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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.11.2023

Pronounced on : 09.11.2023

CORAM

**THE HONOURABLE MR. JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR. JUSTICE SUNDER MOHAN**

Criminal Appeal No.340 of 2023

Mohamed Irfan

...Appellant/3rd Accused

Vs.

Union of India represented by
The Inspector of Police,
National Investigation Agency,
Chennai.
(R.C.No.20/2022/NIA/DLI)

...Respondent/Complainant

Criminal Appeal filed u/s.21(4) of National Investigation Agency Act, 2008, to set aside the order passed in CrI.M.P.No.718 of 2022, dated 05.01.2023 on the file of the Hon'ble Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial for Bomb Blast Cases Chennai at Poonamallee, Chennai.

For Appellant : Mr.I.Abdul Basith

For Respondent : Mr.R.Karthikeyan
Special Public Prosecutor
(for NIA cases)



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JUDGMENT

(Order of the Court was delivered by **SUNDER MOHAN, J.**)

The captioned appeal has been preferred by the petitioner, challenging the order in CrI.M.P.No.718 of 2022 dated 05.01.2023 passed by the Sessions Court for Exclusive Trial of Bomb Blast Cases, Chennai, at Poonamalle, Chennai – 600 056, dismissing his bail application.

2. The brief facts leading to the filing of the above appeal are as follows:

(a) According to the prosecution one Sathick Batcha (A1) was a prime accused in Mayiladuthurai, P.S. Crime No.1601/2020 and 164/2022. On specific information that he was in possession of arms and weapons, a special police team on 21.02.2022, at about 10.00 hours, intercepted a black colour Mahindra Scorpio bearing Reg.No.TN OF IL-1446 at Nidur – Mayiladuthurai Railway gate travelling from Nidur to Mayiladuthurai. The appellant and the other accused were found in the car. A case in Cr.No.165/2022 was registered on the file of Mayiladuthurai



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Police Station for the offence under Sections 148 and 506 (ii) IPC r/w

Section 28 of the Arms Act, 1959. All the accused were arrested. One laptop with adapter, one stainless steel hand-cuff, one I-Phone, one OPPO Phone, one power bank, one V8 video shooting pen, one GITE Wireless router, one hard disk, one metal air gun, a small box containing pellets and a Mahindra Scorpio with registration TN-07-BL-1446 were seized from the accused.

(b) On 25.02.2022, an alteration report was filed by the Investigating officer to include Section 307 of the Indian Penal Code. On 06.03.2022, another alteration report was filed by the Investigating officer before Judicial Magistrate-I, Mayiladuthurai, for including the offences under Sections 13, 38, 39 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the UA (P) Act).

(c) The Government of India, in exercise of powers conferred under Section 6 (5) r/w Section 8 of the National Investigation Agency Act, 2008 (hereinafter referred to as the NIA Act), entrusted the investigation of the case to the respondent/National Investigation Agency (NIA).

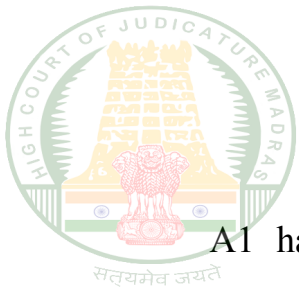


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(d) The respondent re-registered an FIR in R.C.NO.20/2022/NIA/DLI on 30.04.2022 under Sections 148, 506 (ii) IPC, 1860, and Sections 13, 38, 39 of the UA (P) Act, and Section 28 of the Arms Act, 1959.

(e) On investigation, the respondent filed a Final Report after obtaining sanction against the appellant and others which was taken cognizance in Spl.S.C.No.2 of 2022 by the Trial Court. The Government of India accorded sanction for prosecuting the appellant for the offences under Sections 18 and 39 of the UA (P) Act.

(f) It is the case of the prosecution as seen from the Final Report that A1 and A3 had been indulging in anti-national activities in the name of Khilafah Party of India, and Intellectual Students of India (ISI); that A1 is a strong and a devote supporter of ISIS; that Khilafah Party of India and Khilafah Front of India, are manifestations of Islamic State/ISIS/Daesh outfit; that A3 was associated with A1, since 2019; that A1 to A3 had discussed about establishing Islamic rule in India, knowing fully well that



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A1 had links with ISIS; that A3 participated in conspiracy meetings conducted at Tamil Nadu Haj Services Society by A1 and others for discussing about ideologies of ISIS, and for promoting Khilafah Party of India, which was formed with a motto to establish Islamic rule in India by waging war and overthrowing the Government lawfully established; that A3 had conspiracy meetings with other accused and hence, A3 has committed the offence under Section 120-B of the Indian Penal Code and Sections 18 and 39 of the UA (P) Act, 1967.

(g) The appellant filed the bail application before the Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial of Bomb Blast Cases, Chennai at Poonamalle, Chennai – 600 056, in CrI.M.P.No.718 of 2022. The Special Court dismissed the said bail application, holding that there are reasonable grounds to believe that the appellant had committed the offences and hence, he is not entitled to bail. Aggrieved by the said order, the instant appeal has been filed.



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2. Mr.I.Abdul Basith, the learned counsel for the appellant, submitted that the Final Report is based on surmises and conjectures; that there is no material to charge the appellant for the offence under the UA(P)Act; that the prosecution at best had only established the appellant's association with A1 and not with any terrorist organization; that the appellant is a meat dealer and had supplied sheep to A1 during Bakrid festival; that the statements of witnesses relied upon by the prosecution against the appellant do not suggest that the appellant has committed the offences under the UA(P) Act. The learned counsel relied upon the Judgment of the Hon'ble Supreme Court in:

(i) *Thwaha Fasal and Ors. Vs. Union of India (UOI)*

and Ors reported in (2021) SCC Online SC 1000.

(ii) *Union of India Vs. K.A.Najeeb* reported in (2021) 3

SCC 713,

in support of his submission and prayed for releasing the appellant on bail.

3. The respondent had filed a counter, praying for dismissal of the appeal.



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4. Mr.R.Karthikeyan, learned Special Public Prosecutor (for NIA cases), submitted that the appellant is associated with A1/founder of the Khilafah Party of India, which has ideologies of ISIS (Islamic State of Iraq and Syria), and all the accused, including the appellant worked towards the goal of establishing the Islamic rule in India in violation of the Constitution of India and the laws established thereunder; that the investigation revealed that the appellant had participated in conspiracy meetings held at the Tamil Nadu Haj Service Society at Choolai, and in a Madrassa by the name Jamia Muhammadia at Mannadi. The learned Public Prosecutor further submitted that the statement of Protected Witness – B, the statement of another witness by the name M.Fasithi Ali Rahman, and the messages in the WhatsApp group called the Islami Country/Islamic State stating that the conspiracy meetings were conducted at Tamil Nadu Haj Services Society, revealed the involvement of the appellant in the offences under the UA (P) Act. Therefore, the learned Public Prosecutor submitted that there are reasonable grounds to believe that there is a *prima facie* case against the appellant.



WEB COPY 5. This Court finds that the appellant has been charged for the offences under the UA (P) Act, which falls under Chapters IV and VI of the said Act. Therefore, there is a statutory restriction under the proviso to Section 43 – D (5) of the UA (P) Act, while considering the bail application. Before we analyse the facts to ascertain whether the appellant is entitled to bail in view of the statutory limitations, the nature of the said limitations has to be understood. The Hon'ble Supreme Court had occasion to consider this aspect in a few cases.

6(a). In ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali*** reported in (2019) 5 SCC, the Hon'ble Apex Court had held as follows:

“23.By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar



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*special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is “prima facie” true. **“By its very nature, the expression “ prima facie true” would mean that the materials/evidence collaged by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, (emphasis supplied)** and on the fact of it, shows the complicity of such accused in the commission of the stated offence. It must be good*



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and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is “prima facie true,” as compared to the opinion of the accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act.”

6 (b). In Paragraph 24 of the ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali's case*** (cited supra), the Hon’ble Supreme Court had held as follows:

“24. A priori, exercise to be undertaken by the Court at this stage of giving reasons for grant or non - grant of bail is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the



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evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.”

6 (c). In the above case, the Hon’ble Supreme Court had relied upon the observations made in an earlier three Bench Judgment in ***Ranjitsing Brahmajeetsing Sharma V. State of Maharashtra***, reported in (2005) 5 ***SCC 294*** while interpreting Section 21 (4) of Maharashtra Control of Organised Crime Act, 1999. It is worthwhile to extract the relevant observations made therein:

“44. The wording of Section 21 (4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the appellant has not committed such an offence. In such an event, it will be possible for the



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prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature."

6 (d). Further in *Thwaha Fasal Vs. Union of India's case*

(cited supra) the Hon'ble Supreme Court had held as follows:

"20. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue a prima facie case as required by sub section (5) of Section



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43 D is not expected to hold a mini trial. This Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is. (emphasis supplied).

6(e). This Court also finds that in *Union of India Vs. K.A.Najeem* (cited supra), the Hon'ble Supreme Court had observed as follows:

“18. It is thus clear to us that the presence of statutory restrictions like Section 43 – D (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. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy



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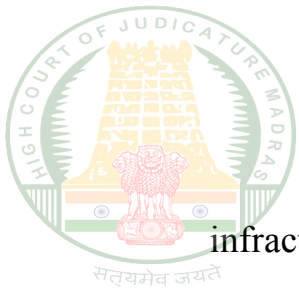
against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43 – D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.”

7. Thus, from the observations made in the above judgments, it can be seen that in ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali's case*** (cited supra), the Hon'ble Supreme Court had observed that the degree of satisfaction to hold that there is a *prima facie* case for denying bail would differ from the degree of satisfaction to dismiss a discharge petition on the ground that there is a *prima facie* case. While considering a discharge petition and assessing the *prima facie* case, it is trite law that even grave suspicion is sufficient to frame a charge. However, we are of the view that while denying the liberty of a person, the test to assess the *prima facie*



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case would be different. The liberty of a person cannot be denied on grave suspicion alone. The Act specifically employs the words “reasonable grounds for believing that the accusation against such a person is *prima facie* true”. Further, we are of the view that the accusation must be not only grave, but the materials in support of the accusation must be cogent at whatever stage the bail application is considered. Thus, there must be something more than grave suspicion while holding that there is a *prima facie* case to deny bail. The Judgements referred to above would also indicate that the above restriction in the proviso to Section 43 D (5) of the UA (P) Act is a slight departure from the bail jurisprudence, namely that bail is the rule and the jail is an exception. It only means that while considering a bail application, the Courts cannot grant bail on mere asking, and there must be reasons for the grant of bail. However, the above restriction found in the proviso to 43 (5) of the UA(P) Act cannot be read to mean that the basic human right or the constitutional right of a person is taken away. Pre-trial detention is an anathema to the Constitution besides being in violation of the basic human right. The Judgments referred to above would also indicate that where the Constitutional Courts find that there is an



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infraction of the fundamental right under Article 21 of the Constitution of India, the rigours of the proviso would melt down. As to when pre-trial detention would amount to a violation of Article 21 of the Constitution of India, would depend on the facts and circumstances of each case. In one case, the pre-trial detention, even for six months may be in violation of Article 21 of the Constitution of India. In yet another case, pre-trial detention of even three years would not amount to a violation of Constitutional right. This would depend on the gravity of the offence alleged, the role played by the particular accused, the nature of the evidence relied upon by the prosecution, and the probable punishment that could be imposed on the said accused. The liberty of a person pending trial cannot be ordinarily curtailed unless the law and facts warrant such curtailment.

8. Keeping in mind the above legal principles, we may analyse the facts in the instant case. The allegation against the appellant is that he had committed the offence under Section 18 of the UA (P) Act by conspiring to commit a terrorist act and also under Section 39 of the UA (P) Act, relating to support given to a terrorist organization. The materials relied upon by the

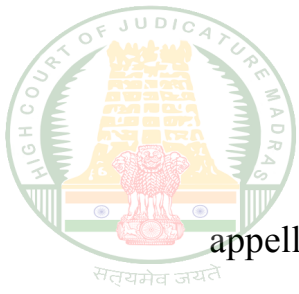


prosecution is reiterated in the counter at paragraph 16, which reads as

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“16. It is submitted that there are oral evidence against the petitioner, to prove that during October – 2021 the petitioner threatened witness Shri M.Fasithi Ali Rahman, that his leader A-1 and his associate A-2 are ISIS terrorist and have no mercy and threatened the witness that he will be killed in the middle of the street. Further, protected Witness – B, had clearly disclosed the role of the petitioner/accused (A-3), that he is the close confident of A-1 and he used to deal all the matters of A-1 including funds illegally and hence there are every grounds to substantiate that the petitioner/accused has actively participate in the offence committed by A-1 and A-2 in pursuance of conspiracy and hence the petition is liable to be dismissed.”

9. From the above, it can be seen that the first material relied upon is a statement of witness who is alleged to have been threatened by the



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appellant by stating that his leaders were ISIS terrorists and they would kill any person. We are of the view that merely because the appellant had threatened the person stating that he was associated with an ISIS terrorist, it would by itself not be a reasonable ground to hold that he had supported a terrorist organization. The threat would certainly amount to an offence but not an offence under Section 39 of the UA (P) Act. The prosecution has to establish the support to the terrorist organisation by independent evidence. The other statement relied upon by the prosecution is the statement of the protected witness whose entire statement has been redacted. This Court had perused the unredacted statement and found that neither the conspiracy to commit a terrorist act nor the support of the appellant/petitioner to a terrorist organization can be inferred. No doubt, the statement reveals the association of the appellant with A1. The requisite intention to support a terrorist organization cannot be inferred from the materials filed in support of the final report. The fact that the appellant handled the funds of A1 cannot be the basis to infer his support to any terrorist organization. Support to an individual is different from support to a terrorist organisation. Further, we find from the averments in the Final Report that the motto of the outfit said



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to have been formed by A1, namely the Khilafa Party of India, was to establish Islamic rule in India by overthrowing the Government established by law. This by itself would not amount to a terrorist act within the meaning of Section 15 of the UA (P) Act. There must be material to show that the appellant had intended to support a terrorist organisation or had conspired to commit a terrorist act in order to attract the offences under Sections 39 and 18 of the UA (P) Act, respectively. The allegation of conspiracy to commit a terrorist act must spell out the object of the conspiracy (i.e) as to what exactly was the terrorist act that was agreed to be committed. However, we may hasten to add that the above observations are made only for arriving at a *prima facie* satisfaction for the purpose of considering the bail application on the basis of the broad probabilities of the case.

10. We may also add here that the appellant has been in custody since February 2022. Even assuming that the materials collected by the prosecution may ultimately lead to conviction, the detention pending trial cannot be indefinite. We are informed that the charges are yet to be framed. The prosecution has cited 119 witnesses and in such circumstances, the trial



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is not likely to be completed within a reasonable time. We have already referred to the observations of the Hon'ble Supreme Court in *Union of India Vs. K.A.Najeem's case* (cited supra), wherein it has been held that the rigours of 43 – D (5) of the UA(P) Act, would melt down if the accused had been incarcerated for a long time and the trial is not likely to be completed in the near future. Bearing in mind, the principles laid down by the Hon'ble Supreme Court as summed up by us in Paragraph 7 supra, considering the nature of allegation, the nature of the materials relied upon by the prosecution, and the period of incarceration, we are inclined to exercise our powers to grant bail to the accused.

11. Therefore for the above reasons, this appeal deserves to be allowed, and the accused is set at liberty on the following conditions:

(i) The appellant shall execute a bond and furnish two sureties for a likesum of Rs.50,000/- [Rupees Fifty Thousand only] each and one of the sureties should be a blood relative to the satisfaction of the learned Judge, Special Court under the National Investigation Agency Act, 2008 (Sessions



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Court for Exclusive Trial of Bomb Blast Cases)
Chennai at Poonamallee, Chennai - 600 056;

(ii) After coming out from jail, the appellant shall stay at Chennai and shall not leave the Chennai city without the permission of the trial court;

(iii) The appellant shall appear and sign before the trial court every day at 10.30 a.m. until further orders;

(iv) The appellant shall surrender his Passport (if any) before the trial court and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the trial court. In the latter case the trial court will if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said period, the trial court will be entitled to act on the statement of the appellant;

(v) The appellant shall cooperate with the investigation;

(vi) The appellant shall not tamper with evidence and indulge in any other activities which are in the nature of preventing the investigation process;



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(vii) The appellant shall inform the trial court the address where he resides and if changes his address, it should be informed to trial court;

(viii) The appellant shall use only one mobile phone during the time he remains on bail and shall inform the trial court his mobile number;

(ix) The appellant shall also ensure that his mobile phone remains active and charged at all times so that he remains accessible over phone throughout the period he remains on bail;

(x) The trial court will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

(S.S.S.R., J.) (S.M., J.)
09.11.2023

Index : yes / no
Speaking/Non-Speaking Order
Neutral citation : yes/no



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Copy to:

1. The Judge,
Sessions Court for Exclusive Trial for Bomb Blast Cases Chennai,
Poonamallee,
Chennai – 600 056.
2. The Superintendent of Prisons,
Central Prison,
Puzhal,
Chennai.
3. The Inspector of Police,
National Investigation Agency,
Chennai.
4. The Public Prosecutor
High Court of Madras,
Chennai – 600 104.



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S.S. SUNDAR, J.
AND
SUNDER MOHAN, J.
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Pre-delivery Judgment in
Criminal Appeal No.340 of 2023

Dated: 09.11.2023

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