(2018) 09 DEL CK 0119

In the Delhi High Court

Case No : Criminal Appeal No. 768 Of 2018

Zahoor Ahmad Shah Watali — APPELLANT

Vs

National Investigating Agency — RESPONDENT

Date of Decision : 13-09-2018

Acts Referred:

National Investigation Agency Act, 2008 — Section 21(1), 21(4)
Indian Penal Code, 1860 — Section 120B, 121, 121A
Unlawful Activities Prevention Act, 1967 — Section 13, 16, 17, 18, 20, 38, 39, 40, 43D, 43D(5), 43D(6), 44
Code of Criminal Procedure, 1973 — Section 161, 161(3), 173, 173(6), 173(8), 175(5)(b), 207, 207(ii), 207(4), 438
Negotiable Instruments Act, 1881 — Section 17

Citation : (2018) 09 DEL CK 0119

Hon'ble Judges : S. Muralidhar, J;Vinod Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

,,,

Dr. S. Muralidhar, J.",,,

1. This is an appeal under Section 21(1) read with Section 21(4) of the National Investigation Agency Act, 2008 (â??NIA Actâ?) against an order",,,

dated 8th June 2018 passed by the learned District & Sessions Judge/Special Court (NIA), New Delhi (hereafter â??the learned DS&J/trial",,,

Courtâ?) rejecting the bail application dated 2nd January, 2018 of the Appellant, Zahoor Ahmad Shah Watali in NIA Case No.RC-",,,

10/2017/NIA/DLI.Â,,,

Case against the Appellant,,,

2. The aforementioned case was registered by the National Investigating Agency

(â??NIAâ?), the Respondent herein, against 12 accused persons,",,,

including the Appellant, who has been arrayed as Accused No.10 (â??A-10â?). The case has been registered under Section 120-B, 121, 121-A of",,,

the Indian Penal Code (â??IPCâ?) as well as Sections 13, 16, 17, 18, 20, 38, 39 and 40 of the Unlawful Activities Prevention Act, 1967",,,

(â??UAPAâ??).Â Â Â Â,,,

3. The charge sheet filed against the Appellant before the trial Court on 18th January, 2018 states that he received money from Hafeez Mohammad",,,

Syed (â??A-1â?), from the Inter Services Intelligence (â??ISIâ?) of Pakistan, the Pakistan High Commission in New Delhi (â??PHCâ?) and also",,,

from â??a sourceâ? in Dubai and then remitted money to the leaders of the All Parties Hurriyat Conference (â??APHCâ?), a conglomerate of 26",,,

political/social/ religious organizations whose agenda is to create an atmosphere conducive to the attainment of their goal in Jammu and Kashmir of,,,

secession from the Union of India as well as to separatists and stone-pelters.Â,,,

4. According to the charge-sheet, the Appellant was acting as a conduit to transfer funds from terrorist organizations operating out of Pakistan and",,,

from other sources to India to fuel violence in J&K. As noted by the trial Court, in paragraph 3.1 of the impugned order, the case of the NIA is that",,,

the Appellant thus played a crucial role in the funding of terrorist activities.Â Â,,,

The charge sheet,,,

5. A copy of the charge-sheet filed by the NIA in the trial Court on 18th January 2018 is enclosed with the present memorandum of appeal as,,,

Annexure-C. The charge-sheet is in 64 pages. There are 12 accused. A-1 is Hafeez Mohammad Syed, described as the head of the banned terrorist",,,

organization â??Lashkar-e-Toibaâ? (â??LETâ?), A-2 is Mohammed Yusuf Shah @ Syed Salahuddin, stated to be the head of banned terrorist",,,

organization Hijbul Mujahiddin (â??HMâ?); A-3 is Aftab Ahmad Shah @ Aftab Hilali Shah @ Shahid-ul-Islam, described as the spokesman and",,,

media advisor of the APHC (Mirwaiz Umar Farooq Faction); A-4 is Altaf Ahmad Shah @ Fantoosh, described as the public relations officer and",,,

chief organizer as well as Secretary of the APHC; A-5 is Gulam Mohammad Khan, the chairman of National Front which is described as a political",,,

separatist outfit of J&K.; A-6 is Farooq Ahmad Dar @ Bitta Karate, described as the Chairman Jammu and Kashmir Liberation Front (R); A-7 is",,, Mohammad Akbar Khanday, described as spokesperson/ media advisor of Hurriyat Conference (G); A-8 is Raja Mehrajuddin Kalwal, described as",,,

President of Tehreek-e-Hurriyat, District Srinagar; A-9 is Bashir Ahmad Bhat @ Peer Saifullah, an Imam in a Masjid and a personal assistant of",,,

Syed Ali Shah Geelani as well as a secretary of Tehreek-e-Hurriyat; A-11 is Kamran Yusuf, a photo journalist; and A-12 is Javed Ahmad Bhatt who",,,

is a hawker of home appliances.Â Â,,,

6. After filing of the charge-sheet, A-11 and A-12 have been granted regular bail. A-1 and A-2 have not been arrested. All the other accused,",,,

including the present Appellant (A-10) are in judicial custody.Â,,,

7. As far as the Appellant is concerned, he was arrested on 17th August, 2017 and has been in judicial custody since then. Although in the charge-",,,

sheet in the column for â??ageâ?, his date of birth is indicated as 25th June 1952, the Court is informed that this is not his correct date of birth. His",,,

age shown as â??75 yearsâ??, is also stated to be inaccurate, although he is definitely over 70 years old.Â Â Â Â",,,

8. The portion of the charge-sheet that is relevant to the Appellant is from paragraph 17.6 onwards, which titled â??funding of secessionist and",,,

terrorist activities in Jammu and Kashmirâ??. The paragraph begins with the statement,,,

â??If publicity and propaganda is oxygen for terror groups, terror financing is like its blood.â?? It proceeds to state:",,,

â??Terror financing provides funds for recruitment, operationalization of training and training camps, procurement of arms and ammunition,",,,

operational cost of planning and resources for terrorist acts, running of underground networks, well-planned stone pelting, school burnings, targeted",,,

attacks, provision of legal support for terrorists and over- ground workers facing judicial process, ex-gratia payment for militants killed in terrorist",,,

operations, regular payments to the families of terrorists and militants killed or convicted, funds for propaganda to clergy as well as relief measures",,,

for civilian population and also in case of natural disasters.Â,,,

The investigation in the case has revealed that the secessionists are mobilizing funds from all possible sources to fuel unrest and support the on-going,,,

secessionist and terrorist activities in Jammu & Kashmir.â??Â,,,

9. Paragraph 17.6.1 of the charge-sheet is titled â??funding from Pakistanâ?. It

says that the Hurriyat leaders are receiving funds from Pakistan,,,

through conduits and also from the PHC directly. According to the NIA, this was substantiated by an incriminating document seized from the house",,,

of Ghulam Mohd. Bhatt during search. Ghulam Mohd. Bhatt worked as the cashier-cum-accountant with accused Zahoor Ahmad Shah Watali (A-,,,

10), a known Hawala conduit.Â Â",,,

10. It is further stated in paragraph 17.6.1 (i) that the said document, which is described in the charge-sheet as Document No.132 (a), showed that",,,

the Appellant was receiving money from A-1 via ISI, from the PHC and also from a source based in Dubai. It is then asserted that the Appellant was",,,

remitting the same to the Hurriyat leaders, as well as separatists and stonepelters in Jammu and Kashmir. According to the NIA, the said document",,,

has been maintained in the regular course of the Appellantâ?s business and has been signed by the Appellant himself. It is again asserted that the said,,,

document shows that Hurriyat leaders were receiving funds from Pakistan through the officials of the PHC and through the Appellant. It is further,,,

stated that the signature of the Appellant has also been verified and as per the expert report his signature on the questioned document matched the,,,

specimen handwriting as well as his admitted handwriting.Â,,,

11. Paragraph 17.6.1 (ii) of the charge-sheet states that the role of Pakistan for funding secessionist activities also surfaced during the scrutiny of an,,,

â??unedited version of the audio/video furnished by the office of India Today TV News Channelâ? wherein A-5 is said to have admitted that â??the,,,

secessionists and terrorists of the Valley are receiving financial support from Pakistan and would have received approximately Rs.200 crores to,,,

organize anti-India protests and agitations after the killing of Burhan Wani, the Commander of HM.â? Inter alia it is stated that A-5 admitted to the",,,

pivotal role played by the PHC to receive and convey instructions from Pakistan.Â,,,

12. Paragraph 17.6.1 (iii) again refers to the same audio/video which purportedly revealed that A-6 (Bitta Karate) likewise admitted that funds were,,,

being sent by Pakistan to the secessionists and terrorists in the Kashmir Valley including himself â??for organizing forcible closures, anti-India",,,

protests and processions and stone-pelting on the security forces.â??,,,

13. Paragraph 17.6.1(iv) of the charge-sheet alleges that the PHC in New Delhi

used to organize functions and meetings in New Delhi to which the,,,

Hurriyat leaders from Kashmir were invited and they were given instructions and funds on a regular basis. It is further stated:,,,

â??These funds were given to various allied groups of the APHC and investigations have revealed that a First Secretary level officer of Pakistan,,,

High Commission in New Delhi would act as a channel and A-10 Zahoor Ahmed Shah Watali would act as a courier to deliver the funds to the,,,

Hurriyat leadership. These funds as explained above were used to foment the secessionist and separatist activities and unrest in the Valley in an,,,

organized manner.â??Â,,,

14. It may be noticed at this stage that in the charge-sheet no one in the PHC is named. It is not asserted that the NIA is unable to proceed against,,,

such individual because of any diplomatic immunity or status. Further, except for a reception held at the PHC at New Delhi on 22nd March, 2013, no",,,

dates of functions/meetings organized by the PHC in Delhi where the Hurriyat and other separatist leaders were given instructions and funds have,,,

been mentioned. The invitation card from the PHC inviting him to the above function is said to have been seized from the house of A-6. It is stated,,,

that the investigation â??also established that A-4 was in direct contact with the High Commission of Pakistan in New Delhi and would apprise him,,,

about the situation in Jammu and Kashmirâ?. There is no document forming part of the charge-sheet or any statement of any witness that A-10 was,,,

invited to the PHC and given funds or instructions by anyone in the PHC.Â Â,,,

15. Paragraph 17.6.2 of the charge sheet is subtitled â??Funding from Terrorist Organizations based in Pakistanâ?. Here it is asserted that the same,,,

incriminating document No.132 (a) which was seized from the house of Ghulam Mohd. Bhatt, who worked as Cashier-cum-Accountant with the",,,

Appellant, showed that the Appellant received money from A-1 and remitted it to the Hurriyat leaders who were responsible for causing the",,,

secession of J&K from the Union of India.Â,,,

16. Paragraph 17.6.3 is subtitled â??Local donations/ Zakat/ Baitulmal.â? It is stated that the Hurriyat has an established network of cadres at,,,

districts and local levels. There are district presidents of the Hurriyat and block level leaders who have the responsibility to raise funds through,,,

donations during the religious festivals in the month of Ramzan. It is stated that in a wellestablished system, receipt books are printed and funds are",,,

collected from shopkeepers, businessmen, and residents of Kashmir. Money is also collected to become a member of the Tehreek-e-Hurriyat. The",,,

selected members are made rukuns and asked to propagate the separatist ideology of the Hurriyat. These rukuns acts as foot soldiers and ensure that,,,

bandhs and hartals are successful. They also lead the processions and participate in stone-pelting. It is stated that the Hurriyat leadership appeals to,,,

the public to contribute money generously by way of donations for their so called freedom movement. Reference is made to the website of the,,,

Hurriyat Conference which carries a message from Shah Ahmad Shah Geelani (not an accused) asking people to come forward for donations in the,,,

month of Ramadan to help the families of martyrs and prisoners. This is said to substantiate the fact that â??Hurriyat is raising funds through,,,

donations and using the same to fuel secessionist activities and to support the families of killed and jailed terrorists.â??Â Â,,,

17. Paragraph 17.6.4 is subtitled â??LoC Tradeâ?. According to the NIA, the separatists leaders are raising funds through the LoC trade by way of",,,

directing Kashmiri traders to do under-invoicing of the goods which were imported through LoC barter trade. Parts of the profits from selling the,,,

goods to traders in Delhi is alleged to be shared with Hurriyat leaders and other separatists, which in turn is used for anti-India propaganda for",,,

mobilizing the public to organize protests and stone-pelting and to support the families of killed/jailed militants. It is said that there arehawala operators,,,

based in Srinagar, New Delhi and other parts of the country.Â Â Â",,,

18. Specific to the Appellant are the allegations made in Paragraph 17.6.5 of the charge-sheet which is subtitled â??Hawalaâ?. This being the,,,

principal allegation against the Appellant, requires to be summarized as under:Â",,,

(i) The Appellant is one of the conduits to bring money from off-shore locations of India to fuel anti-India activities in Jammu and Kashmir.,,,

Reference is again made to the same incriminating document i.e. D No.132 (a).,,,

(ii) A-10 was bringing money from off-shore locations to India â??by layering it through the scores of firms and companies he has openedâ?.,,,

Reference is made to an NRE account of the Appellant at the J&K Bank where, from 2011 till 2013, he is said to have received Rs.93, 87, 639. 31",,, from â??unknown sourcesâ??.Â,,,

(iii) The Appellant was showing foreign remittances under â??other incomeâ? in his proprietorship M/s Trison International, Srinagar. Foreign",,,

remittances in the sum of Rs.2,26,87,639.31 were received by the Appellant in different accounts from 2011 to 2016. It is repeated that",,,

Rs.93,87,639.31 was received in his NRE account from 2011 to 2013.Â",,,

(iv) It is stated that Rs.14 lacs were remitted in the account of a medical college in Jammu through NEFT on 9th April, 2013 against the fees",,,

deposited for his son (who incidentally is a medical doctor and through whom the present appeal has been filed). It is stated that Rs.60 lacs were,,,

remitted in the current account of the Appellant in J&K Bank. Rs.5 lacs were remitted in the account of M/s Trison Farms and Constructions Pvt.,,,

Limited (â??TFCPLâ??). It is stated that all these foreign remittances â??are from unknown sourcesâ??.Â,,,

(v) On 7th November, 2014, one Nawal Kishore Kapoor (who initially was a witness but has, since the filing of the charge-sheet, been arrayed as an",,,

accused himself), a resident of United Arab Emirates (â??UAEâ?) entered into an agreement with TFCPL, whose Managing Director (â??MDâ?)",,,

is the Appellant to take land measuring 20 kanals in Budgam in J&K on lease in consideration of a sum of Rs.6 crores as premium and Rs.1,000/-",,,

annual rent for an initial period of 40 years which could be extended through mutual agreement. In the said agreement, TFCPL was declared as the",,,

absolute owner of the land. Mr Kapoor remitted a total sum of Rs.5.579 crores in 22 instalments between 2013 and 2016 to the Appellant.Â,,,

(vi) During investigation it was revealed that no land exists in the name of TFCPL as per the balance sheet of that company. Further, it was",,,

ascertained that Rs.5,57,90,000 was mobilized by Mr. Kapoor from unknown sources and remitted to Appellant to lease a piece of land which does",,,

not even exist in the name of TFCPL and therefore the agreement itself lacks legal sanctity. According to the NIA, this â??proves that the said",,,

agreement was a coverâ?? created by the Appellant â??to bring foreign remittances from unknown sources to Indiaâ??.Â,,,

(vii) The Chartered Accountant (â??CAâ?) who signed the audited balance sheet of M/s Trison International., TFCPL and M/s Yasir Enterprises",,,

for various years between 2013-14 and 2015-16 â??did so without seeing any supporting documentsâ?. According to the NIA, the balance sheets of",,,

the above entities/companies were sent to the CA by Mustaq Mir, Cost Accountant and Shabir Mir, CA from Wizkid Office, Srinagar through email",,,

and he was asked to sign on them in Delhi without showing any documents. According to the NIA, this also clearly showed that the Appellant was",,,

remitting money received from unknown sources to India.Â,,,

(viii) TFCPL raised an unsecured loan of Rs.2,65,55,532/- from the Directors of the company, i.e. the Appellant, hisÂ wife, and his three sons in the",,,

Financial Year (â??FYâ?)Â 2010-11Â in the form of both cash and cheque and this was used to repay the secured loan of Rs.2,94,53,353/- in the",,,

books of J&K Bank. The source of money with the Directors could not be explained satisfactorily by the Appellant.Â,,,

(ix) The seizure from the house of the Appellant of a list of ISI officials and a letter from Tariq Shafi, proprietor of Al Shafi Group addressed to the",,,

PHC recommending grant of visa to the Appellant â??shows his proximity with Pakistani Establishmentâ?. It is stated that the name of Tariq Shafi,,,

figures in the document of foreign contributions seized from the house of the Appellantâ??s cashier-cum-accountant Ghulam Mohd. Bhatt.,,,

19. Paragraph 17.9 of the charge sheet is sub-titled â??CDR Analysisâ?. According to the NIA, the CDRs revealed the conduct of the accused",,,

persons â??with each other with some militants/OGWs (Over Ground Workers) and the hawala conduitâ? i.e. the Appellant and the other accused.,,,

It is asserted that the Appellant was telephonically in contact with A-3, A-4, A-5 and A-6. It is also stated that A-3 to A-12 are in contact with each",,,

other either directly or indirectly. The chart showing their inter-linkages is set out as part of the charge-sheet.Â,,,

20. Paragraph 17.10 of the charge sheet is sub-titled â??Summing Upâ??.,,,

Paragraph 18 is subtitled â??Chargeâ??. Specific to the Appellant are the allegations in paragraph 18.9 stating:Â,,,

â??A-10 is a known hawala dealer and financer and has a number of cases against him which are being investigated by sister investigation,,,

agencies.â??Â,,,

21. The charge-sheet does not set out the details of the other cases against the Appellant being investigated. This Court too has not been shown any,,,

such details.Â,,,

22. Paragraph 18.10 of the charge sheet refers to the CDR linkages establishing that â??A-3 to A-10 are with constant communication with each,,,

other and there is a clear meeting of minds of the above accused in hatching the conspiracy with the support of A-1 and A2 and the other,,,

secessionist leaders of Hurriyat Conference and other terrorist organizations of Jammu and Kashmir.â??Â Â Â Â,,,

23. Paragraph 18.13 of the charge-sheet sets out in tabular form the names of the accused and the offences with which they are charged. Paragraph,,,

18.14 refers to sanction having been received by the Ministry of Home Affairs, Government of India on 16th January, 2018 for prosecuting the",,,

accused under the UAPA provisions. Paragraph 18.16 states that further investigation will continue under Section 173 (8) of Cr PC.Â,,,

In the trial Court,,,

24. As noticed earlier, the charge-sheet was filed on 18th January, 2018. Cognizance was taken by the trial Court on 2nd February, 2018. The",,,

application filed by the Appellant on 3rd January, 2018 for regular bail was listed on nine dates between 12th January, 2018 and 18th May, 2018,",,,

when arguments were concluded. While the bail application was reserved for orders, an order dated 23rd May, 2018 was issued by the High Court of",,,

Delhi on the administrative side transferring the pending matters from the Court of the Additional Sessions Judge (â??ASJâ?) to the Court of the,,,

D&SJ â??with immediate effectâ?. As a result, the bail application, which was otherwise reserved for orders, got transferred to the Court of D&SJ",,,

and again listed for hearing on 17th July, 2018.",,,

Order of this Court,,,

25. Aggrieved by the above transfer of the case to the Court of the D&SJ, the Appellant, through his son, Dr. Yawar Watiali filed W.P. (C)",,,

No.5990/2018 in this Court. It was submitted that â??the previous Judge who has heard the bail application ought to dispose of the bail application as,,,

all submissions have been practically concluded.â??Â Â Â Â,,,

26. In its order dated 31stMay, 2018 disposing of the said writ petition, the Division Bench of this Court distinguished the decisions in Javed Ahmed",,,

Tantray v. Delhi High Court (decision dated 17th September, 2013 in W.P. (C) No.5661/2013) and the Full Bench in Subhashni Malik v S.K. Gandhi",,,

2016 SCC-OnLine (Del.) 5058 and observed as under:,,, â??In the present case, no doubt some adverse impact would be felt by the petitioner because his bail application was heard and was scheduled for",,,

disposal, nevertheless, the Court is of the opinion that no exception can be taken to the general approach that barring rare cases, the Court which is",,,

entrusted with the case through transfer should deal with it fully.â??,,,

27. The Court then directed as under:,,,

Â Â Â Â â??Keeping in mind, however, the likelihood of some prejudicial impact, given that the bail application in the petitionerâ?s case was heard",,,

for some time, the Court is of the opinion that instead of the date scheduled for hearing i.e. 17.07.2018, the concerned Judge Ms. Poonam Bamba,",,,

District & Sessions Judge should advance the hearing of the case NIA vs. Hafeez Mohammad Syed, RC No. 10/2017/NIA/DLI and it should be",,,

listed before her on 4th June, 2018.â??",,,

28. The Division Bench requested the trial Court to â??proceed and hear the bail application expeditiously and if possible on day-to-day basis and on,,,

conclusion of hearing pass appropriate orders preferably by the end of June, 2018â?. Thereafter the case was heard before the learned D&SJ on 4th",,,

and 5th June, 2018 and the impugned order was passed on 8th June, 2018.Â Â Â",,,

Impugned order of the trial Court,,,

29. In the impugned order, the learned D&SJ came to the following conclusions:Â",,,

(i) From a plain reading of Section 17 of the UAPA it is clear that the funds may have been collected/raised from a legitimate source and that â??the,,,

actual user of such funds is not a must.â? The offence is attracted when funds are raised, collected or provided with the knowledge that such funds",,,

â??are likely to be used by such person/terrorist / terrorist organization / terrorist gang for commission of terrorist act.â??Â,,,

(ii) The fact that the Appellant was receiving money from abroad/(A-1), from the HCP and others and was passing on the said funds to Hurriyat",,,

leaders was â??prima facie borne out from D-152 read with statement of PW-29 and D-154 (expertâ?s report) as per which the signatures of the,,,

accused on D-152 were compared with his admitted handwriting and were verified and found to be similar.â? [Document D-152 referred to by the,,,

learned D&SJ is in fact the same as D132(a)]. Thus, the submission of defence counsel that the said document could not be looked into at all even to",,,

form a prima facie opinion â??cannot be acceptedâ?. The decision of the Supreme Court in Manohar Lal Sharma v. Union of India (2017) 11 SCC,,,

783 is â??also of no assistance to the accusedâ??.Â,,,

(iii) The association/proximity of A-4 and A-6 with the Appellant was also prima facie borne out from the statement of protected witness PW-48.,,,

The Appellantâ?s link â??with people who have role in governance of Pakistan and its Hurriyat leadersâ? had also â??prima facie come on record,,,

vide statement of PW-52, documents D-3, D-4, D-4(e) etc and other material on recordâ??. The trial Court then came to the following conclusions:Â",,,

â??7.10. In view of the above facts and circumstances, the statements of witnesses/ material/documents and other material placed on record by",,,

NIA, offences as alleged against the accused are prima facie made out. Therefore, in view of the bar under proviso to Section 43D (5) UA (P) Act,",,,

the accusedâ??s prayer for bail cannot be granted.â??,,,

30. The trial Court then proceeded to deal with the prayer for interim bail on health grounds and rejected it after noting that he was being provided,,,

appropriate medical attention at the jail hospital and at the RML Hospital as well as AIIMS. Nevertheless, the Jail Superintendent was directed to",,,

provide proper medical care and treatment to the Appellant as and when requested.Â,,,

31. This Court has heard the submissions of Mr Vikas Pahwa, learned Senior Counsel appearing for the Appellant and Mr Sidharth Luthra, learned",,,

Senior Counsel appearing for the NIA. The Court has also been taken through the documents which formed part of the record before the trial Court,",,,

reference to some of which will be made presently.Â,,,

Relevant provisions of the UAPA,,,

32. Before proceeding to deal with the submissions, the Court would first like to refer to the provisions of the UAPA that have been invoked by the",,,

NIA against the Appellant. It may be recalled that Section 13 (punishment for unlawful activities); Section 16 (punishment for terrorist act); Section,,,

17 (punishment for raising funds for terrorist act); Section 18 (punishment for conspiracy); Section 20 (punishment for being member of terrorist gang,,,

or organization); Section 39 (offence relating to support given to terrorist organization); and Section 40 (offence for raising funds for a terrorist,,, organization) of the UAPA have been invoked.Â Â,,,

33. Relevant to the present appeal is Section 43-D of the UAPA which modifies the application of certain provisions of the Cr PC in their application,,,

to the UAPA. Specific to the question of bail to an accused charged with UAPA offences is Section 43-D (5) of the UAPA which reads as under:,,,

â??(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:Â,,,

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.â??,,,

34. In other words, the proviso to Section 43-D (5) of the UAPA states that an accused shall not be released on bail if the Court â??on a perusal of",,,

the case diary or the report made under Section 173 of the Code is of the opinion that there are â??reasonable grounds for believing that the,,,

accusation against such person is prima facie true.â?? A careful reading of the above proviso indicates that:Â,,,

(i) As opposed to the general criminal law, under the UAPA grant of bail is the exception. If the prosecution either through the case diary or through",,,

the charge sheet is able to show â??reasonable groundsâ? for believing that the accusation is â??prima facieâ? true then the accused person,,,

â??shall not be released on bailâ??.Â,,,

(ii) As far as the accused person is concerned, in order to be able to be considered for the grant of bail, he will have to demonstrate that the",,,

prosecution has not been able to discharge the above burden viz., that there are reasonable grounds to show that the accusation against him is prima",,,

facie true.Â,,,

(iii) For forming such an opinion, what the trial Court will peruse is the case diary â??orâ? the charge-sheet under Section 173 Cr PC. At a stage",,,

prior to the filing of the charge sheet, the case diary can be looked into by the trial Court to find out about the progress of the investigation and about",,, the material gathered against the accused person. The charge sheet is the culmination of the analysis of the investigation officer (IO) of all the,,,

material gathered and reflects his opinion about the guilt of the accused. Although it is argued by Mr Luthra that the trial Court could peruse both the,,,

case diary as well as the charge-sheet, the legislative intent is clear that once a charge-sheet has been filed, the trial Court will look to the charge-",,,

sheet as it is the expression of opinion formed by the Investigating Officer (â?? IOâ?) after analyzing the evidence that has been gathered, all of",,,

which ought to have been referred to in the case diary.Â Â,,,

35. What is â??reasonableâ? will of course differ from case to case. The Supreme Court in Hitendra Vishnu Thakur v State of Maharashtra AIR,,,

1994 SC 2623 in the context of the Terrorism and Disruptive Activities Act, 1985 (â??TADAâ??), observed as under:",,,

â??... Of late, we have come across some cases when the Designated Courts have charge-sheeted and/or convicted an accused person under",,,

TADA even though there is not even an iota of evidence from which it could be inferred, even prima facie, let alone conclusively, that the crime was",,,

committed with the intention as contemplated by the provisions of TADA, merely on the statement of the investigating agency to the effect that the",,,

consequence of the criminal act resulted in causing panic or terror in the society or in a section thereof. Such orders result in the misuse of TADA.,,,

The Parliament, through Section 20A of TADA has clearly manifested its intention to treat the offences under TADA seriously in as much as under",,,

Section 20A(1), notwithstanding anything contained in the Cr.PC, no information about the commission of an offence under TADA shall even be",,,

recorded without the prior approval of the District Superintendent of Police and under Section 20A(2) no court shall take cognizance of any offence,,,

under TADA without the previous sanction of the authorities prescribed therein. Section 20A, was thus, introduced in the Act with a view to prevent",,,

the abuse of the provisions of TADA.,,,

13. We would, therefore, at this stage, like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA",,,

277.,"Statement of Protected Witness â??Charlieâ?

under Section 164 Cr PC dated

21.12.2017.",,"Available in the

Honâ?ble court of Spl

Judge NIA in sealed

cover

278.,"Statement of protected witness â??Romeoâ?

under section 164 Cr PC dated

15.12.2017",,"Available in the

Honâ?bleÂ court of

Spl Judge NIA in

sealed cover

statements of â??Charlieâ? and â??Romeoâ? were before the learned D&SJ. It, however, does not appear that the learned D&SJ actually perused",,,

them. The impugned order makes no reference to the said statements.Â,,,

44. Paragraph 7.9 of the impugned order, extracted hereinbefore, refers to statements of â??PW-52, documents D-3, D-4, D-4(e) etcâ? and",,,

â??other material on recordâ?. The Court is unable to read the expression â??other material on recordâ? used by the trial Court as including the,,,

above statements under Section 164 Cr PC, copies of which have not been provided to the Appellant. In the considered view of this Court, if such",,,

documents were not provided to the Appellant, they could not have been referred to by the prosecution and consequently could not have been",,,

referred to by the trial Court while dealing with the bail application of the Appellant.Â Â Â,,,

45. Mr. Luthra then referred to Section 17 of the NIA Act and Section 44 of the UAPA, both of which are identically worded. Section 17 NIA Act",,,

reads as under:Â,,,

â??17. Protection of witnesses.Â,,,

(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if",,,

the Special Court so desires.,,,

(2) On an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, if the",,,

Special Court is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for",,, keeping the identity and address of such witness secret.,,,

(3) In particular, and without prejudice to the generality of the provisions of sub-- section (2), the measures which a Special Court may take under that",,,

sub-section may include-,,,

(a) the holding of the proceedings at a place to be decided by the Special Court;,,,

(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to,,,

public;,,,

(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed; and,,,

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any,,,

manner.,,,

(4) Any person who contravenes any decision or direction issued under sub-section (3) shall be punishable with imprisonment for a term which may,,,

extend to three years and with fine which may extend to one thousand rupees. â??Â,,,

46. Both under Section 17 NIA Act and Section 44 of the UAPA, the prosecution can apply to the Court to hold proceedings â??in cameraâ? on the",,,

ground that the life of the witness is in danger. What is permitted to be kept â??secretâ? by the Court is â??the identity and address of such a,,,

witnessâ?. It can permit avoiding the mention of the â??names and addresses of the witnessesâ? in the orders, judgments or any record of the case",,,

accessible to the public.,,,

The trial Court can issue directions â??for securing that the identity and address of the witness are not disclosedâ??.Â,,,

47. It is not possible to read Section 17 of the NIA Act or Section 44 of the UAPA as an exception to Section 207 read with Section 173 Cr PC,,,

which mandates that an accused shall be supplied copies of the police report and other documents relied upon by the prosecution in the charge-sheet,,,

â??without delayâ?? and â??free of costâ??. Section 207 Cr PC reads as under:Â,,,

â??207. Supply to the accused a copy of police report and other documents. In any case where the proceeding has been instituted on a police report,",,, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-",,,

(i) the police report;,,,

(ii) the first information report recorded under section 154;,,,

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses,",,,

excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section,,,

173;,,,

(iv) the confessions and statements, if any, recorded under section 164;",,,

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:Â,,,

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the",,,

police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be",,,

furnished to the accused:Â,,,

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused",,,

with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.â??",,,

48. The first proviso to Section 207 Cr PC makes an exception only in respect of the documents mentioned in Section 207 (iii), which in turn refers to",,,

the statements recorded under Section 161 (3) Cr PC. There is no exception to providing â??confessions and statements, if any, recorded under",,,

Section 164 Cr PCâ? which has been mandated in terms of Section 207 (4) Cr PC. Reference may also be made to Section 173(6) Cr PC which,,,

again refers to the statement under Section 161 Cr PC, which is mentioned in Section 173 (5) (b) and it is only when the police officer is of the view",,,

that any part of such statement is not relevant or its disclosure to the accused is not essential in the interest of justice and is not expedient in the public,,,

interest that he appends a note requesting the Magistrate â??to exclude that part from the copies to be granted to the accused and stating his reasons,,,

for making such a request.â? In other words, even in respect of statements under Section 161 Cr PC, there is no wholesale exclusion of the entire",,, document from being provided to the accused. What is permitted is the redaction of certain portions of the documents. In the context of Sections 17,,,

2015,,,

3.3.2015,"2,50,000

AED",Mudassir Wani,

8.3.2015,"10,00,000",,Masrat Alam

7.4.2015,"15,00,000

Rs.",,Yasin Malik

29.04.2015,"10,00,000

Rs.",,Shabir Shah

3.5.2015,"3,00,000

AED","Tariq Shafi

(From

Â Â Â Â Â Â Â Â Â Â Â Â Â

Hafeez

Saeed)",

6.7.2015,"5,00,000

Rs.",,Haj Exp.

20.07.2015,"25,00,000

Rs.",,Geelani Sb

30.08.2015,"10,00,000

Rs.",,Personal (Dubai visit)

13.09.2015,"15,00,000

Rs.",,"Altaf

Â Â Â Â Â Â Â Â Â Â Â Â Â Â Â

Fantoosh

(Geelani Sb)

21.11.2015,"5,00,000

Rs.",,Shagufta

2016,,,

15.03.2016,"30,00,000

Rs.",HCP,

10.04.2016,"10,00,000

Rs.",,Personal

17.06.2016,"12,00,000

Rs.",,Advocate Shafi RishiÂ

16.06.2016,"15,00,000

Rs.",,Naseem Geelani

20.10.2016,"40,00,000

Rs.",Iqbal Cheema HCP,

21.11.2016,"20,00,000

Rs.",,Geelani Sb

62. While the genuineness and the evidentiary value of Document 132 (a) is yet to be established by the NIA at the trial, since this one document is",,,

being relied upon by the NIA as being central to its case against the Appellant, it is but inevitable that the trial Court and now this Court has to discuss",,,

it in some detail for the purpose of deciding whether the Appellant can be released on bail.Â,,,

63. The question that arises is whether there is anything to show with reference to each of the dates mentioned in the above Document No. 132 (a),,,

that the figures shown against the entry on each date (purporting to be specific amounts of money) was in fact received by the Appellant in his,,,

personal accounts or in the accounts of any of his entities. Although the case of the NIA is that the money has been received, there is no document",,,

or statement, which forms part of the charge sheet, which in fact indicates this.Â",,,

64. The above document is also relied upon by the NIA as providing proof of the linkages of the Appellant to A-1, through the entry dated 3rd May,",,,

2015 and with the Pakistan High Commission (PHC) through the entries dated 15th and 20th October, 2016. Yet none from the PHC has been",,,

named, much less statement of such a person been recorded to confirm that those figures represented money that was received from the PHC.Â",,,

65. The case of the NIA in the charge sheet is that the same document is also

proof of the fact that the monies so received were passed on to the,,,

Hurriyat leaders. Reference is made to the fourth column of the above document where the names of some of the Hurriyat leaders are mentioned.,,,

However, there is nothing to show that the money was received by the Appellant and then transmitted by him to any of the named Hurriyat leaders.",,,

Nor have any of the â??prospective witnessesâ?? including Mr Bhatt made any statement to that effect.Â,,,

66. Mr. Luthra urged that the signature of the Appellant in the right hand bottom corner of the document has been confirmed by the handwriting,,,

expert to match the specimen signature of the Appellant. In reply it was pointed out by Mr. Vikas Pahwa, learned Senior counsel for the Appellant,",,,

that the mere fact that the Appellantâ?s signature appeared on the document did not mean that he had in fact signed the document in acceptance of,,,

the truth of its contents. According to him, it is too early to speculate whether the Appellant when he signed the paper, if at all, put his signature on a",,,

blank green legal size paper which may be have then been used for legal purposes for an affidavit etc.Â,,,

67. It is indeed too early in the case to speculate whether the Appellant in fact signed the document after it was typed out and whether his signature,,,

amounts to accepting the truth of its contents or for that matter whether the contents of the document in question constitute conclusive proof of what,,,

the NIA alleges the document to be.Â,,,

68. In the circumstances, the Court is not satisfied that a sheet of paper containing typed entries and in loose form, not shown to form part of the",,,

books of accounts regularly maintained by the Appellant or his business entities, can constitute material to even â??prima facieâ? connect the",,,

Appellant with the crime with which he is sought to be charged. The conclusion of the trial Court that this document shows the connection of the,,,

Appellant with the other accused as regards terrorist funding does not logically or legally flow from a plain reading of the document.,,,

Other documents,,,

69. Mr Luthra then referred to the statements of Mustaq Ahmad Mir and Shabbir Ahmad Mir, the reply of Mr Mustaq Ahmad Mir (Ex.D-214), the",,,

CFSL report dated 6thNovember, 2017 (document D-154); the seizure memo dated 3rd June, 2017 (document D-3) regarding the recovery being",,, made from the residence of the Appellant; the seizure memo of the same date of the recoveries from the office of the TFCPL (document D-4); and,,,

the bunch of papers seized from the Appellant [D-4(e)] referred to by the trial Court.Â,,,

70. Beginning with the last referred document, [D-4(e)], it is actually a bunch of documents, the first of which is a letter dated 28th June, 2016,",,,

written byÂ the Prime Minister of Pakistan Mr Mohammad Nawaz Sharif to the Appellant thanking him for the bouquet sent to him with wishes for,,,

his good health and well being.Â,,,

71. Then there is a letter dated 20th November, 2007 from the President of the Azad Jammu and Kashmir, Chambers of Commerce and Industry,",,,

addressed to the Appellant, appointing the Appellant as an Honorary Trade ConsultantÂ atÂ Srinagar.Â ItÂ notesÂ thatÂ PakistanÂ andÂ",,,

IndiaÂ had initiated/undertaken a number of Kashmir related CBMs (confidence building measures) in the recent past to provide respite to the,,,

Kashmiris on both sides of the LoC (Line of Control):,,,

â??1.Pakistan and India have initiated/undertaken a number of Kashmir related CBMs in recent past to provide respite to the Kashmiris on both,,,

sides of the LoC. One such CBM which is under active consideration is commencement of trade between both parts of Kashmir. Necessary,,,

modalities including the items to be traded are being worked out.â??,,,

72. The other documents reflect the correspondence carried out in the regular course of business between the Appellantâ?s business entities and,,,

other entities including the Al-Shafi Group of companies, headquartered at Lahore. A business invitation was extended to the Appellant on 7th",,,

February, 2014 by Mohd. Tariq Shafi, the director of Al-Shafi Group of companies to visit them for business negotiations. There is a letter of the",,,

same date addressed by Mr. Mohd. Tariq Shafi to the PHC in New Delhi for grant of Pakistan Business Visa to the Appellant.,,,

73. It must be noticed at this stage that the NIA does not dispute that the Appellant is a leading businessman in Kashmir. He runs a conglomerate of,,,

business entities and has been active in the context of the Indo-Pakistan trade. Nothing has been shown to this Court from the entire bunch of,,,

documents which would suggest that these trade activities were geared toward funding of terrorist activities, as alleged in the charge-sheet.Â",,,

74. Turning next to the statements of Mr. Mustaq Ahmad Mir and Mr. Shabbir Ahmad Mir, it requires to be stated, at the risk of repetition, that these",,,

have no evidentiary value as they are merely statements under Section 161 Cr PC. Even if taken at face value, they only indicate that some of the",,,

entries in the accounts and in particular the source of credit entries were not properly explained. It appears that the accounts of the entities are,,,

regularly audited. It is not possible to prima facie conclude that these â??unknown sourcesâ? were in fact connected to any of the other accused and,,,

that remittances were received from Pakistan or UAE for terrorist activities. There has to be something more substantial than mere audited accounts,,,

that may have entries that require explaining and might be of interest to the income tax authorities.Â,,,

75. The above documents do not enable this Court to prima facie conclude, as the trial Court has in paragraph 7.8 of the impugned order, that the",,,

Appellant received money from A-1 or PHC or others and was passing on the said funds to the Hurriyat leaders for funding terrorist activities and,,,

stone pelting.Â,,,

76. The statement of the â??protected witnessâ?, referred to by the trial Court as W-48, about the Appellantâ?s proximity with A-4 and A-6 has",,,

been perused. It is not supported by any other statement or material on record. It cannot be construed as material that would enable the prosecution,,,

to show that the accusation against the appellant about his funding terrorist activities is prima facie true.Â,,,

77. Turing to the transaction of lease involving Mr. Naval Kishore Kapoor, it is explained on behalf of the Appellant that only individuals domiciled in",,,

Kashmir can hold properties there. There was no declaration of â??ownershipâ? of lands by the companies and in any event it was a lease. The,,,

lease itself has not been shown to be a sham transaction. As regards the NRE account, it is pointed out that it has since been closed and the fine",,,

amount was also paid. As regards the CDRs, it is pointed out that there may have been exchange of calls between the Appellant and A-6 but not",,,

between the Appellant and A-3, A-4 or A-5. This cannot at this stage be said to constitute material to show that the accusation of a criminal",,,

conspiracy between the Appellant and A-6 for commission of terrorist offences is prima facie true. It also emerged during the course of the hearing,,, of this appeal that neither the APHC nor any of its 26 constituent organisations are â??bannedâ?? organisations within the meaning of the UAPA.Â,,,

78. The entire discussion by the trial Court of the material forming part of the charge sheet is contained in three short paragraphs i.e. in paragraphs,,,

7.8, 7.9 and 7.10 of the impugned order. It is cryptic. The following observations made by the High Court of Andhra Pradesh in Davender Gupta v.",,,

National Investigating Agency (2014) SCC-Online AP 192 are relevant here:,,,

â??...till the truth comes out, it is always better to keep the fingers crossed, and to respect the age-old principle, that an accused cannot be equated to",,,

a convict, even before the trial is conducted and the judgment is rendered. Further, whatever be the considerations in economic offences, even an",,,

inadvertent attempt to implicate persons in terrorist related cases, otherwise than on the basis of strong and foolproof evidence would, as an",,,

immediate consequence, embolden, if not encourage the real perpetrators.â?? Â",,,

79. As to other requirements of Section 438 Cr PC, nothing has been shown to the Court about the previous criminal involvement of the Appellant in",,,

any offence. Nothing also has been shown to the Court about the possibility of the Appellant fleeing from justice, if he is released on bail. The record",,,

shows that the Appellant is a septuagenarian and is suffering from various medical ailments. He has been in judicial custody for more than a year. It,,,

has been more than six months since the charge-sheet has been filed. He is not shown to have tampered with the evidence or interfered with any of,,,

the â??prospective/protectedâ?? witnesses.Â,,,

80. The following observations by the Supreme Court in Sanjay Chandra v CBI AIR 2012 SC 830 are relevant in this context:Â,,,

â??In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused",,,

person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a,,,

punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect",,,

to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the",,,

earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity",,,

demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is",,,

the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be",,,

punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only",,,

the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention",,,

being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and",,,

it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or,,,

to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.â??Â,,,

81. In light of the above discussion, this Court holds, for the limited purposes of the present appeal, that there are no reasonable grounds to form an",,,

opinion at this stage that the accusations against the Appellant under the UAPA are prima facie true. The Court is also not satisfied at this stage that,,,

there is prima facie material to show the involvement of the Appellant in any criminal conspiracy with the other accused justifying the accusations for,,,

the offences under Section 120-B IPC or Section 121, 121-A, 124-A IPC. The duty of the Court at this stage is not to weigh the evidence",,,

meticulously but to arrive at a finding on the basis of broad probabilities.,,,

Conclusion,,,

82. The impugned order dated 8thJune, 2018 of the trial Court is accordingly set aside. The Appellant is directed to be released on bail subject to his",,,

furnishing a personal bond in the sum of Rs.2 lakhs with two sureties of like amount to the satisfaction of the trial Court, and further subject to the",,,

following conditions:Â,,,

(i) The Appellant shall report to the IO in charge of the case as and when required. He shall provide to the IO as well as the trial Court the mobile,,,

phone on which he can be contacted and his current address where he will be available. He will keep both the IO and the trial Court informed,,,

promptly if there is any change in either.Â,,,

(ii) He will not influence or intimidate the proposed/prospective prosecution witnesses or tamper with the evidence of the prosecution in any,,,

manner.Â,,,

(iii) The Appellant will surrender his passport before the trial Court at the time of execution of the bail bonds. He will not travel out of the country,,,

without prior permission of the trial Court.,,,

(iv) If there is any breach of the above conditions, it will be open to the NIA to apply to the trial Court for cancellation of bail.Â",,,

83. It is clarified that the observations of this Court in this order both on facts and law are based on the materials forming part of the charge sheet and,,,

are prima facie in nature and for the limited purpose of considering the case of the Appellant for grant of bail. They are not intended to influence the,,,

decisions of the trial Court at any stage of the case hereafter.Â,,,

84. The appeal is allowed in the above terms.Â Â,,,

