IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

214

CRM-M-10292-2022(O&M)
Date of decision: 17.05.2022

DHARMINDER SINGH ALIAS FAUJI AND ANOTHER

....Petitioners

Versus

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

*****

Present : Mr. Arnav Sood, Advocate
for the petitioners.

Ms. Amarjit Kaur Khurana, DAG Punjab.

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VINOD S. BHARDWAJ. J. (ORAL)

The instant petition has been filed under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC') for grant of regular bail to the petitioners in case FIR No.46 dated 31.05.2018 under Sections 307, 438, 427, 148 and 149 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'); Sections 121, 121-A, 122, 124-A, 115 and 120-B of the IPC, 1860; Sections 11, 12, 13, 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'UAPA Act'); Sections 25/54/59 of the Arms Act, 1959 and Section 66-F of the Information and Technology Act, 2000 added later on, registered at Police Station Rangar Nangal, District Batala.

2. Learned counsel for the petitioners has contented that as per the case of the prosecution, the FIR in question was initially registered on the statement of one Sartaj son of Kunj Lal, who was working as salesman in the liquor store of Balraj Singh. It is claimed that when he was sleeping in the liquor shop at

Dhariawal (Adda Pandoi) on 30.05.2018 at about 3:30 a.m., some persons set the room of the liquor shop on fire by sprinkling petrol. He came out of the room and saved his life. The unidentified assailants ran away from the spot and an attempt had been made by the said assailants to kill the complainant after setting the room of the liquor shop on fire. Learned counsel contends that the petitioners have been roped in the present case on the basis of an alleged secret information that the petitioners have some link with an illegal organization and the said organization is aiding them financially in executing various illegal and unlawful activities. The petitioners were thereafter arrested on 01.06.2018 on the strength of the said secret information. He contends that the investigation in the case was completed on 16.11.2018 and a final report under Section 173 CrPC was filed, whereafter, the trial Court proceeded to frame charges punishable under the Sections as afore-stated, including Section 124-A IPC.

3. Learned counsel argues that as per the allegations and the evidence collected by the prosecution during investigation of the case, the petitioners are alleged to be members of various WhatsApp groups and that upon arrest of the petitioners recovery of .32 bore revolver along with three live cartridges, two live cartridges of .315 bore, Rs.40,000/- currency notes, 110 posters of Sikhs for Justice, three forms of Khalistan Zindabad, 01 board containing Punjab Referendum 2020, fiber-sheet, 5 spray, two mobile phones and one box with brush etc., was effected from petitioner No.1, while .22 bore pistol along with 03 cartridges was recovered from petitioner No.2. It is contended that upon consideration of the material recovered, the offences under the Unlawful Activities (Prevention) Act, 1967, would not be made out and at best, it would a case under the Arms Act, 1959. He further contends that despite conclusion of investigation,

there is no material available with the investigating agency as would establish any link of the petitioners to any unlawful activities or unlawful association formed by the petitioners.

4. It is further argued that the order framing charge has been challenged by the petitioners by means of filing Criminal Revision No.1798 of 2019, in which further proceedings have been stayed before the trial Court vide order dated 23.01.2020. He thus contends that the trial was not proceeding and currently the Hon'ble Supreme Court, vide its order dated 11.05.2022 passed in ***S.G. Vombatkere Vs. Union of India,*** in W.P.(C) 682/2021 passed on 11.05.2022 has decided to re-examine and re-consider the provisions of Section 124-A of the IPC and has further directed that all pending trials, appeals and proceedings with respect to the charge framed under Section 124-A IPC be kept in abeyance and adjudication with respect to the other Sections, if any, be proceeded with. It is further directed by the Hon'ble Supreme Court that the State Governments and Central Government shall refrain from registering any new FIR or continuing with any investigation or taking any coercive measures by invoking Section 124-A IPC, while the aforesaid provision of law is under consideration. Hence, the usage of the aforesaid provision of law i.e. Section 124-A IPC has been kept in abeyance by orders of the Hon'ble Supreme Court of India.

5. It is also argued by learned counsel for the petitioners that various other accused persons have already been granted the concession of bail by placing reliance on the judgment rendered by the Hon'ble Supreme Court in the matter of ***Union of India versus K.A. Najeeb, 2013(3) SCC 713*** decided on 01.02.2021 passed in Criminal Appeal No.98 to 2021. It is contended that the petitioners have undergone actual custody of 03 years 11 months and 05 days. He has further

contended that the ingredients of the offences attracted by the Police are not made out and it is for the said reason that further proceedings were stayed before the trial Court, when the order framing charge was challenged by the petitioners by means of Criminal Revision No.1798 of 2019.

6. While making a reference to the provisions of Section 307 IPC, it is contended that there is no evidence on record to suggest that the petitioners were ever aware that complainant namely Sartaj was in the liquor shop when the same was set on fire. Even otherwise, the petitioners were neither named nor had they been identified in the commission of the said of offence. Apart therefrom, it is also evident that when the complainant claims to come out of the room adjacent to the wine shop, no attempt was made to cause any injury to him. It is thus contended that the offence under Section 307 IPC cannot be said to be attracted once there is no evidence to attribute that the act of setting the room on fire was actually intended to eliminate the complainant. Despite concluded investigation, there is nothing to link that the petitioners were involved in the said act. No recovery or link evidence is available to establish that the petitioners were involved in the said act or had any motive to execute such a plan or ever had any intention to kill anybody. He further contends that the provisions of Section 124-A IPC having been kept in abeyance, cognizance thereof cannot be taken for the same at this stage.

7. While referring to the provisions of the Unlawful Activities (Prevention) Act, 1967, it is submitted that the charge had been framed under Sections 11, 12, 13, 17 and 18 of the UAPA Act. However, the necessary ingredients for attracting the said Sections are not made out. He contends that there is no evidence to suggest that the petitioners had been in receipt of any funds

of any unlawful association. Even though, the prosecution claims to have recovered a sum of Rs.40,000/-, however, there is no evidence to connect that the aforesaid money relates to an unlawful association. He further contends that despite conclusion of the investigation, there is nothing on record to suggest that any unlawful activity, in the form of terrorist activity, was undertaken or planned by the petitioners at any point of time. Being in possession of the arms, which may be illegal, would not *ipso facto* amount to an unlawful activity within the aegis of the Unlawful Activities (Prevention) Act, 1967, unless sufficient material is brought on record to establish that the said activities undertaken were intended to bring about cessation of the territory of India or was intended to disrupt the sovereignty and territorial integrity of the country. He contends that no such activity was undertaken by or at the behest of the petitioners or being at any stage of planning or execution, have been pointed out in the final report so filed. It is further contended that assuming for the sake of arguments and without conceding to the same, the said offence even if committed would attract the maximum penalty for 03 years and the petitioners have already undergone more than 03 years and 11 months. There would thus be no justification to continue incarceration of the petitioners on the allegation of having committed the offence under Section 11 of the Unlawful Activities (Prevention) Act, 1967.

8. Furthermore, while referring to Section 12 of the UAPA Act, it is contended that the same relates to a penalty for contravention of an order made in respect of a notified place. He contends that despite conclusion of investigation, there is no evidence brought on record as to what order, in relation of any notified place, had been violated by the petitioners. In the absence of any such evidence, the necessary ingredients to attract Section 12 of the UAPA Act are not made out.

9. A further reference is drawn to Section 13 of the UAPA Act, which prescribes punishment for taking part in or abetting or inciting any unlawful activity and prescribes a punishment of up to 7 years. The counsel vehemently argues that in the absence of any evidence to show that the petitioners have participated planned or executed in any unlawful activities, the question of aiding or abetment thereof does not arise. Besides, the petitioners are not linked to the commission of any such unlawful activities or any conspiracy or plan to undertake any such activity within the territorial boundary of the State of Punjab or anywhere in the sovereignty of the country of India.

10. Additionally, Section 17 of the UAPA Act relates to punishment prescribed for raising funds for terrorist Act. A mere recovery of Rs.40,000/- is stated to have been effected from petitioner No.1, which is claimed by the respondent-State to have been received by him. It is thus not the case that the petitioners were in fact raising funds for undertaking terrorist activities. Being a recipient, he cannot be labelled as fund-raiser. Resultantly, it is argued that Section 17 of the UAPA Act would not be attracted against the petitioners as there is no such collection of funds for undertaking terrorist activities. As a matter of fact, the suggestion put forth by the prosecution is that he was the recipient of the funds already collected, which would rather fall only under Section 11 of the UAPA Act and not attract Section 17 of the UAPA Act thereof.

11. A further reference is made to Section 18 of the UAPA Act, which deals with the punishment for conspiracy. He contends that no such element of conspiracy has been brought on record as the said aspect is being sought to be drawn on the basis of the posters pertaining to Sikhs for Justice, Referendum of Khalistan 2020 and the posters declaring Khalistan Zindabad. The said fact *ipso*

facto does not amount to aiding or abetting any terrorist act and there is no recovery that would substantiate that any terrorist activity or act was proposed or was planned to be executed. There is also no material to infer that the petitioners were in constant touch with any association or person.

12. *Per contra,* learned State counsel has objected to the grant of the concession of bail in favour of the petitioners by stating that serious allegations have been levelled against the petitioners and that the investigation already stands concluded. It is pointed out that heavy recovery of arms and ammunition was effected at the disclosure of the petitioners and that the posters show the mind-set of the petitioners and also their intent to involve in undertaking unlawful activities that were dangerous to the integrity of the nation and sovereignty of the country. Hence, the petitioners have been rightly charged for the commission of offences under the Unlawful Activities (Prevention) Act, 1967. She further submits that the petitioners being part of various WhatsApp groups/social media groups were actively involved in inciting youth to become part of the unlawful association so that unlawful activities could be undertaken. In this regard, she has drawn attention to a transcript of a WhatsApp conversation, which is allegedly at the instance of petitioner No.1, wherein, it is stated that petitioner No.1 had asked the other petitioner to undertake activities putting the State in a tight spot (s*arkaar nu waqt jeha pe je)*. Invariably, the interpretation sought to be drawn from the aforesaid phrase as an attempt to terrorize the government is apparently not based on correct interpretation of the phrase commonly used in the dialect.

13. Learned State counsel, however, could not dispute that the petitioners had undergone actual custody of 03 years 11 months and 05 days and that proceedings before the trial Court cannot be proceeded further owing to the stay

order passed by the High Court. It is also not disputed that as the constitutional validity of Section 124-A IPC is already pending consideration before the Hon'ble Supreme Court and the proceedings before the trial Court cannot even otherwise continue as the entire trial is integral and cannot proceed independent of Section 124-A IPC.

That learned State counsel also could not point to any disclosure that would reflect to participation of the petitioners in any unlawful activity undertaken by or at the behest of the petitioners. The State counsel also could not point out any link evidence to show existent of any of the petitioners with any such organization or person. Being in possession of literature or publicity material would not amount to challenging the sovereignty and integrity of the country.

14. I have considered the rival submissions advanced by the respective parties and have gone through the record with their able assistance.

15. The essential question which arises for consideration at this stage is regarding the balancing of the right of an accused to seek speedy trial *viz-a-viz* the entitlement of the State to keep an accused in custody for a prolonged period of the same. It is a well settled position in law that the power of bail is not a substitute to inflict sentence on an under-trial and that unless sufficient circumstances exist justifying confirmed incarceration, an accused would rather be entitled to a concession of bail. It is also not in dispute that Article 21 of the Constitution of India guarantees right to speedy trial. The Hon'ble Supreme Court while dealing with the issue related to the Unlawful Activities (Prevention) Act 1967, directed release of the accused-petitioner on bail in the case of ***Union of India versus K.A. Najeeb, 2013(3) SCC 713,*** wherein it was held that long custody would be an essential factor while granting bail under the Unlawful

Activities (Prevention) Act, 1967. Article 21 of the Constitution of India provides right to speedy trial and long period of incarceration would be a good ground to grant bail to an under-trial for an offence punishable under the Unlawful Activities (Prevention) Act, 1967. It has also been held that the embargo under Section 43-D of the UAPA Act would not negate the powers of the Court to give effect to Article 21 of the Constitution of India. The relevant extract of the judgement is reproduced hereunder:-

> *"It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA per se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Whereas at commencement of proceedings, the Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.*
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> *xxxxxxxxxxx*
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> *Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc."*

16. Similarly, in the case of ***Mahender Lal Das Vs. State of Bihar and others (2002) 1 Supreme Court Cases 149,*** the Hon'ble Supreme Court observed

as under:-

> *"It is true that interference by the court at the investigation stage is not called for. However, it is equally true that the investigating agency cannot be given the latitude of protracting the conclusion of the investigation without any limit of time. This Court in Abdul Rehman Antulay & Ors Vs. R. S. Nayak & Anr.[1992] 1 SCC 225 while interpreting the scope of Article 21 of the Constitution held that every citizen has a right of speedy trial of the case pending against him. The speedy trial was considered also in public interest as it serves the social interest also. It is in the interest of all concerned that guilt or innocence of the accused is determined as quickly as possible in the circumstances. The right to speedy trial encompasses all the stages, namely, stage of investigation, enquiry, trial, appeal, revision and re-trial. While determining the alleged delay, the court has to decide each case on its facts having regard to all attending circumstances including nature of offence, number of accused and witnesses, the work-load of the court concerned, prevailing local conditions, etc. Every delay may not be taken as causing prejudice to the accused but the alleged delay has to be considered in the totality of the circumstances and the general conspectus of the case. Inordinate long delay can be taken as a presentive proof of prejudice."*

17. Furthermore, in the matter of ***Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar (1980) 1 SCC 81,*** the Hon'ble Supreme Court held as under:

> *"5. There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a bad reflection on the legal and judicial*

system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." So also Article 3 of the European Convention on Human Rights provides

that:

"every one arrested or detained-shall be entitled to trial within a reasonable time or to release pending trial." We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi Vs. Union of India. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt

> *of such person. No procedure which does not ensure a reasonable quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21.....".*

18. A perusal of the aforesaid un-controverted position of law clearly establishes that a person cannot be deprived of his liberties unless there is a valid justification of statute to continue detention of a person. The crucial aspects are related to gravity of offence, possibility of tampering with evidence or evading trial etc. The submissions advanced by the learned State counsel would at best reflect at the petitioners sharing an ideology but do not establish execution of any untoward incident of terror. Besides, there is nothing shown to reflect and establish any foreign terror link.

19. The trial in question was stayed even prior to the order passed by the Hon'ble Supreme Court of India in the matter relating to Section 124-A IPC. Now even the adjudication of Revision petition against charge has been adjourned *sine die* to await outcome of the issue before the Hon'ble Supreme Court. It thus does not appear probable in any near future that the trial is likely to make any progress. Even otherwise, Section 124-A IPC was widely worded to cover bringing or attempts to bring into hatred or contempt, or attempt to excite dis-satisfaction towards government established by law. The object being to subjugate Indian people and to function on absolutism and to crush any people's movement ignoring the fundamental rights embodied in the Constitution of India recognizing freedom of speech and expression as well as the freedom to assemble.

The provision of law were recently applied in a spate of cases where people protested against established governments for seeking acceptance of their demands, bringing back the focus on the sedition laws. It is not that every mischief would fall in the description of the offence. Laws like sedition, need

narrower and stricter interpretation and the acts charged of should reflect something more than expressing discontent against State. In a democratic set up, there always would be voices of dissent and opinions against rules and protest against actions. Some protests may have aggression but still an act of dissent would not be ordinarily labeled as sedition. The law is not aimed to silence criticizing rather criticism is the key to improvement, reform and radical growth. To attract an offence such as Section 124-A IPC, there must be deliberate resistance and conscious defiance of authority with a conceived plan aimed to unsettle elected government. The Hon'ble Supreme Court held in the matter of ***Nazir Khan Vs. State of Delhi, (2003) 8 SCC 461*** that "Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval".

20. Once the trial in a case is not proceeding, the accused cannot be penalized by being forced to undergo confinement. Needless to mention that proceeding before the trial Court were stayed only after noticing strong *prima facie* case in favour of the petitioners. Consideration of the said aspect also needs to be given. It would amount to causing much prejudice to the petitioner inasmuch as the Court on the one hand, while accepting merit in the contentions raised by the petitioners stays further proceedings, is on the other hand, denying to extent him the benefit of such *prima facie* argument in his favour.

21. It is also not in dispute that weapons and cartridges were also recovered from other similarly situated accused persons, who have been granted the concession of bail after considering their undergone substantive sentence of more than 3 years and 6 months. It is not in dispute that this sentence undergone by the petitioners is higher than the sentence undergone by the other co-accused.

22. Having considered the judgments and the facts as afore-noticed and also taking note of the fact that the charges framed against the petitioners are a subject matter of challenge in CRR-1798-2019, wherein, further proceedings are stayed by this Court vide order dated 23.01.2020; the order passed by the Hon'ble Supreme Court in the matter of ***S.G. Vombatkere Vs. Union of India,*** *(supra)*; the period of custody undergone by the petitioners, coupled with the fact that a serious dispute as to the existence of the ingredients for the commission of the offences has been raised and that other similarly situated co-accused persons have been granted the concession of bail, I deem it appropriate to enlarge the petitioners on bail.

23. Accordingly, the present petition is allowed and the petitioners are admitted to regular bail subject to their furnishing bail bonds/surety bonds to the satisfaction of Trial Court/Duty Magistrate, concerned.

24. It is also directed that at the time of release of the petitioners, the SHO of the concerned Police Stations where the petitioners are residing shall be duly informed and that the petitioners shall furnish their mobile number to the concerned SHO and shall keep their location 'Switched On'. They shall also appear before the concerned SHO every alternate Monday till the conclusion of the trial and shall not indulge in any other activity that is likely to interfere in the process of administration of justice or misuse the concession of bail so awarded to them. The passport, if any, possessed by the petitioners shall be surrendered to the Police authorities and the details of social media accounts shall also be shared with the investigating agency.

25. It is made clear that the petitioners shall not extend any threat and shall not influence any prosecution witnesses in any manner directly or indirectly.

26. The observation made hereinabove shall not be construed as an expression on the merits of the case and the Trial Court shall decide the case on the basis of available material.

(VINOD S. BHARDWAJ)
JUDGE

May 17, 2022
S.Sharma(syr)

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No