

(2021) 11 J&K CK 0047

In the Jammu And Kashmir High Court

Case No : Criminal Appeal (D) No. 13 Of 2021, Criminal Miscellaneous No. 1096 Of 2021

Mujahid Ashraf Khan & Ors

APPELLANT

Vs

UT Of J&K & Another

RESPONDENT

Date of Decision : 25-11-2021

Acts Referred:

National Investigation Act, 2008 — Section 21
Unlawful Activities (Prevention) Act, 1967 — Section 13, 18, 38, 43D, 43D(2)
Code Of Criminal Procedure, 1973 — Section 167, 167(2)

Citation : (2021) 11 J&K CK 0047

Hon'ble Judges : Ali Mohammad Magrey, J; Sanjay Dhar, J

Bench : Division Bench

Advocate : Z. A. Qureshi, M. Asif, Sajjad Ashraf

Final Decision : Dismissed

Judgement

1) Appellants have filed the instant appeal under Section 21 of the National Investigation Act, 2008, challenging judgment and order dated 19.07.2020 passed by Special Court for Trial of offences under Unlawful Activities (Prevention) Act, Baramulla (hereinafter referred to as the Special Court), whereby application of appellants for grant of bail in FIR No.21/2021 for offences under Section 13, 18 and 38 ULA(P) of P/S Sogam, has been dismissed.

2) Before coming to the grounds of challenge, it would be apt to give a brief background of the facts leading to the filing of this appeal.

3) On 06.05.2021, while last rites of one Mohammad Ashraf Khan alias Sehrai were being performed at Village Tekipora Tulkhan within the jurisdiction of Police Station, Sogam, some unknown persons raised anti-national slogans against the sovereignty and integrity of the nation and they also prepared video of the said incident. Police upon receipt of this information registered FIR No.21/2021 for offence under Section 13 ULA(P) Act and set the investigation into motion. During investigation of the case, involvement of the appellants in commission of

offences under Section 13, 18 and 38 of ULA(P) Act was disclosed and they were taken into custody on 16.05.2021. During the investigation of the case, the appellants moved the Special Court for grant of bail. The application came to be dismissed by the Special Court vide the impugned order dated 19.07.2021. While dismissing the bail application of the appellants, the Special Court observed that the bar to grant of bail contained in Section 43-D of ULA(P) Act is attracted to the facts of the case and that investigation of the case is not complete. It is this order, which is under challenge before us in the instant appeal.

4) Appellants have challenged the impugned order on the grounds that there was no material on record before the learned Special Court to hold that an offence under Section 18 of the ULA(P) Act is made out against the appellants. It is further contended that at the time when the learned Special Court granted extension in period of investigation and detention of appellants/accused beyond 90 days, the appellants/accused had already spent more than 90 days in custody and, as such, they were entitled to grant of default bail. It is further contended that once the period of 90 days had already expired, it was not open to the learned Special Court to even entertain application for extension of period of investigation and detention of accused. It is also urged that extension of period of investigation granted in terms of order dated 14.08.2021 passed by learned Special Court is not in accordance with law, inasmuch as the application for extension of period of investigation has been made by the investigating officer and not by the Public Prosecutor and that there were no reasons, much-less cogent reasons, for granting the extension. Thus, according to the appellants, the grant of extension in period of investigation beyond 90 days in the instant case is without jurisdiction and, as such, the same entitles the appellants to grant of default bail.

5) We have heard learned counsel for the parties and perused the record of the case.

6) During the pendency of the instant appeal, the investigation of the case has been completed and the charge sheet has been filed before the Special Court. Learned Senior counsel appearing for the appellants has submitted that he would like to confine this appeal to the question of grant of bail on the ground of default in filing the charge sheet within 90 days and so far as merits of the bail application are concerned, the same would be urged before the learned Special Court, if required.

7) In view of the aforesaid submission of the learned Senior counsel, we are only called upon to consider the question as to whether appellants were entitled to grant of default bail on the ground that charge sheet was not filed by the investigation agency within the prescribed period of 90 days.

8) The appellants/accused have been arrested on 16.05.2021. The period of 90 days prescribed for completion of investigation as per provisions contained in Section 167 of Cr. P. C with its modified application to offences under ULA(P) Act

expired on 14.08.2021. On the said date, the period of detention of appellants/accused was extended by the Special Court by 29 days and thereafter from time-to-time it was extended upto 10.11.2021. The record reveals that charge sheet before the Special Court has been presented on 01.11.2021, which means that the same has been presented within the extended period of investigation.

9) It has been vehemently urged by the learned Senior counsel appearing for the appellants that order dated 14.08.2021 of the Special Court, whereby the period of investigation was extended beyond 90 days, is without jurisdiction and, as such, the appellants are entitled to grant of default bail. The submission of learned senior counsel is that application for extension of period of investigation has been made by the Investigating Officer and not by the Public Prosecutor as contemplated by the provisions of Section 43-D of ULA(P)Act. It is further urged that there were no cogent reasons for the learned Special Judge to grant extension is period of investigation.

10) In order to test the merits of the argument raised by learned Senior counsel appearing for the appellants, it would be apt to refer to the provisions contained in Section 43D(2) of ULAP Act:

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section

(2),-

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:-

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

11) The afore-quoted proviso to sub-section (2), which is to be read into Section 167 of the Cr.P.C in its application to cases for offences relating to ULA(P)Act, lays down that if it is not possible to complete the investigation within 90 days, the custody of an accused alleged to have committed offences under ULA(P) Act can be extended up to 180 days subject to the following conditions:

(1) there has to be a report of the Public Prosecutor indicating the progress of

investigation;

(2) Specific reasons for detention of accused beyond the period of 90 days have to be spelled out.

12) Learned Senior counsel appearing for the appellants had laid much emphasis on the ground that the application for extension in period of custody has to come from Public Prosecutor and not from the Investigating Officer and, as such, the Special Judge was not within his jurisdiction to pass order dated 14.08.2021.

13) There can be no quarrel with the proposition that a Public Prosecutor in the scheme of the provisions contained in Section 43D of the ULA(P) Act is an important functionary. It is the Public Prosecutor who has to examine the Case Diary and other material whereafter the said authority has to frame its independent opinion as to whether there is any requirement for extension of custody of the accused. The Supreme Court in the case of *State of Maharashtra v. Surendra Pundlik Gadling and others*, (2019) 5 SCC 178, has emphasized this aspect of the matter in clear terms. Paras 36 and 37 of judgment gives an idea as to what sort of role a Public Prosecutor has to perform while making his report in terms of Section 43D of UAPA Act. The same are reproduced hereunder:-

"36.No doubt, in para 23 of *Hitendra Vishnu Thakur* case, this Court laid emphasis on the importance of the scrutiny by a public prosecutor so as to not leave the detenu in the hands of the IO alone, being the police authority. The public prosecutor, thus, has the option to agree or disagree with the reasons given by the IO for seeking extension of time but in the facts of the present case, the second document in the form of an application shows scrutiny of the first document and thereafter details grounds and expanded reasons for the requirement of further time to complete the investigation.

37. Undoubtedly the request of an IO for extension of time is not a substitute for the report of the public prosecutor but since we find that there has been, as per the comparison of the two documents, an application of mind by the public prosecutor as well as an endorsement by him, the infirmities in the form should not entitle the respondents to the benefit of a default bail when in substance there has been an application of mind. The detailed grounds certainly fall within the category of "compelling reasons" as enunciated in *Sanjay Kedia* case."

14) In the light of aforesaid ratio laid down by Supreme Court and the legal position discussed hereinbefore, we need to consider facts of the instant case. It is true that, in the instant case application for extension of period of investigation and custody of the accused beyond 90 days has been made by the Investigating Officer before the Special Court. A certified true copy of the said application has been placed on record by the appellants. The appellants have also placed on record a certified true copy of the report of the Public Prosecutor submitted before the Special Court. The report and the application are both dated 14.08.2021.

15) The requirement of laws, as is clear from a bare perusal of the language of sub-section (2) of Section 43-D of ULA(P) Act, is that the Court has to record a satisfaction on the basis of report of the Public Prosecutor indicating the progress of investigation and the reasons for detention of accused beyond the period of 90 days. In the instant case, as per appellants own documents, there was a report of Public Prosecutor before the Special Court at the time of passing of order dated 14.08.2021. It is not a case where the Special Court has granted extension in period of detention of appellants/accused merely on the basis of application made by the Investigating Officer but it is a case where learned Special Court has drawn its satisfaction from the report of the Public Prosecutor which was before it. This becomes clear from the reading of the order dated 14.08.2021 passed by the learned Special Court. The said order bears reference to not only the application of the Investigating Officer but also to the report of the APP. Thus, the argument of learned Senior counsel that the order dated 14.08.2021 has been passed merely on the basis of the application of the Investigating Officer is belied by the material on record.

16) It has been next contended by learned Senior counsel appearing for the appellants that the investigation of the case was complete as back as on 15.07.2021 and, as such, the learned Special Judge while granting extension in period of investigation of the case was not possessed with sufficient reasons to do so.

17) A perusal of the application for extension of period of investigation filed by the Investigating Officer does reveal that on its part the investigating agency had completed the investigation on 15.07.2021 and had submitted the case for obtaining sanction from the Government but it is also recorded in the application that the file was received back from the higher authorities in terms of communication dated 15.07.2021 with directions to rectify certain observations. This means that the higher authorities were not satisfied with the investigation conducted and certain more aspects of the matter were required to be investigated. The application for extension of investigation as well as the report of the Public Prosecutor indicate that there were certain more aspects of the matter which were required to be investigated. It would be apt to reproduce the relevant excerpts of report of the Public Prosecutor to throw light on this aspect of the matter.

? "Since the accused persons have been arrested by making stern efforts by Police/SFs and if released on bail at this stage there is every apprehension that they will adopt again work for strengthening the activities of outfit in the area due to which the security & dignity of the State as well as peace loving citizens will be at stake.

? That technical opinion is awaited in the case so as to enable the investigating agency to investigate the case further and ascertain and trace the accomplices of the accused. It is further submitted that financial intelligence unit (FIU.IND) has been approached with the request to provide transaction details of accounts

Numbers used by the accused and the report thereof is still awaited. After the report is received the same can be put the analysis to ascertain the rule of accused in providing financial aid and sport to various proscribed organizations. The transaction made by accused Mujahid Ashraf through NEFT - SBI global line services and NEFT western unit financial services is being ascertained to unravel the conspiracy hatched by the accused.

? That sanction for launching prosecution is required to be obtained from the competent authority and investigating agency has to be forwarded designated authority for the purpose and the same is awaited so that charge sheet can be filed in the Hon'ble court."

18) It is in the light of afore-quoted report of the Public Prosecutor that learned Special Judge has noted in his order dated 14.08.2021 that further time is required for culmination of investigation as the retrieved data of seized mobile phones from FSL and transaction details of account numbers of accused persons from Financial Intelligence Unit (FIU-IND) has not been received so far. Besides this, it is also noted in the aforesaid order that the report relating to transactions made with account number of Mujahid Ashraf Khan through NEFT-SBI Global Line Services and NEFT Western Unit Financial Services is also awaited. So, it is a case where the learned Special Judge has meticulously applied his mind to the report of the Public Prosecutor and thereafter recorded a satisfaction that extension in period of investigation and custody of the appellants/accused is absolutely necessary. The order dated 14.08.2021 passed by learned Special Judge is lucid and well-reasoned.

19) Even otherwise, the appellants have not challenged the validity and legality of the order dated 14.08.2021 passed by the learned Special Court whereby their custody has been extended beyond the period of 90 days. Therefore, it does not lie in their mouth at this stage to contend that their custody beyond 90 days is not in accordance with law. In fact, it appears that the appellants have not even urged the ground of default bail before the Special Court while seeking bail in their favour.

20) Having held that order dated 14.08.2021, whereby period of detention of the appellants has been extended beyond 90 days is in accordance with law, the very basis for claiming default bail is knocked down.

21) For the foregoing reasons, we do not find any merit in this appeal. The same is, accordingly, dismissed. However, having regard to the fact that investigation of the case is complete and the charge sheet has already been laid before the learned Special Court, we leave it open to the appellants to approach the Special Court for grant of bail on merits in view of the changed circumstances.