

(2021) 06 DEL CK 0082

In the Delhi High Court

Case No : Criminal Appeal No. 90 Of 2021

Devanganakalita

APPELLANT

Vs

State Of Delhi Nct

RESPONDENT

Date of Decision : 15-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(a), 19(1)(b)
National Investigation Agency Act, 2008 — Section 21(4)
Indian Penal Code, 1860 — Section 34, 109, 114, 120B, 124A, 147, 148, 149, 153A, 186, 201, 212, 295, 302, 307, 341, 353, 395, 419, 420, 427, 435, 436, 452, 454, 468, 471
Prevention Of Damage To Public Property Act, 1984 — Section 3, 4
Arms Act, 1959 — Section 25, 26
Unlawful Activities (Prevention) Act, 1967 — Section 13, 15, 16, 17, 18, 43D(5), 45
Code Of Criminal Procedure, 1973 — Section 41A, 439

Citation : (2021) 06 DEL CK 0082

Hon'ble Judges : Siddharth Mridul, J;Jairam Bhambhani, J

Bench : Division Bench

Advocate : Adit S. Pujari, Tusharika Mattoo, Kunal Negi, Amit Mahajan, Rajat Nair, Dhruv Pande, Shantanu Sharma

Final Decision : Disposed Of

Judgement

Anup Jairam Bhambhani, J

Introduction

1. The appellant, Devangana Kalita, is a student pursuing the M.Phil.Ph.d. Programme in the Department of Women's Studies at the Jawaharlal

Nehru University, New Delhi, having completed her Bachelor of Arts (Honours) degree in English from Miranda House College, Delhi University and

Master of Arts degree in Gender & Development at the Institute of Development Studies, University of Sussex, United Kingdom.

2. The appellant has preferred the present appeal under section 21(4) of the

National Investigation Agency Act 2008 (â??NIA Actâ??, for short)

impugning order dated 28.01.2021 made by the learned Special Court rejecting the appellantâ??s bail application in case FIR No. 59/2020 dated

06.03.2020 (â??subject FIRâ??, for short) registered initially under sections 147 / 148 / 149 / 120-B of the Indian Penal Code, 1860 (â??IPCâ??, for

short) at P.S.: Crime Branch, New Delhi, to which offences under sections 109 / 114 / 124A / 153A / 186 / 201 / 212 / 295 / 302 / 307 / 341 / 353 / 395

/ 419 / 420 / 427 / 435 / 436 / 452 / 454 / 468 / 471 / 34 IPC, sections 3 / 4 of the Prevention of Damage to Public Property Act, 1984 (â??PDPP

Actâ??, for short), sections 25 / 26 of Arms Act, 1959 and sections 13 / 16 / 17 / 18 of the Unlawful Activities (Prevention) Act, 1967

(â??UAPAâ??, for short) were subsequently added.

3. The appellant was arrested and is stated to be in custody in the subject FIR since 29.05.2020.

Backdrop & essence of allegations against Appellant

4. The appellant is one of the accused in 04 FIRs, bearing FIR No. 250/2019 dated 21.12.2019 registered at P.S.: Daryaganj; FIR No. 48/2020 dated

24.02.2020 registered at P.S.: Jafrabad; FIR No. 50/2020 dated 26.02.2021 registered at P.S.: Jafrabad; and FIR No. 59/2020 dated 06.03.2020

registered at P.S.: Crime Branch, the last one being the subject FIR in the present appeal. It would be relevant to mention at this point, that the

appellant has already been admitted to regular bail in FIR Nos. 250/2019, 48/2020 and 50/2020 vidÂ© orders dated 02.06.2020, 24.05.2020 and

01.09.2020 made by the concerned courts; and is presently in judicial custody only in FIR No. 59/2020, that is in the subject FIR.

5. The essential case alleged by the State against the appellant is that, as part of a womenâ??s rights group called Pinjra Tod (which may loosely be

translated as â??break-free from the cageâ??, namely from societal shackles), and other activist groups called the Delhi Protests Support Group

(â??DPSGâ??, for short), the Jamia Coordination Committee (â??JCCâ??, for short), Warriors, and â??Aurat ka Inquilabâ??, the appellant

participated in what is described by the State as a â??larger conspiracyâ??, to commit certain offences that are subject matter of the subject FIR,

which led to violence and rioting in the North-East Delhi between 22.02.2020 and 26.02.2020. These allegations arise from protests, in which the

appellant is alleged to have participated, against the Citizenship Amendment Act, 2019 (â??CAAâ??, for short) passed by Parliament and the

exercise undertaken by the Central Government to create a database of citizens called the National Register of Citizens (â??NRCâ??, for short); and

the gravamen of the allegation is that as part of such protests, the appellant along with co-conspirators instigated the local population in certain Muslim

dominated areas of Delhi, particularly women, and incited in them feelings of persecution, which subsequently led to violence and rioting.

6. The sequence of the appellantâ??s arrest in the various cases mentioned above also deserves to be noticed. On 21.05.2020, an investigating team

from P.S.: Crime Branch visited the appellantâ??s residence and served upon her a notice directing her to join investigation. Two days later, that is

on 23.05.2020, the appellant was arrested by police officers from P.S.: Jafrabad in FIR No. 48/2020; and upon being produced before the learned

Duty Metropolitan Magistrate, the appellant was released on regular bail on 24.05.2020, that is on the very next day, with an observation that the

â??accused was merely protesting against the NRC and CAA and accused did not indulged in any violenceâ?. Immediately upon being released on

bail by the learned Duty Metropolitan Magistrate, then-and-there in the same court-room, the appellant was re-arrested by police officers from P.S.:

Crime Branch in FIR No. 50/2020. Thereafter, while she was in judicial custody in Tihar Jail in FIR No. 50/2020, on 29.05.2020 she was arrested in

the subject FIR namely FIR No. 59/2020; and then again on 30.05.2020, the appellant was also arrested in FIR No. 250/2019.

7. As recorded above, the appellant has been admitted to regular bail in FIR No. 48/2020 vidÂ© order dated 24.05.2020; in FIR No. 250/2019 vidÂ©

order dated 02.06.2020; and in FIR No. 50/2020 vidÂ© order dated 17.09.2020 by the concerned courts. It bears mentioning that at the time the

appellant was arrested on 29.05.2020, while she was in Tihar Jail, the Investigating Officer did not seek her police custody in the subject FIR; but

sought police custody in FIR No. 250/2019 for 04 days on 30.05.2020, which was declined and she was remanded to 04 days judicial custody in FIR

No. 250/2019. Subsequently, on an application, police custody of 03 days was granted in FIR No 250/2019 till 02.06.2020. Subsequently on 06.06.2020,

the appellant was remanded to 02 days police custody in the subject FIR, whereafter she was returned to judicial custody on 08.06.2020 and has

remained there ever since.

8. As per the record therefore, the appellant has 04 FIRs registered against her, all of which however appear to arise from the same event, namely

protests against the CAA and the NRC, in which she is alleged to have participated. It deserves to be noted that though FIR No. 59/2020, namely the subject FIR, was registered on 06.03.2020, the appellant was not arrested in the subject FIR until almost 03 months later i.e., till 29.05.2020.

9. The investigation in the subject FIR is complete. Charge-sheet dated 16.09.2020 has been filed inter alia naming the appellant as one of the accused persons; and although 02 supplementary charge-sheets dated 22.11.2020 and 01.03.2021 have also been filed in the subject FIR, admittedly, the other charge-sheets do not concern the appellant, and are therefore irrelevant for purposes of the present appeal.

10. The court is informed that vidÃ© order dated 17.09.2020 the learned Special Court has taken cognizance of the offences alleged in the subject

charge-sheet, except offences under section 124A / 153A / 109 / 120B IPC, for which sanction for prosecution was still awaited from the State

Government as of the date of passing of the impugned order. However, charges have not yet been framed against the accused persons.

11. Although earlier-on, vidÃ© order dated 10.11.2020 in Crl. M. C. No. 2119/2020 filed by the State, a learned Single Judge of this court had stayed

further proceedings in the trial of the subject FIR, we are informed that that stay order has since been vacated vidÃ© order dated 23.03.2021 made

by the learned Single Judge.

Submissions on behalf of the Appellant

12. Mr. Adit S. Pujari, learned counsel appearing on behalf of the appellant, submits that in essence, the allegations contained in the subject charge-

sheet against the present appellant Devangana Kalita are almost the same as those against co-accused Natasha Narwal, who has also preferred a

criminal appeal bearing Crl. A. No. 82/2021 before this court the order made by the learned Special Court rejecting her bail application.

13. Counsel points-out that on a perusal of the subject charge-sheet, it will be seen that the names of the appellant and of co-accused Natasha Narwal

appear more or less in the same breath, arising from alleged WhatsApp messages and other evidence sought to be cited by the prosecuting agency in

the case. If anything, Mr. Pujari points-out, fewer allegations have been made against the appellant in the subject charge-sheet of involvement in the protests. For this reason in fact, Mr. Pujari has made common submissions in Crl. A. No. 82/2021 and in the present appeal bearing Crl.A. No. 90/2021.

14. Be that as it may, a brief summary of the submissions made on behalf of the appellant in the present case is as follows:

(a) The appellant does not deny that she was part of the protests and the 24x7 sit-in organised predominantly by women at two separate sites, namely

at the 66-foota Road at the Jafrabad Metro Station, and at a site near Madina Masjid, Seelampur; but the appellant submits that she was not present at

the said protests sites at the time when violence and riots broke-out in and around those locations between 22.02.2020 and 26.02.2020; and in evidence

thereof, the appellant seeks to rely upon her call detail records (CDRs) and CCTV footage of the cameras installed in that area.

(b) The appellant also contends that she was in no manner concerned with calling for any violent protests against the CAA or the NRC, either as part

of Pinjra Tod, DPSG, JCC, Warriors, or â??Auraton ka Inquilabâ?? groups. In fact the appellant denies that she was a member of the JCC

Whatsapp group at all.

(c) The appellant further gainsays the allegation that she participated in various meetings as alleged; and also denies that she was present at various

protest sites when violence and rioting occurred, submitting that such allegations are supported merely by bald statements of witnesses, most of whom

are protected witnesses, and whose statements came to be recorded much after the dates of the alleged incidents. The appellant contends that what

would be the best evidence in support of these allegations, namely the CDRs and relevant video footage is being intentionally withheld by the

investigating agency since it would belie their allegations.

(d) Counsel also points-out that the investigating agency has not produced nor even relied upon any statement of an actual victim of the alleged

violence that may name the appellant, since no such statement exists; and further that, any such statement would only disprove the appellantâ??s

alleged presence or involvement in the riots and violence. In this context, it is urged that copies of the CDRs and video footage is not being provided to

the appellant, though it is the appellant's submission, that the protests in question were in fact professionally recorded by a videographer who was specially engaged by the Delhi Police for the purpose.

(e) Counsel submits that in the subject charge-sheet, the court will find no reference to any specifics, such as names and addresses of any actual victims who may have suffered injuries; nor any evidence of the nature of injuries sustained nor any MLCs; nor any particulars of persons who may have died at the locations where the appellant is alleged to have been present, since such details would contradict the allegations levelled against the appellant. In fact, counsel contends that applications moved on behalf of the appellant before the learned Special Court asking for copies of the contents/data of the appellant's cellphone that was seized; for requisitioning her CDRs for the relevant period; and a copy of the video footage recorded at the instance of the Delhi Police, have all been rejected by the learned Special Court; and that thereby, the appellant has been put in a position where no exculpatory evidence, although collected by and available with the prosecuting agency, is on record.

(f) The appellant contends that the effort of the State is evidently to make vague and non-specific allegations of the appellant being involved some imaginary larger conspiracy and to thereby implicate her in events with which she had no concern.

(g) Counsel contends that the ingredients of the offences alleged under sections 15, 17 or 18 appearing in Chapters IV and VI of the UAPA are not made-out even on a plain reading of the factual allegations levelled against the appellant; and accordingly, the additional conditionalities, limitations, and restrictions contained in section 43D(5) of the UAPA would not apply to the appellant's bail plea. Hence the bail plea must be decided on the usual and ordinary principles of grant of bail, that is, the triple test of assessing the flight risk, evidence tampering and witness intimidation.

(h) Counsel also submits that no notice under section 41A of the Cr.P.C. was issued to the appellant; yet she was arrested almost 03 months after the date of registration of the FIR. That she has always remained available for investigation at her own residence throughout; and accordingly there is no chance that she would flee from justice.

(i) Counsel points-out that the subject charge-sheet has already been filed and

therefore all evidence required to be collected is already available with the investigating agency; that there is no evidence in the appellant's possession and there is no risk that she could tamper with any evidence. Furthermore, considering the appellant's profile, including her educational background and the fact that she is a student pursuing an M.Phil.-Ph.d. degree at the Jawaharlal Nehru University, it can hardly be said that the appellant would influence any witnesses, much less intimidate them.

Submissions on behalf of the State

15. The State/Delhi Police has been represented in the matter by Mr. Amit Mahajan, learned Special Public Prosecutor, who has sought to explain the appellant's involvement in what is alleged to be a "larger conspiracy" of inciting violence and rioting, which led to the events that occurred in the North-East part of Delhi between 23.03.2020 and 26.02.2020. To this end, Mr. Mahajan has drawn the attention of this court to certain portions of the subject charge-sheet dated 16.09.2020, which runs into about 19,000 pages. For ease of reference, the portions to which attention is drawn are extracted in Annexure-A to this judgment.

16. The principal allegations levelled by the prosecuting agency against the appellant are as follows :

(a) It is alleged that the appellant is/was a member of the women's rights group called Pinjra Tod and various other groups and formations identified by the WhatsApp groups named "Warriors", "Auraton ka Inquilab", DPSG, and JCC; and that, as part of such groups, the appellant engaged in a conspiracy to incite violence and riots in the guise of a protest against the CAA and the NRC, with the aim and intent of destabilising the Government. To support this submission, the State draws attention to the portion of the subject charge-sheet extracted as Screenshot 1a-1b in Annexure - A attached to this judgment.

(b) The appellant is alleged to have been present at a meeting on 23.01.2020 at the office of Pinjra Tod at E-1/13 Seelampur, Delhi, at which meeting, one of the principal accused advised the group to escalate their chakkajam agitation (which may loosely be translated as a form of protest in which protesters cause complete stoppage of vehicles and blockade of roads); and advised them that nothing would be achieved by only giving inflammatory speeches. In this behalf, the State has drawn attention of this court to the

portion of the subject charge-sheet extracted as Screenshot 2, 3a-3c, 4 and 5 in Annexure-A attached to this judgment.

(c) It is further alleged that the appellant also attended a meeting on the night of 16/17.02.2020 at a place called Chand Bagh, where it is alleged that

the conspirators agreed to execute the chakkajam, in evidence of which the State points to the part of the subject charge-sheet extracted as

Screenshot 6, 7 and 8a-8c in Annexure-A.

(d) By way of a specific role assigned to her, it is alleged that the appellant was one of the leaders who organised the protesters inter alia at a site

described as the plot of Chaudhary Mateen in Jafrabad, Delhi; at another site described as Opposite Tent Wala School, Jafrabad, Delhi; and also at a

Fruit Market in Seelampur, Delhi. Attention of this court is invited in this behalf to the portion of the subject charge-sheet extracted as Screenshot 9,

10, 11, 12 and 13 in Annexure-A.

(e) The State has also implicated the appellant as one of the coconspirators in organizing and instigating the 24x7 sit-in protests led by around 300

women at the Madina Masjid, Seelampur; and the protest held on 23.02.2020, when women protesters occupied the 66-foota Road at Jafrabad Metro

Station, blocking traffic and creating a chakkajam and also engaging in shouting slogans and instigating the public against the Government by giving

bhadkau-bhashan namely inflammatory speeches. Support for this allegation is drawn by the State from the portion of subject charge-sheet appearing

as Screenshot 14a-14b, 15a-15b, 16, 17a-17b, 18, 19, 20a-20b, 21, 22, 23a-23d and 24 in Annexure A.

(f) The appellant is further sought to be implicated in distributing packets of chilly powder to women protesters, with instructions to attack the police

and the military with it. It is further alleged that inter alia the appellant asked women and youngsters to stockpile chilly powder, dandas (sticks), empty

bottles, acid and stones for use when occasion arises. In this regard, the State refers to the portion of the subject chargesheet extracted as Screenshot

25, 26, 27, 28, 29, 30, 31 and 32 in Annexure A.

(g) It is further alleged that the appellant that, along with other protesting women, proceeded from the Jafrabad protest site to the Maujpur-Babarpur

metro station, which brought them near the pro-CAA protesters, where it is alleged, that the appellant distributed chilly powder, bottles, and stones to

women protesters, which were thrown at the pro-CAA protesters sitting at that protest site. The State draws the attention of this court to the portion

of the charge-sheet extracted as Screenshot 33a-33b, 34, 35, 36, 37, 38 and 39a-39b in Annexure A, to support this allegation.

(h) The State also alleges that, as part of executing the conspiracy, the appellant was also involved in the actual riots that occurred in North-East

Delhi, though no specific or particular role has been assigned to her in relation thereto. It is also alleged that as part of the protests, the perpetrators

used firearms, petrol bombs, acid, iron rods, swords, knives, stones, sling shots, and chilly powder, etc., to terrorise people and the society at large. To

support this submission, the State references the portion of the subject charge-sheet extracted as Screenshot 40, 41a-41c, 42, 43 and 44.

(i) The prosecuting agency seeks to substantiate the foregoing allegations on the strength of statements of several witnesses, including many who have

been declared as protected witnesses; and on the basis of video recordings, which the prosecuting agency says they have seized and which, they say,

show the appellant's presence.

Basis & reasoning of Impugned Order

17. It transpires that the learned Special Court has rejected the bail pleas filed by co-accused Natasha Narwal (appellant in CRL.A. No. 82/2021) as

well as Devangana Kalita (appellant in the present CRL.A. No. 90/2021) by two separate but almost verbatim orders, both dated 28.01.2021. The

reasoning that informs the rejection of the bail pleas is also identical in both orders.

18. For sake of completeness, we may summarise the reasoning which has impelled the learned Special Court to reject the appellant's bail, which

reasoning we have also referred to in our contemporaneous judgment dated 15.06.2021 in CRL.A. No. 82/2021 titled "Natasha Narwal vs.

State". The learned Special Court has proceeded essentially on an un-critical acceptance of the allegations contained in the subject charge-sheet

and appears to have given weightage to the following considerations :

(a) The learned Special Court says that since under section 45 of the UAPA, previous sanction of the Central Government is required for a court to

take cognizance of any offence under Chapters IV and VI of the UAPA; and that, before the Central Government gives such sanction, the Central

Government itself is required to consider the report of an authority to be appointed by it, which authority is supposed to make an independent review of the evidence gathered in the course of investigation, therefore: In the present case, previous sanction was taken under UAPA and thus, an independent review of the evidence gathered during the investigation has been done by an independent authority after its satisfaction about the evidence. Accordingly, the learned Special Court says that since such independent review by an independent authority must already have been undertaken in respect of the evidence gathered in the investigation, on the basis of which the Central Government has granted sanction for prosecution for offences under Chapters IV and VI of UAPA, that lends credence to the allegations. In our reading of the impugned order, the learned Special Court appears to believe that the grant of sanction by the Central Government all but obviates the need for the court to apply its own mind or to consider whether any offence under Chapters IV and VI of the UAPA is made out;

(b) The learned Special Court has also proceeded on the basis that the appellant was a member of Pinjra Tod, DPSG, Warriors, and Auraton ka Inquilab and was part of a multi-layered conspiracy and in regular touch and reporting to the higher conspirators, which, the learned Special Court concludes, makes her actions culpable.

19. For one, we would wish to immediately debunk this misconception that merely because section 45 of the UAPA mandates an independent review of the evidence gathered by an independent authority appointed by the Central Government; which independent authority is to recommend to the Central Government whether or not sanction for prosecution for offences under the UAPA is to be given, that legal requirement in itself, in any manner, obviates the need for the court to apply its own independent mind and to form its own independent judicial view as to whether any offence under the UAPA is disclosed in the charge-sheet and in the material placed along with it. It does not.

20. In fact we are of the view that the purported independent review of evidence by a purported independent authority; and the fact that the Central Government has, based thereupon, granted sanction of prosecution for offences under Chapters IV or VI of the UAPA, must never enter the

consideration of the court when deciding whether the ingredients of any offence under the UAPA are disclosed in the charge-sheet.

21. We must point-out that offences under the UAPA are treated as extremely serious, inviting very severe punishment; and therefore, the formation of an independent judicial view by the court at every step of the way, is imperative.

22. In our contemporaneous judgment dated 15.06.2021 rendered in the case titled "Asif Iqbal Tanha vs. State of NCT of Delhi" in CRL. A.

No. 39/2021, we have given our interpretation of the phrase "terrorist act" appearing in section 15 of the UAPA and in other related provisions.

We have also expressed our view on the constitutionally guaranteed right to protest that flows from Article 19(1)(b) of the Constitution; as also our

understanding of the general principles of bail. Since the present appellant is a co-accused in the same subject FIR, we would repeat, if only to

reiterate, the view taken on these aspects in the said other case. The view taken in that case is set-out below.

Interpretation of "terrorist act" & related provisions under UAPA

23. In its contemporaneous judgment rendered in Asif Iqbal Tanha (supra), this court has analysed in detail the provisions engrafting "terrorist

act" and "conspiracy" or "act preparatory" to the commission of a terrorist act. Without repeating that exercise in the present

judgement, it would be sufficient to recapitulate the position of law in that regard, as expatiated by this court in the said judgement.

24. As detailed by this court in Asif Iqbal Tanha (supra), the position is that though the phrase "terrorist act" has been given a very wide and

detailed definition in section 15, in our considered view, the court must be careful in employing the definitional words and phrases used in section 15 in

their absolute, literal sense or use them lightly in a manner that would trivialise the extremely heinous offence of "terrorist act", without

understanding how terrorism is different even from conventional, heinous crime.

25. In Hitendra Vishnu Thakur & Ors vs. State of Maharashtra & Ors(1994) 4 SCC 602, the Hon'ble Supreme Court says that the extent and

reach of a terrorist activity must travel beyond the effect of an ordinary crime and must not arise merely by causing disturbance of law and order or

even public order. The Hon'ble Supreme Court says that the effect of terrorist

activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to deal with it under the ordinary penal law. The following words in *Hitendra Vishnu Thakur* (supra) bear careful attention :

“Terrorism” is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof and is a totally abnormal phenomenon.”

(emphasis supplied)

26. Furthermore, in the same judgment that the Hon’ble Supreme Court says: “...it is not the intention of the Legislature that every criminal should be tried under TADA, where the fall out of his activity does not extend beyond the normal frontiers of the ordinary criminal activity. Every “terrorist” may be a criminal but every criminal cannot be given the label of a “terrorist” only to set in motion the more stringent provisions of TADA.”

(emphasis supplied)

27. The Hon’ble Supreme Court has further explained the concept of terrorism in *People’s Union For Civil Liberties & Anr. vs. Union of*

India (2004) 9 SCC 580. (“PUCL”, for short) in which decision, quoting *Mohd. Iqbal M. Shaikh & Ors. vs. State of Maharashtra* (1998) 4 SCC

494., the Hon’ble Supreme Court says:

“...it may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole.”

(emphasis supplied)

28. In *PUCL* (supra), the Hon’ble Supreme Court also observes that:

“... Terrorist acts are meant to destabilise the nation by challenging its sovereignty and integrity, to raze the constitutional principles that

we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow

democratically elected government, to promote prejudice and bigotry, to demoralise the security forces, to thwart the economic progress

and development and so on. This cannot be equated with a usual law and order

problem within a State. On the other hand, it is inter-State, international or cross-border in character. Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavour.

Rather, it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together ...â??

(emphasis supplied)

29. More recently, in Yakub Abdul Razak Memon vs State of Maharashtra through CBI, Bombay(2013) 13 SCC 1, the Honâ??ble Supreme Court

refers to acts of terrorism in the following words:

â??... Acts of terrorism can range from threats to actual assassinations, kidnappings, airline hijackings, bomb scares, car bombs, building

explosions, mailing of dangerous materials, computer based attacks and the use of chemical, biological, and nuclear weaponsâ?"weapons

of mass destruction (WMD)â??

(emphasis supplied)

30. As this Court has held in Asif Iqbal Tanha (supra) therefore, in our view, although the definition of â??terrorist actâ?? in section 15 UAPA is

wide and even somewhat vague, the definition must partake of the essential character of terrorism and the phrase â??terrorist actâ?? cannot be

permitted to be applied in a cavalier manner to criminal acts or omissions that fall squarely within the definition of conventional offences as defined

inter alia under the IPC. We must not forget the principle laid down by the Constitution Bench of the Honâ??ble Supreme Court in A.K. Roy vs.

Union of India and Ors (1982) 1 SCC 271. where it says that the requirement that crimes must be defined with an appropriate definitiveness is a

fundamental concept of criminal law and must be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi vs. Union of

India 1978 (1) SCC 248. ; and that the underlying principle is that every person is entitled to be informed as to what the State commands or permits and

the life and liberty of the person cannot be put on peril of an ambiguity. The Constitution Bench further says that to stand true to this principle, what is

expected is that the language of the law must contain adequate warning of the conduct which may fall within the proscribed area â??when measured

by common understandingâ???. Most importantly, the Constitution Bench says:

â??... These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language

carries with it the inconvenience of the imperfections of language...â??.

â??...We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a

precise definition, courts must strive to give to those concepts a narrower construction than what the literal words suggest ...â??.

(emphasis supplied)

31. We must also carefully note the words of another Constitution Bench of the Honâ??ble Supreme Court in *Sanjay Dutt vs. State through CBI (II)*

(1994) 5 SCC 410 to the effect that when law visits a person with serious penal consequences, courts must take extra care to ensure that those to

whom the legislature did not intend to be covered by the express language of the statute â??are not roped in by stretching the lawâ??.

32. Our jurisprudence therefore dictates that where a provision of law which contains serious penal consequences is vague or widely worded, such

provision must be construed narrowly to bring it within the constitutional framework; and most importantly, must be applied in a just and fair way, lest

it unjustly draw within its ambit persons whom the Legislature never intended to punish. Where the court finds that an act or omission is adequately

addressed and dealt with by the ordinary penal law of the land, the court must not countenance a State agency â??crying wolfâ??.

33. Upon a careful consideration of the aforesaid verdicts of the Honâ??ble Supreme Court, in our opinion, the intent and purpose of Parliament in

enacting the UAPA and in amending it in 2004 and 2008 to bring terrorist activity within its scope, was and could only have been, to deal with matters

of profound impact on the â??Defence of Indiaâ??, nothing more and nothing less. Had that not been the case, UAPA could not have been enacted

by Parliament since the only entries in List-I of the Seventh Schedule to the Constitution that would bring the statute within the legislative competence

of Parliament are Entry 1 read with Entry 93 relating to the Defence of India and offences with respect to the Defence of India. It was not the intent,

nor purpose of enacting UAPA that other offences of the usual and ordinary kind, however grave, egregious or heinous in their nature and extent,

should also be covered by UAPA, since such conventional matters would have fallen within Entry 1 of List-II (State List) and/or Entry 1 of List-III

(Concurrent List) of the Seventh Schedule of our Constitution. This is the only possible view that can be taken if we are to lean in favour of

constitutionality of the provisions of section 15, 17 and 18 of the UAPA, as we must.

Right to Protest

34. As in *Asif Iqbal Tanha (supra)*, since this matter also emanates from protests organised by certain persons against the CAA and the NRC; and

since the State alleges that these were not ordinary protests but were of a kind that have shaken, or are â??likelyâ?? to have shaken, the entire

foundations of our Nation, we must discuss what the law considers as permissible contours of a protest that would not threaten our Nation.

35. In this context, we are required to examine, as to when the constitutionally guaranteed right to protest flowing from the right under Article 19(1)(b)

of the Constitution to â??assemble peaceably and without armsâ?, turns into a cognizable offence under the ordinary penal law; and when the right to

protest gets further vitiated and becomes a terrorist act, or a conspiracy or an act preparatory, to commission of a terrorist act under the UAPA.

36. The observations of the Honâ??ble Supreme Court in *Mazdoor Kisan Shakti Sangathan vs Union of India* and *An(r2 018) 17 SCC 324* give the

most lucid answer, explaining the contours of legitimate protest. In the said decision, the Honâ??ble Supreme Court says that legitimate dissent is a

distinguishable feature of any democracy and the question is not whether the issue raised by the protestors is right or wrong or whether it is justified or

unjustified, since people have the right to express their views; and a particular cause, which in the first instance, may appear to be insignificant or

irrelevant may gain momentum and acceptability when it is duly voiced and debated. The Honâ??ble Supreme Court further says that a

demonstration may take various forms: it may be noisy, disorderly and even violent, in which case it would not fall within the permissible limits of

Article 19(1)(a) or 19(1)(b) and in such a case the Government has the power to regulate, including prohibit, such protest or demonstration. The

Government may even prohibit public meetings, demonstrations or protests on streets or highways to avoid nuisance or disturbance of traffic but the

Government cannot close all streets or open areas for public meetings thereby defeating the fundamental right that flows from Article 19(1) (a) and 19(1)(b) of the Constitution.

37. In the present case, we are not deciding if the protests, in organising which the appellant is alleged to have been involved, were within the constitutionally guaranteed right to assembly, or whether they crossed the limit of what is permissible under Article 19(1)(a) and 19(1)(b) and became non-peaceful protests. However, what we find is that, for one there is nothing to say that the Government had prohibited the protest in the first instance. What we know is that offences, if any, that are alleged to have been committed by reason of the protests having been turned non-peaceful, are subject matter of FIR Nos. 48/2020 and 50/2020, in which the appellant is one of the accused and in which the appellant has been admitted to bail and will face trial in due course. There is absolutely nothing in the subject charge-sheet, by way of any specific or particularised allegation, that would show the possible commission of a "terrorist act" within the meaning of section 15 UAPA; or an act of "raising funds" to commit a terrorist act under section 17; or an act of "conspiracy" to commit or an "act preparatory" to commit, a terrorist act within the meaning of section 18 UAPA. Accordingly, prima-facie we are unable to discern in the subject charge-sheet the elemental factual ingredients that are a must to found any of the offences defined under section 15, 17 or 18 UAPA.

38. In our view, the subject charge-sheet and the material filed therewith does not contain any specific, particularised, factual allegations that would make-out the ingredients of the offences under sections 15, 17 , or 18 UAPA. As we have observed in *Asif Iqbal Tanha* (supra), alleging extremely grave and serious penal offences under sections 15, 17 and 18 UAPA against people frivolously, would undermine the intent and purpose of the Parliament in enacting a law that is meant to address threats to the very existence of our Nation. Wanton use of serious penal provisions would only trivialise them. Whatever other offence(s) the appellant may or may not have committed, at least on a prima facie view, the State has been unable to persuade us that the accusations against the appellant show commission of offences under sections 15, 17 or 18 UAPA.

39. Since, in the opinion of this Court, no offence under sections 15, 17 or 18

UAPA is made-out against the appellant on a prima facie appreciation of the subject charge-sheet and the material collected and cited by the prosecution, the additional conditions, limitations and restrictions on grant of bail under section 43D(5) UAPA do not apply; and the court must therefore apply the usual and ordinary considerations for bail under section 439 Cr.P.C.

General Principles of Bail

40. The general principles of grant or refusal of bail are well settled. Since a detailed discussion of such principles has recently been made by us in our judgment in *Asif Iqbal Tanha* (supra), only a brief reiteration of the principles would suffice in the present case, since both cases arise from the same subject FIR.

41. Though grant of bail involves exercise of discretionary power by the court, as always, the exercise of discretion must be judicious and not perfunctory or as a matter of course. In granting bail the court must keep in mind not only the nature of accusations but also the severity of the punishment and the nature of evidence in support of the accusations. Apart from being prima facie satisfied as regards the charges levelled; the court must also reasonably assess the apprehension of flight risk, evidence tampering and witness intimidation; with careful regard to the genuineness of the prosecution. The court must also consider the character, behaviour, means, position and standing of the accused and the likelihood of the offence being repeated. [cf. *Ash Mohammad vs Shiv Raj Singh & Anr.*, (2012) 9 SCC 446 : para 8 and 11.]

42. Furthermore, we remind ourselves that the object of bail is neither punitive nor preventative but is principally to secure the presence of the accused at the trial; and that punishment begins only after conviction and that everyone is deemed to be innocent until duly tried and found guilty. It is well settled that detention in custody pending completion of trial can cause great hardship to an accused; that it is improper for any court to refuse bail as a mark of disapproval of the past conduct or to refuse bail to a person yet to be convicted only to give him a taste of imprisonment as a lesson.

â??Necessityâ? to secure the attendance of an accused at the trial, the Honâ??ble Supreme Court has held, is the operative test. [cf. *Sanjay Chandra vs CBI*, (2012) 1 SCC 40 : para 21-23]. It also requires to be understood that though the larger interest of the public or the State and other

similar considerations are also relevant, there is no hard and fast rule and each case has to be considered on its own facts, circumstances and merits.[

cf. P. Chidambaram vs. CBI, 2019 SCC OnLine SC 1380 : para 22.]

43. Since courts often tend to fall into this error, it is extremely important to bear in mind the words of the Honâ??ble Supreme Court that grant of

bail cannot be thwarted merely by asserting that an offence is grave, since the gravity of the offence can only beget the length of the sentence, which

may be awarded upon conclusion of the trial [cf. P. Chidambaram vs. Directorate of Enforcement, 2019 SCC OnLine SC 1549 : para 12.].

44. We must also never forget the profound insight of V.R. Krishna Iyer, J., when he said that the consequences of pre-trial detention are grave; that

by being kept in custody, an undertrial accused, though presumed innocent, is subjected to psychological and physical deprivations of jail life; that the

accused is also prevented from contributing to the preparation of the defence; and that the burden of pre-trial detention frequently falls heavily on the

innocent members of the family [cf. Moti Ram vs. State of M.P., (1978) 4 SCC 47 : para 14.].

Discussion & Conclusions

45. From the foregoing discussion the position that emerges is this. There is no contest that, as member of certain womenâ??s rights organisations

and other groups, the appellant did participate and help organise protests against the CAA and the NRC in Delhi. Considering however, that the right

to protest is a fundamental right that flows from the constitutionally guaranteed right to assemble peaceably and without arms enshrined in Article

19(1)(b) of our Constitution, surely the right to protest is not outlawed and cannot be termed as a â??terrorist actâ?? within the meaning of the

UAPA, unless of course the ingredients of the offences under sections 15, 17 and/or 18 of the UAPA are clearly discernible from the factual

allegations contained in chargesheet and the material filed therewith. So, the question we must answer is, whether on a plain, straightforward and

objective reading of the allegations against the appellant contained in the subject charge-sheet read with the purported WhatsApp chats and

statements of various witnesses relied upon by the State, do such allegations impute to the appellant any specific, particularised or definite act, which

answers the ingredients of the offences under sections 15, 17 and/or 18 of the

UAPA?

46. In fact, on a reading of the portions of the subject charge-sheet to which attention has been invited by the State and which have been extracted in the screenshots in Annexure- A to this judgment, we find that invariably the appellant's name appears along with that of several other alleged co-conspirators and even the instructions and directions allegedly issued by the main accused persons are not directed to the appellant. In our reading of the subject charge-sheet and the material included in it, therefore, prima-facie the allegations made against the appellant are not even borne-out from the material on which they are based.

47. We are afraid, that in our opinion, shorn-off the superfluous verbiage, hyperbole and the stretched inferences drawn from them by the prosecuting agency, the factual allegations made against the appellant do not prima facie disclose the commission of any offence under sections 15, 17 and/or 18 of the UAPA. As expatiated by the Honâ??ble Supreme Court in the precedents cited above, protests against Governmental and Parliamentary actions are legitimate; and though such protests are expected to be peaceful and non-violent, it is not uncommon for protesters to push the limits permissible in law. The making of inflammatory speeches, organising chakkajams, and such like actions are not uncommon when there is widespread opposition to Governmental or Parliamentary actions. Even if we assume for the sake of argument, without expressing any view thereon, that in the present case inflammatory speeches, chakkajams, instigation of women protesters and other actions, to which the appellant is alleged to have been party, crossed the line of peaceful protests permissible under our Constitutional guarantee, that however would yet not amount to commission of a â??terrorist actâ?? or a â??conspiracyâ?? or an â??act preparatoryâ?? to the commission of a terrorist act as understood under the UAPA.

48. We are constrained to say, that it appears, that in its anxiety to suppress dissent and in the morbid fear that matters may get out of hand, the State has blurred the line between the constitutionally guaranteed â??right to protestâ?? and â??terrorist activityâ??. If such blurring gains traction, democracy would be in peril.

49. Therefore, having bestowed our anxious consideration to the allegations contained in charge-sheet dated 16.09.2020 and the material adduced

therewith, we do not think that the accusations made against the appellant under sections 15, 17 and/or 18 of the UAPA are prima facie true. In view

thereof, the stringent conditionalities contained in section 43D(5) of the UAPA will not apply; and the appellant's bail plea would need to be

considered on the general principles of bail enunciated above.

50. Since the subject charge-sheet has been filed and cognisance of some of the offences has been taken, but charges are yet to be framed by the

learned Special Court; and there are around 740 prosecution witnesses, including public witnesses, protected witnesses, and police witnesses, who

would have to be examined during trial, there is hardly any doubt that the process will take a very long time, since not even one witness has so far

been examined. The prevailing pandemic and the consequent truncated functioning of courts, will only add to the delay.

51. It is the conceded position that the appellant has already been granted regular bail in FIR Nos. 250/2019, 48/2020 and 50/2020 vid orders dated

02.06.2020, 24.05.2020 and 01.09.2020 respectively made by the concerned courts; and as we have noticed, in order dated 24.05.2020 the court has in

fact recorded that the appellant had only engaged in protests against the CAA and the NRC but did not indulge in any violence. From the factual

matrix it appears that there is evidently some overlap between the allegations against the appellant as contained in the other FIRs and in the subject

FIR, since the offences alleged in all cases arise from alleged violence and rioting that occurred in the North-East Delhi between 22.02.2020 and

26.02.2020.

52. Furthermore, considering the educational background, profile and appellant's position in life, we also see no reason to suspect or apprehend

that the appellant is either a flight risk or that she will indulge in evidence tampering, or witness intimidation, or will otherwise impede the trial in any

way.

53. Due notice is also taken of the fact that the appellant was not arrested in the subject FIR for nearly 03 months after the date of its registration.

54. In the circumstances, we see no reason, basis or justification to detain the appellant in judicial custody in the subject FIR any longer.

55. As a sequitur to the above discussion, we deem it appropriate to allow the present appeal and set-aside impugned order dated 28.01.2021 made by

the learned Special Court in case FIR No. 59/2020 dated 06.03.2020 registered at P.S.: Special Cell, Delhi.

56. Accordingly, we also admit the appellant to regular bail until conclusion of the trial subject to the following conditions:

- (a) The appellant shall furnish a personal bond in the sum of Rs. 50,000/- (Rs. Fifty Thousand Only) with 02 local sureties in the like amount, to the satisfaction of the learned trial court;
- (b) The appellant shall furnish to the Investigating Officer/S.H.O. a cellphone number on which the appellant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- (c) The appellant shall ordinarily reside at her place of residence as per the trial court records and shall inform the Investigating Officer if she changes her usual place of residence;
- (d) If the appellant has a passport, she shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the learned trial court;
- (e) The appellant shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The appellant shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.

57. Nothing in this order shall be construed as an expression on the merits of the pending trial.

58. A copy of this order be sent to the concerned Jail Superintendent.

59. The appeal stands disposed of in the above terms.

60. Pending applications, if any, are also disposed of.

ANNEXURE-A

RELEVANT SCREENSHOTS EXTRACTED

FROM THE SUBJECT CHARGE-SHEET

The names and other identifying details of persons other than the appellant and co-accused Natasha Narwal have been redacted by this Court.

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Screenshot 1b

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Screenshot 2

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Screenshot 3a

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Screenshot 3b

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