IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 02.06.2025
Pronounced on: 06.06.2025

CrlA(D) 78/2024

Bilal Ahmad Kumar
S/O. Mohammad Abdullah Kumar
R/O. Heff Shirmal, Shopian

…Appellant

CrlA(D) 77/2024

Tawfeeq Ahmad Laway
S.O. Manzoor Ahmad Laway
R/O. Pushwara Khanbal, Anantnag

…Appellant

Through:
Mr. Wajid Mohammad Haseeb, Advocate.

VS

Union Territory Th. SHO Police Station Bijbehara

...Respondent

Through:
Ms. Maha Majeed, Assisting Counsel vice
Mr. Mohsin Qadri, Sr. AAG.

CORAM:

HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE

JUDGMENT

Sanjay Parihar-(J)

1. Aforesaid appeals arise out of common order of rejection of bail dated 11.11.2024 passed by Special Judge (UAPA) Anantnag in case FIR No. 20/2021 under Section 7/25 Arms Act, 3/4 Explosive Substances Act, 18, 20, 23, 39 of UA(P) Act of PS Bijbehara which is assailed on the ground that both the appellants are facing trial for over more than four years and the order of rejection of bail has been passed without appreciating the facts and circumstances of the case. Trial Court has presumed them guilty and rejected their bail application when there was no material to lay presumption against appellants. That the impugned order is against due process of law as

prosecution story itself being prima facie weak and there is not even remote connection of the appellants having been involved in the commission of aforesaid offences. That the case was based on hearsay and evidence is wholly inadmissible under law, so available material cannot satisfy the requirement of Section 43-D of the UAPA, on that ground alone the application deserved to be admitted. That the appellants have been in custody for long who are presumed to be innocent until proved guilty.

2. Respondents were notified of the filing of the appeals who have appeared and filed their response supporting the order drawn by the trial court. It is argued by the respondents that the order drawn by the trial court is reasoned one because the petitioners are involved in offences carrying punishment for imprisonment of life and there is cogent and reliable evidence against them which directly connects them with the commission of the offence. That the nature of the accusations is grave and the appellants are a threat to the sovereignty and integrity of the nation. In case the appellants are released on bail that may hamper the further recording of the prosecution evidence. That the trial court has dismissed the bail application after due appreciation of law.

3. The brief facts giving rise to the aforesaid appeals happen to be that it was on 30.01.2021 PS Bijbehara received information, when a police escort along with army were performing naka checking at Green Tunnel near Doonipora Sangam, they intercepted an Alto Car bearing Registration No. HP12C/0961. On being asked to halt, the occupants of the car tried to escape but were overpowered. During questioning they disclosed their particulars as Imran Ahmad Hajam and Irfan Ahmad Ahanger and during search of the vehicle 02 pistols, 13 pistol magazines, 116 live pistol rounds were recovered which led to registration of FIR No. 20/2021 under Section 7/25 Arms Act 20/30 UA(P). During questioning, they were found to be active recruits of banned terrorist organization JeM. On the disclosure of Imran Ahmad Hajam identity of various other active members surfaced who were receiving arms and ammunition from JeM terrorist Hidayat-ullah Malik for carrying subversive activities in order to boost militancy. Further, on their questioning, involvement of appellants Bilal Ahmad Kumar and Tawfeeq Ahmad Laway

also surfaced whereupon from the possession of former one hand grenade was recovered and from that of later, one kilogram of explosive material came to be recovered who too were booked.

4. From the evidence collected and the statements of the witnesses, as many as six accused including the appellants were found involved in hatching criminal conspiracy against the sovereignty of India and based upon evidence, were found to be involved in militant activities carrying explosive substances for committing a terrorist act. Appellants, therefore, have been charged under Sections 18, 23, 39 UA(P) and 7/25 Arms Act and so they are under trial.

5.Counsel for appellants argued that accused have been in custody since January, 2021 and only 11 witnesses stood examined so far and the way the trial is proceeding, there is no immediate prospect of trial concluding in the near future, so the appellants deserve to be admitted to bail pending trial as delay in trial defeats their right of speedy trial. It is further submitted that custody of the appellants is based on the alleged disclosure statement of the co-accused and there is no other material or any evidence having come forth during the recording of the evidence against him, therefore, the Trial Court was not right in applying Section 43-D.

5. On the other hand, counsel for the respondent urged that the appellants were found in possession of explosive substance and given the mandate of Section 23, their act is punishable with imprisonment for life and shall also be liable to fine. That the appellants were found associated with militants namely Aftab Ahmad Wani, Rayees Ahmad Bhat who both were killed in an encounter in the year 2021, thus, the appellants were the persons who were aiding the terrorists. It is argued that appellants are a threat to society at large, whose admission on bail would not only derail trial but even left over witnesses might not be able to come forward for deposition.

6. We have heard both the counsels and gone through the record of the trial court.

7. At the very outset, from the possession of appellant explosive substance has been recovered which is in the nature of hand grenade and other explosive substances. They have been accused of offence under Sections 18, 23, 38 UA(P) and 7/25 Arms Act read with 3/4 Explosive Substances Act.

Whereas, offences under Sections 18, 23, 38 UA(P) Act carry punishment which may extend to imprisonment for life and fall under Chapter IV and VI of the Unlawful Activities Prevention Act (hereafter called as Act). In terms of Section 43-D (5) no person accused of an offence punishable under Chapter IV and VI, shall be released on bail if, court is of the opinion that there are reasonable grounds for believing that the accusations against such persons are prima facie true. The main limb of the appellant's claim is that they have been roped in on the disclosure statement of co-accused, therefore, the recovery effected from them is untenable. Such an argument cannot hold good for the reasons that at the stage of grant or refusal of bail, the merits of the prosecution case are not to be touched. Having said so and given the nature of explosives recovered and their association with various other persons who were found to be active militants and a few of them were killed in encounter in the year 2021, such allegations, therefore, describe the appellants acting as foot soldiers for transit and carrying of arms and explosive substances which in fact were later on used by the active militants to indulge in subversive activities.

8. **In "National Investigating Agency v/s Zahoor Ahmad Shah Watalli (2019) 5 SCC"**, in a case under Unlawful Activities (Prevention) Act, 1967, the Hon'ble Supreme Court of India held that:

> *"23. By virtue of the proviso to subsection (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.*
>
> *By its very nature, the expression "prima facie true" would mean that the materials/evidence collated 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.

A priori, the exercise to be undertaken by the Court at this stage of giving reasons for grant or non-grant of bail is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad (2005) 2 SCC 13 (1962) 3 SCR 622 (1978) 1 SCC 118 probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.

For that, the totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analyzing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is.

The question is whether there are reasonable grounds for believing that the accusations made against the respondent (Accused No.10) are prima facie true. That will have to be answered keeping in mind the totality of materials including the one presented along with the police report. Be it noted that the prosecution is relying on several documents forming part of the first charge-sheet (pending further investigation) filed against the respondent (Accused No.10) allegedly showing his involvement in the commission of the stated offences.

The fact that there is a high burden on the accused in terms of the special provisions contained in Section 43D (5) to demonstrate that the prosecution has not been able to show that there exists reasonable grounds to show that the accusation against him is prima facie true, does not alter the legal position expounded in ***K. Veeraswami (supra)****, to the effect that the charge sheet need not contain detailed analysis of the evidence. It is for the Court considering the application for bail to assess the material/evidence presented by the Investigating Agency along with the report under Section 173 of Cr.P.C. in its entirety, to form*

its opinion as to whether there are reasonable grounds for believing that the accusation against the named accused is prima facie true or otherwise."

9. In **Union of India vs. K.A. Najeeb Criminal Appeal No. 98 of 2021 decided on 01.02.2021"** the respondent was facing prosecution for offence under Section 16, 18, 18-B, 19 and 20 of the UA(P) Act and had been in jail for over five years wherein during trial several witnesses were yet to be examined. In that case some of co-accused had already been convicted whereas respondent was being tried by way of supplementary charge-sheet wherein the co-accused had been sentenced to eight years' rigorous imprisonment. The Hon'ble Apex Court found that having regard to the peculiar facts, it was legitimately expected that if the respondent is held guilty, he would receive the same sentence which the co-accused had been awarded and given that two-third of the incarceration had already been completed in that background, the bail order was not interfered by the Hon'ble Apex Court. It held that:

18. It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA perse does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonized. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigors of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no

other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

10. In **"Gurinder Singh vs. State of Punjab and Another 2024 live law (SC) 100"** the accused was facing trial for offence under Sections 17, 18 and 19 of the Unlawful Activities (Prevention) Act read with Section 25 Arms Act. In that case also, the recovery was affected from the petitioner on the strength of disclosure statement made by the co-accused. It was the case of the appellant therein that in terror funding charge the name of the appellant does not find place. Again, it was argued that given the large list of witnesses, the trial is likely to take certain time. Apex court denying the concession of bail and distinguishing K.A. Najeeb's case held as under,

"32. The Appellant's counsel has relied upon the case of KA Najeeb (supra) to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and substance. In KA Najeeb's case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court's decision to consider bail was grounded in the anticipation of the impending sentence that the respondent- accused might face upon conviction and since the respondent-accused had already served portion of the maximum imprisonment i.e., more than five years, this court took it as a factor influencing its assessment to grant bail. Further, in KA Najeeb's case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of trial in near future. However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist

organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail. Hence, the aforesaid argument on the behalf the appellant cannot be accepted."

11. In **"Thwaha Fasal and Ors vs. Union of India (UOI) and Ors Criminal Appeal No's 1302 of 2021 and 1303 of 2021 decided on 28.10.2021 it was held,**

"*17. The stringent conditions for grant of bail in sub-section (5) of Section 43D will apply only to the offences punishable only under Chapters IV and VI of the 1967 Act. The offence punishable under Section 13 being a part of Chapter III will not be covered by sub-section (5) of Section 43D and therefore, it will be governed by the normal provisions for grant of bail under the Code of Criminal Procedure, 1973. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. The embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Thus, if after perusing the charge sheet, if the Court is unable to draw such a prima facie conclusion, the embargo created by the proviso will not apply."*

18. In the case of Watali (supra), this Court has extensively dealt with sub-section (5) of Section 43D of the 1967 Act and has also laid down the guidelines for dealing with bail petitions to which sub-section (5) of Section 43D is applicable. In paragraph 23, this Court considered the difference in the language used by Section 37 of the NDPS Act governing grant of bail and sub-section (5) of Section 43D of the 1967 Act. Paragraph 23 of the said decision reads 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 the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA

> *and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, 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 the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act."*

12. Review of the law laid down in aforesaid cases goes on to describe, that for offences falling under Chapter IV and VI of the Unlawful Activities (Prevention) Act, the restrictions imposed under Section 43-D (5) are in addition to the restrictions imposed under the Code of Criminal Procedure. So, what Section 43-D speaks of is that it modifies the application of general provisions of bail in respect of the offences punishable under Chapter IV and VI of the Act.

13. The aforesaid law further holds, that the words "prima facie true" on the face of it, mean that the material must show the complicity of the accused in the commission of the offence i.e. the material/evidence must be good and sufficient to establish the given fact or chain of facts constituting the stated offence, unless rebutted or contradicted by other evidence. The exercise to be undertaken at the stage of grant or refusal of the bail is merely different because the Court cannot elaborate into examination or dissection of the evidence, rather the Court is expected to record the finding on the basis of

broad probabilities regarding the involvement of the accused in the commission of the stated offences or otherwise.

14. In the instant case, the appellants have already undergone more than four years of custody whereas, trial is underway and eleven witnesses have been examined. The offences for which appellants are being tried carry imprisonment extending up to life and for some, the imprisonment is for ten years, so by applying K.A. Najeeb's case still the appellants are short of having completed five years of trial, so the bail on such ground cannot be asked for as a matter of right.

15. As held in Gurinder's case "supra", what Section 43D (5) proposes to ensure is "accused person shall not be released on bail" which means the 'principle of bail not jail' would not be applicable in cases of the nature alleged against the appellant. Therefore, the conventional idea in bail jurisprudence vis-a-vis ordinary penal offences does not find any place while dealing with UA(P) Act cases. The exercise of general principle to grant bail in such offences is severely restrictive in scope. Relying on **"Peerzada Shah Fahad vs. UT of J&K (2023) SCC Online 954" it was argued that appellants deserve to be granted concession of bail.**

Reliance on this case is utterly misplaced for the reasons that in said case the coordinate bench was of the view that, at the most, the appellant is prima facie found to have committed offence under Section 13 and not under Section 18, in that background, the accused was bailed out.

16. We on going through the record of the trial court find that explosive substance in the nature of hand grenade/explosive material stood recovered from the possession of the accused so much so there are also accusations that the appellants were part of a module that included active militants as well (Aijaz Ahmad Wani, Rayees Ahmad Bhat) who were killed in an encounter in the year 2021. The factum of recovery of explosive substance from the possession of the appellants gave rise to commission of offences under Section 23 (enhanced penalties) coupled with Section 18 which provides that 'whosoever conspires to commit a terrorist act or **any act preparatory to the commission of the terrorist act,** shall be punishable with imprisonment for a term which shall not be less than five years or which may extend to

imprisonment for life and shall also be liable to fine'. Similarly, offence under Section 39 also relates to support given to terrorist organization. So, on the face of such a material shows complicity of the accused in commission of offence. In addition, the case of the appellants is also to be examined from another perspective. What the provisions of Unlawful Activities (Prevention) Act, 1967 relate to is to curb terrorist activities and make stringent laws to ensure there is zero tolerance of such acts. This is because what such activity intends to achieve is to bring insecurity amongst general public who feel terrorized so they can follow the dictates of such organisation whose sole objective is to harm national interest and undermine the sovereignty and integrity of the nation. Here comes the duty of the Court to ensure that while balancing the rights of an under-trial on the touchstone of liberty, one must not lose sight of the fact that nothing is above the sovereignty and integrity of the nation besides peace and tranquility to public at large.

17. When examined in that perspective, the offences committed by the appellants cannot be regarded as run of the mill, but the one that are exceptional in nature. Once the charges have been framed and the matter is pending trial, that itself assumes a strong suspicion that the material before the Court has prompted it to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the appellants. Whereas the appellants have not been able to show us any material to warrant a view that the participation of the appellant in commission of offence is meek or hearsay, rather on going through the record of the trial court we lean in favour of drawing the inference that on broader probabilities the involvement of the appellant in the commission of the stated offence has been disclosed and the trial court has rightly not released the appellants on bail. The totality of the material available before the trial court that led it to draw charge and put the appellants to trial and so much so more than eleven witnesses stood examined, it cannot be stated that the trial of the appellants is proceeding at a snail's pace.

18. As discussed above, the material available on record indicates the involvement of the appellants in furtherance of terrorist activities backed by members of terrorist organization that is why two of their accomplices were

killed in an encounter during the currency of the investigation, so mere delay in trial that too pertaining to grave offences as the one involved cannot be urged as a ground for granting of bail. At the cost of repetition, the appellants have not been able to persuade us to take a contrary view than the one taken by the trial court. We neither find any kind of perversity in the order impugned nor any mitigating factor to warrant a view of granting bail to the appellants. Consequently, the appeals lack merits are therefore, dismissed leaving appellants free to take chance afresh before the trial court, if advised so.

19. **Disposed of.** Record be returned.

(SANJAY PARIHAR)
JUDGE

(RAJNESH OSWAL)
JUDGE

SRINAGAR:
06.06.2025
"SHAHID"

Whether approved for reporting: Yes