

(2022) 05 J&K CK 0061

In the Jammu And Kashmir High Court

Case No : Criminal Appeal (D) No. 15 Of 2021, Criminal Miscellaneous Cases No. 1064 Of 2021

Waheed Ur Rehman Parra

APPELLANT

Vs

UT Of J&K Through Investigating Officer,

RESPONDENT

Date of Decision : 25-05-2022

Acts Referred:

National Investigation Act, 2008 — Section 21
Unlawful Activities (Prevention) Act, 1967 — Section 5, 6, 7, 13, 15, 17, 18, 19, 20, 38, 39, 40, 43D, 43D(5), 43D(6), 43E
Indian Penal Code, 1860 — Section 120B, 121, 121A, 124A
Arms Act, 1959 — Section 7, 25
Explosive. Substances Act, 1908 — Section 3, 4
Code Of Criminal Procedure, 1973 — Section 164, 173

Citation : (2022) 05 J&K CK 0061

Hon'ble Judges : Sanjeev Kumar, J; Vinod Chatterji Koul, J

Bench : Division Bench

Advocate : Sharik Reyaz, Asifa Padroo

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1 This is an appeal by the appellant under Section 21 of the National Investigation Act, 2008 [the Act?] against order dated 20.07.2021 passed by the Special Judge Designated under the Act, Srinagar, [trial Court?] rejecting the bail application of the appellant in pending challan in FIR No.31/2020 registered in Police Station, CIK Srinagar under Sections 13, 17, 18, 38, 39 & 40 of Unlawful Activities (Prevention) Act, 1967 ["UAPA Act"] read with Sections 120-B, 121, 121-A & 124-A IPC.

2 The appellant has challenged the order of rejection of his bail by the trial Court inter alia on the ground that FIR No. 05/2020 was registered on 11.01.2020 against one Syed Naveed Mushtaq and ors., in Police Station Qazigund under Sections 18, 19, 20, 38, 39 of UAPA Act read with Section 7/25 Arms Act and

Section 3/4 Explosive Substances Act. The investigation of the said FIR was thereafter taken over by the National Investigating Agency under the Act and the case was re-registered as RC.01/2020/NIA/JMU on 17.01.2020 and in the said case, the appellant was arrested. The appellant filed an application for bail before the Court of 3rd Additional Sessions Judge, Jammu (Designated Special Judge under the Act), however, during the pendency of the said bail application, the respondents, on same set of allegations, which were subject matter of investigation in FIR No. RC.01/2020/NIA/JMU, registered another FIR i.e. FIR No. 31/2020 in Police Station, CIK Srinagar under Sections 13, 17, 18, 38, 39 & 40 of UAPA Act read with Sections 120-B, 121, 121-A & 124-A IPC and as soon as the appellant was released on bail in RC.01/2020/NIA/JMU, he was arrested in the subsequent FIR i.e. FIR No. 31/2020 and this was done only with a view to attain collateral purpose of detaining the appellant illegally and unlawfully. The constitutional guarantees available to the appellant have been violated with impunity.

3. Learned counsel appearing for the appellant has laid much stress on the submission that once an FIR was registered against the appellant wherein he was released on bail, on same set of allegations, the second FIR could not have been registered against him and this being an important aspect, has been ignored by the trial Court while rejecting the bail plea of the appellant. Learned counsel further argues that while rejecting the bail plea of the appellant, the trial Court has not taken into consideration the fact that from the charge-sheet as well as the material placed on record by way of evidence collected during the investigation, the accusations are not made out against the appellant and that on same accusations and allegations, he had already been granted bail in FIR No. RC.01/2020/NIA/JMU by the 3rd Additional Sessions Judge, Special Judge, Jammu.

4. It is the contention of learned counsel appearing for the appellant that the trial Court, while passing impugned order dated 20.07.2021 rejecting the bail application of the appellant, has erred in law in not appreciating that proviso to sub-Section 5 of Section 43-D of UAPA Act is attracted only when the charge-sheet and the material placed in support thereof affords reason to believe that the accusation of being involved in the commission of offence punishable under Chapter IV and VI of the UAPA Act is, prima facie, true. It is argued that in the present case, taking the allegations made in the final report on their face value do not make out a case of commission of any offence falling under Chapter IV and VI of the UAPA Act. It is, thus, submitted that the rigours of Section 43-D of UAPA Act were not attracted and this aspect ought to have been considered by the trial Court.

5 With a view to substantiate his argument that FIR No. 31/2020 registered in Police Station, CIK, Srinagar is founded on the same allegations on the basis of which FIR No. 05/2020 was registered in the Police Station Qazigund, the appellant has, in the memorandum of appeal, drawn a comparative table to

indicate that the allegations in the two FIRs aforesaid are essentially and substantially the same. It is in the aforesaid backdrop, learned counsel appearing for the appellant submits that registration of second FIR i.e FIR No. 31/2020 in the Police Station, CIK Srinagar was only with a view to defeat the order of bail granted by the Special Judge, NIA Court, Jammu in FIR No. 05/2020. Learned counsel also draws the attention of this Court to the statements of material witnesses recorded by the Investigating Officer which are part of the challan pending trial before the trial Court. It is argued that none of the witnesses, whose statements have been recorded by the police in FIR No. 31/2020, anyway implicate the appellant with the commission of offences alleged.

6 Per contra, Ms. Asifa Padroo, learned AAG appearing for the respondents submits that FIR No. 31/2020 registered in the Police Station, CIK Srinagar is not only against the appellant, in particular, but it involves a number of political persons, terrorist outfits, secessionists and influential persons, who, in order to achieve their aim of causing instability in the Union Territory and eventually to cessation of Union Territory from Union of India, have been indulging in terrorist activities. It is submitted that the FIR registered by the police Station NIA, Jammu relates to a single transaction and therefore, the argument of sameness of the allegations in both the FIRs is not tenable and, therefore, the appellant cannot claim any benefit on the basis of such argument. It is contended that since the trial Court has framed charges against the appellant and, therefore, it is not open to him in this appeal to contend that the ingredients of the offences alleged against him are missing and that no offence as alleged is made out against him. Learned AAG argues that the offences allegedly committed by the appellant fall in Chapter IV and VI of UAPA Act and, therefore, the rigours of Section 43-D of UAPA Act are triggered. The appellant will not be entitled to bail if the Court, on perusal of the case diary or the final report made under Section 173 of Cr.PC, is of the opinion that there are reasonable grounds for believing that the accusation against such person is, prima facie, true. It is, thus, argued that given the fact that the trial Court has already framed the charges, the argument that the accusation against the appellant is, prima facie, not true is not available to the appellant.

7. Ms. Padroo thus contends that it may be true that against the framing of charges or for seeking the quashment, the appellants has invoked separate jurisdiction of this Court, but the fact remains that the trial Court, on the basis of evidence and the material collected during the investigation, which has culminated into submission of final report, has found, prima facie, that the allegations against the appellant do constitute offences alleged i.e. offences under Sections 13,17,18, 38, 39 and 40 of UAPA Act read with Sections 120- B, 121, 121-A and 124-A IPC .

8. Having heard learned counsel for the parties and perused the record, it is necessary to set out sub-Sections 5, 6 & 7 of Section 43-D of UAPA Act below:

“(5) Notwithstanding anything contained in the Code, no person accused of an

offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and

(6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing”

9. From reading of sub-Section (5) and (6) of Section 43-D of UAPA Act, it is abundantly clear that a person accused of an offence punishable under Chapters IV and VI of the UAPA Act shall not be granted bail unless following two conditions are satisfied:-

(i) That the Public Prosecutor has been given an opportunity of being heard; and,

(ii) That the Court on perusal of the case diary or the report made under Section 173 of Cr.P.C is of the opinion that there are reasonable grounds for believing that the accusation against such person is, prima facie, not true.

10. The aforesaid two restrictions on grant of bail engrafted in sub-Section (5) of UAPA Act are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on granting of bail. The term “bail” essentially means release of an accused awaiting trial or appeal subject to furnishing of security by the accused that he will submit whenever demanded by the legal authority. The application for bail under the provisions of Cr.P.C can be accepted or rejected on various grounds, such as, nature of offence, the manner in which the offence is committed, severity of punishment, risk of tempering with the evidence or witnesses, flight risk, etc. The object behind the denial of bail is always preventive as opposed to punitive. The bail in the bailable offences is as a matter of right and subject only to furnishing of security as an assurance of the accused for his/ her submission whenever demanded by legal authority, whereas in the matter of non-bailable offences, it is the discretion of the Court, which, of course, is to be exercised by the Court on well defined parameters of law. The most fundamental distinction between the general bail provisions and the bail provisions engrafted under UPA Act owes its origin to sub-Section (5) of Section 43-D of UAPA Act which, in addition to the general restrictions on the grant of bail imposed by the Cr.P.C, also provides that the person accused of an offence

punishable under Chapter IV and VI of UAPA Act shall not be released, unless the Public Prosecutor has been given an opportunity of being heard and if the Court is of the opinion that there are reasonable grounds for believing that accusation against such person is prima facie true. It is, thus, clear that the regular bail provisions under UAPA Act are distinct from similar provisions made in other enactments. While most of the statutes require recording of an opinion by the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, UAPA Act requires recording of an opinion by the Court deciding the bail that there are grounds for believing that accusation against such person is prima facie true.

11 The expression "prima facie true" would mean that the material/evidence collected by the Investigating Agency in reference to the accusation against the concerned accused in the FIR must prevail until contradicted, overcome or disapproved by other evidence and on the face of it, shows the complicity of such accused in the commission of stated offence. Thus, the degree of satisfaction is lighter when the Court has to opine that the accused is "prima facie true" as compared to the opinion of accused being "not guilty" of such offence as required under other special enactments. Therefore, the approach to regular bail under UAPA Act for terrorist acts is higher than the offences under IPC but comparatively less than what was required under the repealed POTA and TADA.

12 The Hon'ble Supreme Court in the case of NIA vs. Zahoor Ahmad Shah Watali, (2019) 5 SCC while considering the parameters for exercise of power under Section 43-D(5) of UAPA Act held thus:

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 special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to 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 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 collected by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good 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 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"

13 The Supreme Court in Zahoor Ahmed Shah Watali's case (supra) has further held that the exercise to be undertaken by the Court at the time of considering the bail plea of the accused is markedly different from discussing merits or demerits of evidence. The elaborate examination or dissection of the 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 stated offence or otherwise.

14 Undoubtedly, grant of bail is a discretion, but this discretion is to be used judiciously. Grant or denial of bail for commission of offences under UAPA Act is a power of the Designated Court which is required to be exercised on the well settled legal parameters laid down in the Cr.P.C for grant of bail hedged by Section 43-D(5) of UAPA Act. UAPA Act, as is apparent from its name, was initially envisaged to be a preventive legislation. It made provisions more or less for preventing the unlawful activities. It was, however, due to the compelling circumstances, UAPA Act became what it was never meant to be. Without going much into the history of legislation, suffice it to say that UAPA Act, which was initially enacted to provide for more effective legal mechanism to prevent certain unlawful activities of individuals and association, later on took within its sweep the robust legal frame work for dealing with terrorist activities and the matters connected therewith.

15 Be that as it may, Section 43-D of UAPA Act embodies a provision which can be viewed by some as an onslaught on personal liberties, but there could be no denying the fact that the personal liberties have to be balanced against the considerations of public interest. While considering the bail applications under UAPA Act, particularly in relation to a person accused of an offence punishable under Chapters IV and VI of UAPA Act, the Courts, while keeping in mind the rigours of sub-Section (5) of Section 43-D of the UAPA Act, should not forget that there is presumption of innocence in favour of the accused till he is proved guilty. This presumption is available to a person accused of any offence under UAPA Act except the offence under Section 15 of said Act. Section 43-E of UAPA Act provides for reverse burden in relation to the offence under Section 15 of the said Act.

16 In the instant case, the appellant is not charged with Section 15 of UAPA Act and, therefore, the reverse burden provision contained in Section 43-E of the

UAPA Act is not attracted. When we view the instant case in the light of settled legal position, we find that the trial Court has not exercised the discretion in consonance with the settled legal principles on grant or refusal of the bail. As is rightly contended by learned counsel appearing for the appellant that the appellant is charged under Section 18 of UAPA Act read with Sections 120-B and 121-A IPC, but no material or evidence is brought on record by the prosecution to sustain the charge.

17. Indisputably, in the final report presented in reference to FIR No. 31/2020, the appellant is the sole accused. Neither the names of the conspirator are vividly given, nor any evidence of prior concert is indicated anywhere in the final report. Regarding the sedition charges under Section 124-A IPC, the issue is governed by the recent judgment of the Supreme Court in the case of *S.G. Vombatkere vs. Union of India*, 2022 LiveLaw (SC) 470, whereby the Supreme Court has directed that all the pending trials, appeals and proceedings with respect to the charge framed under Section 124-A of IPC shall be kept in abeyance. Section 38 of UAPA Act relates to membership of a terrorist organization. Section 39 of the said Act is an offence relating to support given to a terrorist organization and Section 40 of the Act is an offence of raising fund for a terrorist organization.

18. From reading of the final report, it is abundantly clear that the prosecution is relying upon the evidence collected during the investigation which only points to the appellant having been seen in the company of one Yousaf Gadoora, an alleged over ground worker of a proscribed terrorist organization. Prima facie, we could not find any allegation in the final report which shows the association of the appellant with any terrorist organization, that too, with an intention to further its activities. Rather, the appellant is shown to be a member of a recognized political party i.e. Peoples Democratic Party which has remained in power in the erstwhile State of Jammu and Kashmir. There is nothing believable on record to demonstrate that the appellant has supported any terrorist organization with an intention to further activities of such organization. Simply because the appellant has been seen on some occasions with a person with doubtful credentials cannot itself lead to the conclusion that the appellant is either a member of a terrorist organization or is lending support to such organization with an intention to further its activities.

19. The Supreme Court in the case of *Sudesh Kedia vs. Union of India*, (2021) 4 SCC 704 while considering a criminal appeal filed by the accused Sudesh Kedia which had arisen out of rejection of bail under UAPA Act by the Special Judge NIA, Ranchi and dismissal of the appeal by the High Court, in paragraph 13.1 and 13.2 held thus:

"13.1.A close scrutiny of the material placed before the Court would clearly shows that the main accusation against the appellant is that he paid levy/ extortion amount to the terrorist organization. Payment of extortion money does not amount to terror funding. It is clear from the supplementary charge-sheet

and the other material on record that other accused who are members of the terrorist organization have been systematically collecting extortion amounts from businessmen in Amrapali and Magadh areas. The appellant is carrying on transport business in the area of operation of the organization. It is alleged in the second supplementary charge-sheet that the appellant paid money to the members of the TPC for smooth running of his business. Prima facie, it cannot be said that the appellant conspired with the other members of the TPC and raised funds to promote the organization”.

“13.2. Another factor taken into account by the Special Court and the High Court relates to the allegation of the appellant meeting the members of the terror organization. It has been held by the High Court that the appellant has been in constant touch with the other accused. The appellant has revealed in his statement recorded under Section 164 Cr.PC that he was summoned to meet A-14 and the other members of the organization in connection with the payments made by him. Prima facie, we are not satisfied that a case of conspiracy has been made out at this stage only on the ground that the appellant met the members of the organization”.

20 It is, thus, clear that merely the accused having been seen in the company of a member of a terrorist organization without doing anything more is not enough to attract the applicability of UAPA Act. Similarly, insofar as Section 17 of UAPA Act is concerned, it provides punishment for raising funds for the terrorist act. From reading of the final report, one would find that this charge owes its origin to the allegation of attempt made by the appellant to arrange five AK-47 rifles on payment of Rs.1 lac for each. The allegation further states that the aforesaid deal though contemplated, did not materialize and was subsequently abandoned. The allegation has cropped up from the disclosure of one Naveed Babu stating that accused had paid Rs.10 lacs to IrfanShafi forming subject matter of RC No.01/2020/NIA/JMU.

21. It may be noted that with regard to the aforesaid allegation, the Special Judge, NIA Jammu has already admitted the appellant to bail. The allegation with regard to the plan made by the appellant to procure five AK- 47 rifles may amount to making preparation for committing the offence, but cannot be tantamount to commission of offence under Section 17 of UAPA Act. So far as Section 13 of UAPA is concerned which the appellant is also charged with, it does not fall in Chapters IV or VI of UAPA Act and, therefore, saved from the rigours of section 43-D of UAPA Act in the matter of grant of bail to the person accused of such offence.

22. Viewed from any angle, the evidence assembled by the Investigating Agency and relied upon by the prosecution to prosecute the appellant even if accepted as it is without any denial or rebuttal by the appellant, is not such on the basis of which the Court can formulate an opinion that the allegations proved during the investigation are prima facie true. The evidence as is gathered by the prosecution is too sketchy to be believed prima facie true, that too, with a view

to deny bail to the appellant. The gravamen of allegation against the appellant is that he was hobnobbing with a member of a terrorist organization with a view to further his political aspirations. The appellant is shown to be a member of mainstream political party i.e Peoples Democratic Party which has remained in power in the erstwhile State of Jammu and Kashmir. On the close scrutiny of the material placed on record in the shape of statements of various witnesses, the prosecution appears to have prima facie established that the appellant was meeting with and was seen in the company of one Yousaf Gadoora, an over-ground worker, a member of terrorist organization. Whether this meeting was aimed at supporting the terrorist organization by providing funds and other logistics is not substantiated by any of the statements of the witnesses recorded during investigation. There is no evidence on record which, prima facie, shows that the association of the appellant with the terrorist Yousaf Gadoora was with an intention to further the activities of terrorist organization.

23 Though, it is vehemently argued by learned counsel for the appellant that the second FIR i.e FIR No. 31/2020 is on the selfsame allegations on which the earlier FIR i.e FIR No. 05/2020 stands registered in the Police Station Qazigund, yet we have deliberately refrained from commenting on the aforesaid issue as the same is already subject matter of adjudication in separate proceedings launched by the appellant to challenge the FIR No. 31/2020 and the final report filed before the trial Court in pursuant thereto. Suffice it to say that in view of the facts and circumstances we have narrated above, we are of the opinion that the appellant has made out a case for grant of bail. The Trial Court has not appreciated the matter in its true perspective and has dismissed the bail application of the appellant being influenced by the fact that the charges for the offences alleged in FIR No. 31/2020 stand framed and, therefore, it is not open to the appellant to contend that the allegations made in the FIR against the appellant do not make out, prima facie, the offences under Sections 13,17,18, 38, 39 & 40 of UAPA Act read with Sections 120-B, 121, 121-A & 124-A IPC.

24 It may be noted that the appellant was initially arrested in FIR No. 05/2020 on 25.11.2020. and was released on bail by the Special Judge NIA Jammu on 09.01.2021. Before the applicant could be released on bail as directed by the Special Judge vide order dated 09.01.2021, he, while in custody was arrested on 10.01.2021 in connection with FIR No. 31/2020. The appellant is, thus, in incarceration since 25.11.2020. The investigation in the case is complete, the final report filed and the charges framed by the trial Court. As a matter of fact, it is stated by learned counsel for the parties that even a couple of witnesses too has been examined.

25 Keeping in view the totality of circumstances and the discussion made hereinabove, we are of the considered view that this appeal deserves to be allowed. Ordered accordingly. Consequently, order dated 20.07.2021 passed by the Special Judge, NIA Srinagar is set aside and the appellant is admitted to bail in connection with FIR No.31/2020 registered in Police Station, CIK Srinagar. The

Superintendent, Central Jail, Srinagar, is directed to release the appellant, provided he is not involved in any other case, after the appellant furnishes before him a personal bond of rupees one lac with a surety of the like amount. This order shall be subject to the following conditions:

- (i) That the appellant will make himself available before the Investigating Officer of the case, as and when required to do so;
- (ii) That he will not leave the UT of Jammu and Kashmir without prior permission of the learned trial Court;
- (iii) That he shall surrender his passport, if any, before Investigation Officer against proper receipt; and,
- (iv) That he will appear before the learned trial Court on each and every hearing of the case.

26 Before parting, we make it clear that the observations made in this order are restricted to the disposal of this appeal and shall not be construed as an expression of opinion on the merits of the case.

Registry to forthwith send a copy of this judgment to the Superintendent, Central Jail, Srinagar, for compliance.