serious business.

3 MR. SEDITA: Your Honor, I think we can --

4 MAGISTRATE JUDGE SCOTT: Wait a minute. I'm not
5 finished. I need an explanation for why it is different. I
6 don't mean different in what it recommends, I want to know why
7 this has been whited out on the copy that was given to the
8 Court. Where did that happen? Who did it? And give me a
9 reason why it was done.

10 MR. BRUCE: My understanding is Ms. Blackman did
11 it and my understanding is she did it because she wanted to
12 take certain parts of their report and use it as hers.

13 MAGISTRATE JUDGE SCOTT: There is something wrong
14 with that, Mr. Bruce.

15 MR. BRUCE: She can speak to that.

16 MAGISTRATE JUDGE SCOTT: I'm not blaming you, but
17 I'm just telling you it gives me some serious problems. So
18 this part of the report is hidden from the Court.

19 MR. BRUCE: I don't think it was hidden, I don't
20 know that that would ever be hidden.

21 MAGISTRATE JUDGE SCOTT: Until Mr. Sedita handed
22 this to me, I've never seen the recommendation from the Eastern
23 District of New York ever.

24 MR. BRUCE: I understand, and the government is
25 not trying to hide anything from the Court.

1 MAGISTRATE JUDGE SCOTT: That's what I want to
2 know. Just tell me how it happened, so I can move on.

3 MR. BRUCE: The mechanics, I think, she would have
4 to tell me. My understanding, she took those parts of the
5 report that she believed were pertinent to her recommendation
6 and

7 put the first page on and removed those parts that she didn't
8 necessarily agree with.

9 MAGISTRATE JUDGE SCOTT: Do you all do this
10 routinely? Should I know when I see a report on a Rule 5, it
11 may not really be the report that was done in the district
12 where a person is found? Should I ask you is this the whole
13 report?

14 PROBATION: Judge --

15 MAGISTRATE JUDGE SCOTT: You see what I mean?
16 Don't answer the question.

17 PROBATION: I can have Ms. Blackman contact the
18 Court in Chambers by phone immediately if that helps.

19 MAGISTRATE JUDGE SCOTT: Well, that's not helping
20 really. Well, let's just do this. I know there are two
21 reports, one that's been redacted and one that hasn't. Let
22 that be a fact that we understand and now let's go through with
23 a detention hearing. Let's get beyond it.

24 MR. SEDITA: If I may just add this, your Honor.
25 I've asked that the Western District report, the changes, be

1 marked as a court exhibit also, and I ask that the two court
2 exhibits be maintained as part of the record.

3 MAGISTRATE JUDGE SCOTT: Be specific, Mr. Sedita,
4 the February 19th report of Tina Blackman with respect to this
5 case, there is a receipt by Judge McCarthy on February 19th.
6 So we're clear what that is. It's a one paragraph
7 recommendations from probation in the Western District of New
8 York.

9 MR. BRUCE: And just so we're clear, it's clear
10 that the first page that was prepared by Ms. Blackman was at
11 least in Judge McCarthy's hands on Friday and, of course, was
12 in my hands on Friday.

13 MR. SEDITA: It was never in mine, your Honor.

14 MAGISTRATE JUDGE SCOTT: I understand. The
15 problem is, I want to go through this and get it behind us, but
16 I'm looking at a report that clearly has a recommendation just
17 as clear as a bell, and then I'm looking at a report that was
18 apparently in front of Judge McCarthy that had been redacted
19 and the recommendation just simply removed that the Eastern
20 District made. That's a very unusual situation, so I'm going
21 to leave it at that. Let's start with the hearing.

22 MR. SEDITA: Yes, your Honor. May I just make one
23 observation. This gentleman, Mr. Kamdar, was never seen by Ms.
24 Blackman and I have no way of knowing what other documents she
25 looked at. And I think United States Probation should be in a

1 position to confirm that he was never seen by Tina Blackman.

2 MAGISTRATE JUDGE SCOTT: Was he ever seen by Ms.
3 Blackman?

4 PROBATION: No, Judge, I believe he was only
5 interviewed in the Eastern District, which would be the normal
6 course of action, Judge.

7 MAGISTRATE JUDGE SCOTT: Yeah, I know. But
8 certainly what's not normal is we go from a recommendation of
9 let him go on a bond and then same department, part of the
10 court, recommends detention. That's a real -- again, I'm
11 trying to get you beyond it, let's go to the hearing.

12 MR. BRUCE: I want to make a little bit of a
13 proffer about that that I think also affects the outcome of
14 this hearing, Judge, and I invite Mr. Sedita to correct me on
15 dates although I don't believe they're particularly pertinent.
16 Mr. Kamdar, for some time, and we'll get into the reasons when
17 I put the witness on the stand, has been a resident of India
18 although indicted here. In roughly --

19 MAGISTRATE JUDGE SCOTT: I want him to sit down,
20 though, everybody just sit down. We're going to have a
21 hearing.

22 MR. SEDITA: Your Honor, may I introduce
23 co-counsel with me?

24 MAGISTRATE JUDGE SCOTT: Please do.

25 MR. SEDITA: This is Reena Dutta, she is in our

1 office, she is not admitted yet to the Western District, she is
2 a lawyer and she is helping me. Standing to her left --

3 MAGISTRATE JUDGE SCOTT: Does your mother work for
4 Allstate Insurance?

5 MS. DUTTA: She does.

6 MAGISTRATE JUDGE SCOTT: Good morning, Ms. Dutta,
7 I'll get to it. Keep going.

8 MR. SEDITA: And standing next to her is Mr.
9 Maulik Nanavati, he is India counsel.

10 MR. NANAVATI: Good morning.

11 MR. SEDITA: And not admitted of course.

12 MR. BRUCE: In this court.

13 MR. SEDITA: In this court.

14 MR. BRUCE: In a court far far away.

15 MAGISTRATE JUDGE SCOTT: Ms. Data, your mother
16 worked as a colleague of my wife for probably twenty five
17 years.

18 MS. DUTTA: Yes.

19 MAGISTRATE JUDGE SCOTT: And that's most likely a
20 condition why I'm going to have to recuse myself in this case.
21 I don't want to do that, I think I could be fair and impartial,
22 but I think the appearance would suggest to a reasonable person
23 a problem, I'm going to leave it at that.

24 MR. BRUCE: And we have a real problem. Judge
25 Schroeder and Mr. Sedita were at one time law partners and he

1 recuses himself on all Hodgson Russ matters, I think for
2 financial matters.

3 MR. SEDITA: Through his retirement, I know what
4 it is.

5 MR. BRUCE: Judge McCarthy indicated to me while
6 apparently at Phillips Lytle and was a partner of Mr. Sedita
7 for a period of time and I would object, I had no problem with
8 him doing an arraignment, it's a pretty neutral matter, but I
9 would object to Judge McCarthy continuing with respect to this
10 matter given his past relationship with Mr. Sedita so that
11 pretty much ends the ball games that are available in town.

12 MAGISTRATE JUDGE SCOTT: Well, we're one district.

13 MR. BRUCE: In town. We have Judge Foschio.

14 MAGISTRATE JUDGE SCOTT: That is a shame. Ms.
15 Dutta -- what actual role do you plan to have Ms. Dutta play in
16 this?

17 MR. SEDITA: She has been helping me in terms of
18 organizing the documents. She is not going to question any
19 witnesses. She is not admitted. She has been helping me with
20 research, the ordinary things that a first-year associate would
21 do, your Honor.

22 MAGISTRATE JUDGE SCOTT: Perhaps this is waiveable
23 with the clients and the government. I don't know, I will
24 suggest that you think that over.

25 MR. BRUCE: Government has a problem.

1 MR. SEDITA: Well, your Honor, obviously we don't
2 have a problem, Judge, because what's going to happen next is
3 Mr. Bruce is going to try and do what he did before and rely on
4 some obscure section of the law dealing --

5 MR. BRUCE: I'm not going to ask that the
6 defendant be locked up.

7 MR. SEDITA: Well, what he did the last time, well
8 since we're having a continuance, the law says you must, your
9 Honor, lock him up.

10 MAGISTRATE JUDGE SCOTT: And that is -- you're not
11 raising that.

12 MR. BRUCE: I raised that Friday. I backed off
13 from that as a gentleman, and I'm going to back off of it until
14 we finish the proceeding. I told Mr. Sedita, however, if
15 whatever court we're in front of doesn't detain the defendant,
16 I'm going to ask him to be locked up at that point because I
17 intend to go to Judge Arcara once this case is signed.

18 MAGISTRATE JUDGE SCOTT: I'm quite curious about
19 the change in these documents, but given the situation where my
20 wife is clearly a friend of your mother, I think that is a
21 problem. I am going to have to recuse, and I am sorry I have
22 to do that because I'm still curious about what happened here.
23 But I don't think I can do anything better.

24 MR. SEDITA: Your Honor, we always have to defer
25 to how the Court feels about these things. Obviously, it's not

1 a statutory or an in terms of the ethical codes or codes of
2 judicial conduct. It's not a formal disqualification in that
3 regard, but I think what the Court feels about it is what
4 really has to control, and we have to respect that and I do.
5 What I would ask, your Honor, because this is such an important
6 issue, what has happened, going in with a supposedly neutral
7 recommendation from an individual in pretrial services who
8 never saw him conflicts, I would ask them to have an
9 opportunity to have the to court exhibits bound with the record
10 of today's proceeding and a transcript of today's proceeding.

11 MR. BRUCE: I'll tell you what, Judge, when we get
12 to a hearing, I'm going to have both the pretrial officer from
13 Brooklyn here and Ms. Blackman here and they're going to
14 testify and I think whatever judge is going to hear this is
15 going to see there is no chicanery here.

16 MAGISTRATE JUDGE SCOTT: I'm not even assuming
17 that. I just want to know the answer, but now I need not know.
18 I need not know, but I have to recuse myself. Say hello to
19 your mother, but I really can't do this.

20 MR. SEDITA: Where should we go, Judge.

21 MAGISTRATE JUDGE SCOTT: That doesn't make me very
22 happy that I have to do that at all. We'll have to call the
23 clerk's office this will have to be sent -- it has to be sent
24 to Rochester quickly and maybe Judge Foschio, perhaps Judge
25 Foschio can do this.

1 MR. BRUCE: I have an appearance with Judge
2 Larimer in the morning, perhaps Judge Feldman or Judge Payson
3 would be happy to do this.

4 MAGISTRATE JUDGE SCOTT: But if we can keep it
5 here it's more convenient for everyone. We'll take a short
6 recess. Why don't you hold on a minute and let's see what I
7 can do.

8 MR. SEDITA: Judge McCarthy, by the way, has some
9 familiarity with the case. Just so you understand, he and I
10 were partners last in 1999. That is 10 years ago. He said
11 when he was here.

12 MAGISTRATE JUDGE SCOTT: Usually that is about
13 enough time. I don't question Judge McCarthy's judgment on
14 that.

15 MR. SEDITA: But he never said he was recusing
16 himself. He didn't say he recused himself. What he said I
17 want to let everybody know about that.

18 MAGISTRATE JUDGE SCOTT: Did you ask that that
19 happen?

20 MR. BRUCE: Never got, he announced -- I was
21 unaware that he was partners with Mr. Sedita. He came on the
22 bench and announced it. I was very comfortable with him
23 running the arraignment, less comfortable with the detention
24 hearing.

25 MR. SEDITA: But that is up to Judge McCarthy who

1 said he would take the case back.

2 MAGISTRATE JUDGE SCOTT: Believe me, I understand.
3 Let's do this. Just so that I'm clear, I'm not going to have a
4 conversation with any potential judge about the case. I'm
5 going to find out their availability and take it and that's it.
6 I'm going to check with Judge Foschio first so that issue.
7 Court's in recess for a few minutes, let's go back here.

8 (Whereupon, there was a break in the proceeding.)

9 MAGISTRATE JUDGE SCOTT: We're back on this is a
10 continuation of *United States vs. Kamdar*. Counsel, again, my
11 apologies, we're going to send you to Jean Marie in the clerk's
12 office who is making contact. I'm not even going to call the
13 judges and see who can take it. I don't want to have any
14 suggestion of being involved in it. So, right now Jean Marie
15 is making calls and you can go see her right this minute and
16 good luck to you. Good to see you.

17 MR. SEDITA: Your Honor, could we have a
18 recordation of this proceeding this morning?

19 MAGISTRATE JUDGE SCOTT: Certainly. You want a
20 transcript?

21 THE CLERK: I need something in writing, something
22 very simple and you can fax it to me.

23 MR. SEDITA: Sure. I'll give it to you right now.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s Karen J. Bush

Official Court Reporter