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

CrlA(D) No. 42/2022
c/w
CRM (M) N0. 472/2023

Reserved on 31.08.2023
Pronounced on 17.11.2023

Peerzada Shah Fahad … Appellant

Through: Mr. P.N. Raina, Senior Advocate
With Mr. J.A. Hamal, Advocate

Vs.

UT of J&K and Anr., … Respondents

Through: Ms. Monika Kohli, Senior Additional Advocate General and
Mr. Mohsin Qadri, Senior Additional Advocate General
(Through VC)

CORAM:

HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

J U D G M E N T

Per Atul Sreedharan.

This case has compelled us to examine two questions of law. Whether, section 43D(5) of the Unlawful Activities (Prevention) Act, 1967, where despite the existence of a *prima facie* case against the accused, the absence of a "Need to Arrest" would result in violation of the right to life of the accused under Article 21 of the Constitution and if it does, whether the Court can still grant bail on account of the violation of Article 21 even though a *prima facie* case is made out against the accused? And whether, the concept of "Clear and Present Danger" ought to be taken into account by the Courts while deciding a bail application where the bar under section 43D(5) is applicable?

2. The Criminal Appeal (D) No. 42/2022 has been filed by the appellant under the relevant provisions of the National Investigation Act (hereinafter referred to as the 'NIA'), aggrieved by the order dated 15/07/2022, passed by the Ld. Special Judge (UAPA)/ 3rd Additional Sessions Judge, Jammu, by which the bail application of the appellant was dismissed. The petition u/s. 482 Cr.P.C bearing CRM (M) No. 472/2023has been filed against order dated 16/03/2023 passed by the Ld. Special Judge, by which the charges were framed against the Petitioner u/s 13/18 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "UAPA"), 121, 153B/201IPC and 35/39 of the Foreign Contribution (Regulation) Act, 2010 (hereinafter referred to as the "FCRA"). It is pertinent to mention that the appellant is the Accused No.2 (hereinafter referred to as "A2") with one Abdul Aala Fazili being the Accused No. 1 (hereinafter referred to as "A1). In this order, this Court is not concerned with charges framed against A1.As the order in the bail application (in the form of a Criminal Appeal u/s. 21 of the National Investigation Agency Act, 2008 [hereinafter referred to as the "NIA Act"]) would have a direct bearing on the criminal revision filed by the appellant against the order framing charge, both these cases are being decided by a common order. The appellant has been arrested on 20/05/2022 in FIR No. 1/2022 of P.S. JIC/SIA, Jammu. Prolix arguments have been forwarded by the Respondent/Prosecution in this case which compels this Court to deal it with some elaboration.

3. The run up to the present case against the appellant is relevant. As per the averments in the appeal, the appellant was arrested by P.S. Pulwama in connection with FIR No. 19/2022 in which he was granted bail by the TADA/POTA Court at Srinagar. However, the police, without releasing the appellant, shifted his custody to P.S. Shopian in FIR No. 6/2021, registered

there, in which too, the appellant was granted bail by the Court of the Munsiff, Shopian. However, the appellant was still not released, and his custody was shifted to P.S. Safa Kadal in another case registered at that police station. It is also averred that before the Court of competent jurisdiction at Srinagar could decide his bail application, the appellant was taken into preventive detention under the provisions of the Jammu and Kashmir Public Safety Act, 1978(hereinafter referred to as "PSA").It was in this backdrop that the current case against the appellant was dug out by the Respondent with the registration of the aforementioned FIR.

THE PROSECUTION'S CASE AGAINST THE APPELLANT

4. The case, as undisputed by the prosecution/Respondent, is that(A) a source information received on 04/04/2022, led to the discovery of an article titled "The shackles of slavery will break" written byA1,and published on a webpage on the domain of the appellant,www.thekashmirwalla.com.(B) It is alleged that the appellant is a part of an ongoing operation to build and propagate the false narrative that is essential to sustain the secessionist-cum-terrorist campaign and take the same to its logical conclusion which is the breakup of the Indian Union and the secession of Jammu and Kashmir from India and its consequent accession to Pakistan.(C) It is further the case of the Respondent that select anti India elements within the media, several of whom are on the payroll of the ISI, have formed digital platforms which are inexpensive and have a wide reach, and are working to construct a false and distorted account of the events in Kashmir and demonising the Government of India. (D) Pursuant to the recovery of the article, FIR No. 1/2022 was registered at P.S. JIC Jammu – SIA Jammu on 05/04/22 U/s. 13/18 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the "UAPA"), u/s. 120-B, 121, 123, 153-B of the IPC. (E) It is also undisputed

by the Respondent that the offending article was written by A1 and allegedly uploaded by the Appellant on his domain on 06/11/2011 for which the FIR was registered on 05/04/2022 and the Appellant arrested on 20/05/22. In short, the fact admitted by the Respondent is that the Appellant has been arrested for an offence which was allegedly committed by him eleven years ago and his role has been limited to uploading the offending article on his domain but his intention and thought process was extremely insidious which he shared in common with the secessionists, whose cause he espoused.

5. The charge sheet has been filed against the Appellant and co-accused and the charges have been framed by the Ld. Trial Court and six witnesses have been examined on behalf of the prosecution. In all, there are forty-four prosecution witnesses to be examined and forty documents to be exhibited. It is the case of the prosecution that the Appellant, had removed the article from his domain to destroy evidence. The police, with the assistance of experts from the IT field, set about recovering the article and in that endeavour, it was discovered that the Appellant's domain was registered on 09/07/2010 with www.godaddy.com, one of the biggest domain name registrars. Investigation is also said to have revealed that the Appellant removed his domain, allegedly for destroying evidence related to the hosting of the offending article. Thereafter, upon a preservation request made by the police to the domain name registrar www.godaddy.com on 11/04/2022, the article re-appeared on the Appellant's domain. Thereafter, using extractor tools, the IP address of the domain from which the offending article was hosted was derived which was assigned to the Appellant by the domain name registrar.

6. Thus, without delving deep into the charge sheet and reproducing in entirety the same, suffice it to say that the police found evidence to the effect that the

Appellant had hosted the offending article written by A1 on the Appellant's domain and thereafter, to escape detection, removed the domain itself. This was done in the year 2011 and detected in the year 2022. All that this Court must see is if the offending article, read in entirety, and its hosting on the Appellant's domain, *prima facie* constitutes an offence as charged?

7. The Ld. Senior Additional Advocate Generals Ms. Monika Kohli and Mr. Mohsin Qadri have both argued at great length on different days. Their submissions may be summarised as follows. (1) The scope of interference by this Court is limited as charges have already been framed by the Ld. Trial Court, (2) the Appellant must demonstrate how the rigour of s. 43D(5) of the UAPA does not apply to his case, (3)that Article 21 of the Constitution has no application in this case, (4) that the article published by the Appellant and his unpublished poems disclose the fissiparous mental state of the Appellant, (5) that the Appellant conspired with A1 by publishing the offending article on his domain and that despite the disclaimer by Appellant on his domain, the Appellant shared the same mental state of A1 and is thus guilty of conspiring to commit the offences as charged, (6) that the charges against the Appellant are grave and this Court cannot go into the details of the charge at the stage of assessing whether the Appellant should be enlarged on bail or whether he should be discharged. In other words, the argument seeks to impress upon this Court that it is prohibited from carrying out a roving enquiry into the merits of the prosecution's case, (7) that the judgement of the Supreme Court in **Zahoor Ahmed Shah Watali's**[1] case was still applicable, the subsequent judgement of the Supreme Court in **Vernon Gonsalve's**[2] case notwithstanding and (8) that loss of, or damage to, or

[1] **(2019) 5 SCC 1**
[2] **2023 SCC OnLine Supreme Court 885**

destruction of, property also includes maligning India internationally (as is allegedly done by the offending article) and therefore, the same is a terrorist act u/s. 15 (1)(a)(ii) of the UAPA, as "property" as defined u/s. 2(h) of the UAPA includes "incorporeal" property and that the fair name of India is its incorporeal property and maligning it internationally, is a terrorist act.

8. Initially, this Court was under a dilemma as to how much evidence can this Court take into consideration for deciding the bail application (filed as an appeal u/s. 21 of the NIA act) and for deciding the petition u/s. 482Cr.P.C filed by the Appellant/Petitioner for quashing the proceedings against him arising from the FIR mentioned in paragraph 2 *supra*. In **Ranjitsing Brahmajeetsing Sharma's**[3]case, the Supreme Court held that while detailed reasons are not necessary to be assigned, the order must reflect the application of mind on the part of the Court while granting or rejecting bail. In **Vernon Gosalve's**[4] case, the Supreme Court considered the law laid down in Zahoor Ahmed Shah Watali's case to the effect that the expression "prima face case" would mean that the evidence collected by the police against the accused must prevail, unless disproved by other evidence. Thereafter. the Supreme Court held that a superficial analysis of the of probative value of evidence was necessary at the stage of deciding a bail application under the UAPA. Therefore, we are of the view that though, an intense roving enquiry is uncalled for, nonetheless there must be a superficial appreciation of the evidence on record deciding a bail application more so in a case where the bar of s. 43D(5) is raised.

9. The main thrust of the prosecution's argument is that the Appellant and A1 created a narrative to incite the youth of Jammu and Kashmir to adopt

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[3]**(2005) 5 SCC 294 - Paragraph 45**
[4] **2023 SCC OnLine Supreme Court 885 – Paragraph 37**

violent means of protest to secede from India and accede to Pakistan and, the offending article was written with that intention in which the Appellant was a willing collaborator. The main allegations are against A1 who is the *agent provocateur* according to the prosecution. It is he who authored the offending article. Having read the offending article, this Court *prima facie* finds that the same calls for the secession of Jammu and Kashmir from India. There is no reference to in the article for its accession with Pakistan. It accuses India and the Indian government of Genocide against Kashmiris and that they would one day secure freedom. It must however be stated here that there is no call to arms by the author. There is no incitement to an armed insurrection against the State. There is no incitement to violence of any kind much less acts of terrorism or of undermining the authority of the State with acts of violence.

10. The role attributed by the prosecution to the Appellant is of being a willing collaborator who hosted the offending article on the Appellant's domain www.thekashmirwalla.com and later, deleted the domain itself in order to evade detection. The Ld. Sr. AAG's have placed before this Court a large compilation of other articles which were web pages on the Appellant's domain, for demonstrating that the offending article by A1 was not a one-off instance by the Appellant but that he was repeat offender who in the past had hosted several articles for inciting the local populace. One such article is "Ansar Ghazwat-ul-Hind: Kashmir's loneliest militant group's perpetual fights" selected parts of the article were read out by the Ld. Sr. AAG's and one of which we reproduce here as an example; "Recite Kalima and fire!... remember the jihad that [Zakir] Musa talked about ….That's the only path on to the truth", a man asked his militant brother who was trapped inside a house surrounded by government forces in Shopian on 11 April, in the last

phone call. Musa's idea of the jihad is the jihad, nothing else". The Article is a reportage of incidents taking place in the valley and is dated 14/04/21 and reproduces as a quote the last words of a militant to his family. In the article, the Appellant neither endorses the sentiments of the militant and neither does it glorify the militant. There is no incitement to violence in the article either. Interestingly, the article has been written by one Yashraj Sharma who has not been made an accused and is instead a witness for the prosecution. None of the articles either espouse violence against the State or the government agencies but they do report instances of violence and the opinion of others which is in the quotations.

11. Similarly, also placed before the Court, were a compilation of the unpublished poems allegedly written by the Appellant. They reflect his fondness for the valley and freedom, as also his pain and anguish at the turmoil in the State. These poems have been placed before the Court only to show the mental bearing of the Appellant as someone who is of a separatist mentality. In other words, the prosecution wants the Court to hold the Appellant *prima facie* at fault for his mental state. Besides this, it is further alleged in paragraph 16.16 of the charge sheet that the Appellant had received Rs. 10,59,163.00 (rupees ten lakhs, fifty-nine thousand one hundred and sixty three) into his account with the HDFC bank from a non-governmental organisation named Reporters Sans Frontiers in three instalments in the year 2020-21. The Appellant is also stated to have received subscription from his readers amounting to twelve lakhs rupees since the inception of the domain. The Appellant is also alleged to have received approximately rupees fifty-eight lakhs, out of which thirty lakhs are by way of foreign contributions and fifteen lakhs by way of cash deposits which, according to the prosecution, is suspicious. Orally it has been argued

that this surreptitious receipt of monies by the Appellant may have been for terror funding. As regards this, it is relevant to mention here that the Ld. Trial Court has not charged the Appellant u/s. 17 of the UAPA which provides a punishment for terror funding and instead, has charged the Appellant under the relevant provisions of the FCRA. Therefore, the apprehension sounded by the State that the funds received by the Appellant which includes overseas remittances could have been used for terror funding, is summarily rejected.

12. On behalf of the State, it has been argued that the Appellant is charged for an offence u/s. 18 of the UAPA and therefore, the bar of the proviso to s. 43D (5) would become applicable and therefore bail cannot be granted. For the sake of convenience, we are reproducing s. 18 hereunder;

> **18. Punishment for conspiracy, etc.--**Whoever conspires or attempts to commit, or advocates, abets, advises or [2][incites, directly or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

s. 18 provides punishment for conspiracy to commit a "terrorist act"or even preparation to commit a terrorist act. A terrorist act is defined in s. 15 of the UAPA and the same reads as hereunder;

> **15. Terrorist act.--** [3][(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [4][, economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,--
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> (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause--
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> (i) death of, or injuries to, any person or persons; or
> (ii) loss of, or damage to, or destruction of, property; or
> (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

> [4][(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]
> (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or
> (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or
> (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or [5][an international or inter-governmental organisation or any other person to do or abstain from doing any act; or]
>
> commits a terrorist act.
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> [6][*Explanation*.--For the purpose of this sub-section,
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> (a) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;
>
> (b) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorised or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.]
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> (2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.

13. On behalf of the State, it was stated that the Petitioner is a recidivist as besides the present case there were three other criminal cases registered against the Appellant and one case under the preventive detention law. These cases are (1) FIR No. 70/2020 of P.S. Safakadal u/s. 307 IPC and s. 13 of the UAPA, (2) FIR No. 6/2021 of P.S. Shopian u/s. 153 and 505 IPC, (3) FIR No. 19/2022 of P.S. Pulwama (4) A case under the Public Safety Act in which he was taken into custody on 14/03/2022.

THE APPELLANT'S CASE

14. Mr. P.N. Raina, Ld. Senior Advocate appeared on behalf of the Appellant and has strongly controverted the case of the prosecution. On the question of

authorship of the offending article and its uploading on the domain of the Appellant, the Ld. Senior Counsel has stated that there is no evidence of the same. He submits that the alleged offence was committed in the year 2011 and that the same was allegedly unearthed mysteriously in the year 2022. As regards the surreptitious removal of the domain, allegedly to evade discovery, it is submitted on behalf of the Appellant that Yash Raj Sharma, a witness for the prosecution has stated in his statement u/s. 161 Cr.P.C that he is working with the Appellant since the year 2018. He reveals that the domain www.kashmirwalla.com was a victim of a DDOS attack (Distributed Denial of Service) in the year 2020 and the domain had to be revamped and re-designed, for which one Farhan Bhat of Fireboat Studios was engaged. The witness further says that in October 2021, the domain was redesigned but, in the process, data and email prior to 2021 were erased which included the article sent by A1 to the email of the Appellant. He further says that the Appellant always taught the witness to follow ethics and crosscheck the notes so that they do not do anything that is unethical. Ld. Counsel for the Appellant submits that from the statement of this witness it is clear that it was a malicious DDOS attack and the subsequent recovery process that resulted in the deletion of a lot of files from the systems of the Appellant and the same were not deleted in order to evade detection.

15. As regards the probability of the Appellant being a person of separatist tendency, the Ld. Sr. Counsel has drawn our attention to the interrogation of the Appellant by the NIA which is a part of the charge sheet at page 153. Under the sub-head of “Views regards Kashmir problem/General view”, the police has recorded that the Appellant is a person with a moderate and liberal mindset and has always written about Kashmir policies and local political parties and was of the opinion that Kashmir needs to be developed

rather than becoming a free state. The Court's attention has also been drawn to paragraph 16.14 of the charge sheet to demonstrate that though there is an allegation that the article uploaded on the domain of the Appellant caused breach of peace and tranquillity but no details of any incidents of violence, attack on security forces immediately following the articles being uploaded and which were a direct result of the offending article, has been given. The FIR's that were registered were of the years 2020 to 2022. It cannot be presumed reasonably that the instances of stone pelting that may have taken place in the year 2022 were on account of the instigation of the offending article that was uploaded in the year 2011. In this regard it is necessary to advert to the rule of law enshrined in the Latin maxim *causa proxima non remota jura spectator*or that, it is the proximate cause and not the remote cause, which is relevant while fixing liability. Therefore, affixing liability for the offences between the year 2020 to 2022 based on the article written and published in the year 2011, would be stretching causation to absurd limits.

16. In order to demonstrate that the charges against the Appellant are based upon conjectures and surmises, the Ld. Counsel for the Appellant has drawn the attention of this Court to 16.19 of the charge sheet where the prosecution has set out in a tabulated form the increase in violence in the valley and the rise in the number of youth who went missing, having joined terrorist ranks. The charge in the said paragraph is that "The article written by Aala Fazili is <u>believed</u> to have been one of the reasons to ignite feelings of jihad amongst gullible youth…". Ld. Counsel states that this charge is speculative as after completion of investigation, the prosecution should have been affirmative in levelling the charge but instead, it is only a belief that they bear as none of the forty-four witnesses or any of the so called missing person have ever

informed the police that they were influenced and radicalised upon reading the article written by A1 which was published on the Appellant's domain.

17. As regards the argument put forth by the State that the Appellant is a recidivist, the Ld. Counsel for the Appellant has stated that in FIR No. 70/2020 of P.S. Safakadal, the Appellant was arrested on 05/03/2022 and default bail was granted on 07/12/22 and the charge sheet has not been filed yet. As regards FIR No. 6/21 of P.S. Shopian, the Appellant was granted regular bail on 05/03/2022 and the charge sheet has not been filed till date. As regards FIR No. 19/2022 of P.S. Pulwama, the Appellant was arrested on 04/02/22 and was granted bail on 26/02/22. As regards the case of preventive detention under the PSA, the order of detention has been quashed by this Court. These facts have not been controverted by the State.

LEGAL ASPECTS OF THE CASE

18. As regards the legal aspect of the case, the Ld. Sr. AAG's have argued that the Appellant is inter alia, *prima facie* guilty of having committed offence under section 13 and 18 of the UAPA and as s. 18 is in Chapter IV of the UAPA, the bar of the proviso to s. 43D(5) thereby comes into effect. The State has relied upon Zahoor Ahmad Shah Watali's case which lays down that the Court only needs to examine the broad probabilities of the case and does not have to enter into a roving enquiry of the evidence. If the court is satisfied that the case *prima facie* discloses and offence under chapter IV or VI of the UAPA then the bar of proviso to section 43D (5) would apply and bail cannot be granted to the accused.

19. The Court asked the State as to how s. 15 would apply in the facts circumstances of the present case as the Ld. Counsel for the Appellant has negated the contention of the State that the Appellant was conspiring to commit a terrorist act, as according to him, an offence of conspiracy u/s. 18

of the UAPA can only be for committing a terrorist act as defined u/s. 15. He further submits that a terrorist act is confined to the acts mentioned in s. 15 (1) when the same is committed using any of the substances mentioned in s. 15(1)(a) resulting in any of the consequences mentioned in 15(1)(a)(i), (ii), (iii), (iiia) and (iv). The Ld. Counsel for the Appellant has also stated that an act of causing or attempting to cause the death of a public functionary would also be a terrorist act u/s. 15(1)(b) of the UAPA. Likewise, a person who commits the act provided in s. 15(1)(c) of the UAPA, also commits a terrorist act. He further submits that in the present case, there is no allegation in the charge sheet that the Appellant has committed or conspired to commit a terrorist act as mentioned in s. 15(1)(a) as the same requires the usage of bombs, dynamite or other explosive substances of inflammable substances or firearms or other lethal weapons or poisonous of noxious gases, or other chemicals or by any other substances (whether biological, radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature.

20. To the submissions of the Ld. Counsel for the Appellant as hereinabove, the Ld. Sr. AAG came up with a novel argument. He argued that the act of the Appellant would fall within s. 15(1)(a)(ii) as the said clause makes an act resulting in the loss, damage or destruction of property, a terrorist act. He takes the argument further by referring to s. 2(h) of the UAPA where "property" is defined *inter alia* as corporeal or incorporeal in nature. According to the Ld. Sr. AAG, the honour, dignity and fair name of India was its "incorporeal" property which was besmirched on account of the offending article hosted on the domain of the Appellant which levelled baseless allegations against the Government of India of indulging in genocide, committing rape of the women of Kashmir by its forces and other

outrageous conduct which had the propensity to lower the image of India in the eyes of the world.

21. With the greatest deference to the learning and experience of the Ld. Sr. AAG, if this argument is accepted, it would literally turn criminal law on its head. It would mean that any criticism of the central government can be described as a terrorist act because the honour of India is its incorporeal property. Such a proposition would collide head long with the fundamental right to freedom of speech and expression enshrined in Article 19 of the Constitution.

22. The basic precept of criminal law and criminal statutes is that it must be unambiguous, unequivocal, and clear as day when it makes an act an offence.**"Even in their most minimal formulations, the 'rule of law' and the principle of legality require that criminal law should serve its guidance function by giving fair warning of prohibitions to those affected by them. In order to give fair warning, prohibitions should be as clear and as certain as possible, not least when a significant sanction (such as imprisonment) may follow"[5].**It is not just criminal law or criminal statutes that require clarity. The clearest statutes are those that require no interpretation by the courts and are worded in a manner where the rights and liabilities are understood even by the uninitiated. **"The desideratum of clarity represents one of the most essential ingredients of legality…..it is obvious that obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an**

[5]**The Sanctity of Life and the Criminal Law – The Legacy of Glanville Williams – Preventive Orders and the Rule of Law – Andrew Ashworth.**

unauthorised revision which itself impairs legality…A specious clarity can be more damaging than an honest open ended vagueness"[6].

23. Before the concept put forth by the Ld. Sr. AAG can be accepted, the legislature would have to make the act of expressing, in any manner whatsoever, a disparaging thought of India, a specific offence. The average Indian in the street who must suffer the consequences must be made well aware beforehand that his negative opinion of India, expressed in words or in writing or any other form giving permanence, could visit him with severe sanction. Even otherwise, the property referred to in 15(1)(a)(ii) must be such that it is susceptible to destruction or loss using such means (explosives, firearms etc.,) as in s. 15(1)(a). Property that can suffer damage, loss or destruction can only be a material or corporeal property. An incorporeal property would be impervious to damage and destruction by the use of means mentioned in s. 15(1)(a). Therefore, the argument put forth by the Ld. Sr. AAG is rejected.

24. While, the Supreme Court in Zahoor Ahmed Shah Watali's case had interpreted the proviso to section 43D(5) thereby restricting the scope for grant of bail in a case where the offence was under chapter IV or VI of the UAPA, it widened the scope in **K.A. Najeeb's**[7] case where it held that the bar of proviso to s. 43D(5) would not stand in the way of a Constitutional Court to grant bail where any of the rights enshrined in Part III of the Constitution stood violated. It held **"it is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail of the grounds of violation of Part III of the constitution"**. In that case, the

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[6]**The Morality of Law – Lon L. Fuller.**
[7]**(2021) 3 SCC 713- Union of India Vs. K.A. Najeeb – Paragraph 17**

Supreme Court was looking into the correctness of an order granting bail passed by the Kerala High Court in a UAPA case where the accused's right to speedy trial stood infracted. Right to a speedy trial is equated with right to life itself and its denial, considered as being violative of Article 21 itself. This throws another question at us which is;

ARE THERE OTHER INSTANCES WHICH COULD BE EQUATED WITH AN INFRACTION OF ARTICLE 21 WHICH COULD NEGATE THE BAR OF THE PROVISO TO S. 43D(5) OF THE UAPA?

25. The power to arrest is an executive discretion vested with the police. There is no compulsion on the police to effect an arrest only because an FIR has been filed and a person named as an accused. In **Joginder Kumar's**[8] case a young lawyer was held unlawfully by the police for five days. The Supreme Court came down heavily on the police for what it perceived as a malicious exercise of executive discretion in that case and held **"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious**

[8] **(1994) 4 SCC 260 – Joginder Kumar Vs. State of U.P. and Ors.,**

matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified"[9]. Thus the Supreme Court held that an arrest has to be justifiable by the police, it must show adequate cause for depriving a fellow human of his right to personal liberty and has stated without exception, that the authority to arrest if exercised, there must be justification for the exercise of that authority where the police must satisfy the courts, if called upon, the need to arrest in a specific case. Arrest without justification is not merely colourable exercise of executive discretion but it would also result in the violation of the right to life and personal liberty of the individual. An impetuous arrest can destroy the standing of a man in society and effect his family as well. He may come out unscathed after the trial, but the time he spent in incarceration would remain a festering wound on his psyche forever.

26. The discretion of the police during investigation is without fetters. In **M.C. Abraham and Anr., Vs. State of Maharashtra and others[10]**, the Supreme Court, was examining the impugned order passed by the High Court wherein it had directed the police to effect the arrest of the accused whose anticipatory bail application had been dismissed by the High Court. Holding the said direction to be unwarranted, the Supreme Court held in paragraph 14 that **"……In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer.**

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[9](1994) 4 SCC 260 – Joginder Kumar Vs. State of U.P. and Ors., - Paragraph 20
[10](2003) 2 SCC 649–M.C. Abraham and Anr Vs. State of Maharashtra and Ors.

Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection". The Supreme Court made it clear that the power of the police to arrest also included the power of not to arrest if it was satisfied that there was no need to arrest a person even though there was a prima facie case against him.

27. The power to arrest being a discretionary power vested with the police, its arbitrary use can violate Article 14 of the Constitution. Making an arrest

without any justification would be an arbitrary act. So, the question arises as to when can an arrest be justified? From the judgements referred to above, the fundamental right to life and personal liberty in Article 21 of the Constitution reigns tall over all others. At the incipient stage of an investigation, an arrest may be justifiable for the purpose of investigation and unravelling the crime. However, once the police have no further need of the accused in the investigation and the accused is in judicial custody, then the question arises if he ought to be enlarged on bail or be held back as an under trial? This is where the dictum of bail and not jail comes into play. If the Court is of the opinion that post investigation, there is no reasonable cause to detain the accused in judicial custody, then bail is the rule. However, if the Court is of the opinion that the accused could tamper with evidence, influence witnesses, or abscond, then bail may be refused as this consideration would be reasonable cause to deny him freedom, though not for an inordinately long period of time.

28. The charge against the Appellant is basically associated with his right to freedom of speech and expression, which *prima facie* appears to have gone wrong. In **Schenck Vs. United States**[11], the charge against the Appellant was under the provisions of the Espionage Act that impeded the US war efforts against the German Empire in world war I, by mailing letters to discourage conscripts who had qualified to give their service as soldiers against Germany, from joining the US Army. The Appellant sought the quashing of the Espionage Act as it infringed his first amendment right of free speech. Justice Oliver Wendel Holmes writing for the court held **"The question in every case is whether the words used are used in such**

[11] **249 US 47 (1919)/1919 SCC OnLine US SC 62**

circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree".

29. When we examine these authorities in conjunction then what unfolds is that (1) arrest, is an executive discretion with the police, and the police need not arrest a person even where there is evidence against him of having committed offences under chapter IV and VI of the UAPA and neither can they be compelled to do so by the courts (M.C. Abraham and Anr., Vs. State of Maharashtra and Ors.,- (2003) 2 SCC 649). (2) That, even when the investigating agency is empowered to arrest an accused of having committed an offence, the investigating agency would have to justify the need for making such an arrest (Joginder Kumar Vs. State of Uttar Pradesh and Ors., (1994) 4 SCC 260).(3) That while hearing a bail application of an accused for having committed an offence under Chapter IV or VI of the UAPA, the court would have to superficially appreciate the evidence against the accused to see if there exists a *prima facie* case against him (Vernon Vs. State of Maharashtra and Anr., 2023 SCC On Line SC 885). (4) That the bar to grant bail in view of the proviso to s. 43D (5) of the UAPA shall not impede the Constitutional Courts to grant bail to an accused where the Court is satisfied that there is a violation of any of the fundamental rights of the accused as enshrined in part III of the Constitution (Union of India Vs. K.A. Najeeb – (2021) 3 SCC 713).

30. When the law laid down in Joginder Kumar and K.A. Najeeb are seen together, then an arrest under the provisions of the UAPA without any legal justification, would be an arbitrary exercise of executive discretion and the same would be violative of Article 14 of the Constitution as the arrest was

without legal justification, that would be violative of Article 21 of the constitution as well. With two fundamental rights of the accused under part III of the Constitution being violated, the bar of the proviso to s. 43D (5) of the UAPA would be of no consequence in the light of the judgement of the Supreme Court in K.A Najeeb's case and the accused would be entitled to bail.

31. The legislative intent behind s. 43D (5) and its proviso was to ensure that those who were a "clear and present danger" to the society, whose relationship with the offence is proximate and direct, do not get bail during the pendency of the trial lest they take to their nefarious ways again, once released. It was not to keep incarcerated the unwary transgressor who found himself at the wrong place at the wrong time. Hypothetically, the proviso to 43D (5) was to ensure that a terrorist captured after a fire fight with the security forces and charged u/s. 16 of the UAPA, remains incarcerated as an under trial during the pendency of the trial as his release on bail would pose a clear and present danger to the society at large. In the second instance, a shepherd in a remote village is compelled to give refuge to insurgents at gun point and who, for the sake of his family which includes the womenfolk, makes peace with his circumstances out of sheer helplessness and is charged for an offence u/s. 19 of the UAPA, is certainly not a clear and present danger to the society and was someone who ought not to have been arrested in the first place if the police had exercised its discretion properly. In both these instances, the bar arising from the proviso to s. 43D (5) would apply after their arrest but, in the first instance, the arrest is justifiable while applying the dicta of Joginder Kumar. However, in the second instance, the arrest was made without a justifiable cause and was an arbitrary exercise of

executive discretion against a person who was not a clear and present danger to the society and therefore, violative of Article 14 and 21 of the Constitution. Thus, by applying the dicta in K.A. Najeeb's case, the shepherd would be entitled to bail, the bar arising from the proviso to s. 43D (5) notwithstanding.

32. We hold, that the investigating agency, investigating a case under the UAPA, has the unbridled authority to arrest or not to arrest under the provisions of the UAPA. However, upon arrest, the investigating agency would have to justify the arrest on the anvil of "clear and present danger" of the accused to the society at large, if enlarged on bail. The existence of *prima facie* evidence against the accused is to no avail if there is no justification for the arrest based on the doctrine of clear and present danger to the society. If the investigating agency does not satisfy this Court and is unable to justify the arrest (as warranted in Joginder Kumar) the same would result in the violation of the rights of the accused under part III of the Constitution as adumbrated in K.A Najeeb's case, and the accused may be enlarged on bail. In order to assess whether the accused is a clear and present danger, there can be no rule of thumb and it must be seen in the backdrop of the specific facts and circumstances of each case.

33. Returning to the case at hand, we are of the opinion that *prima facie*, offence u/s. 18 of the UAPA is not made out as the act of the Appellant does not come within definition of a terrorist act u/s. 15 of the UAPA as *prima facie* there is no material to suggest that the article hosted by the Appellant has any content that provokes people to take to arms and resort to violence. As regards s. 13 of the UAPA, we hold that there is sufficient material to *prima facie* hold that Appellant can be tried for the offence as there is *prima facie*

evidence on record to support that charge. As regards s. 121 IPC, we are of the opinion that the material on record does not disclose the commission of the offence of waging war against the Government of India. As regards the offence u/s. 153-B IPC is concerned, the offending article does not attempt to bring about disaffection on the basis on caste or religion. Therefore, we opine that the offence u/s. 153-B is not made out from the material on record. As regards the offence u/s. 35 and 39 of the FCRA, there is sufficient material to take the prima facie view that the Appellant had received remittances from overseas without intimating the authorities about it and therefore, there is sufficient evidence for the Appellant to stand trial for the same.

34. The act was allegedly done eleven years back. From then till date, no evidence has been brought on record that the offending article was responsible in provoking persons to take to militancy. Not a single witness says this. The other cases in which the Appellant was arrested, he has been enlarged on bail in all of them. On facts also, the bar of the proviso to s. 43D (5) is not applicable in this case as the act of the Appellant does not fulfil the requirements of s. 15 of the UAPA and therefore, the Appellant cannot be tried for the offence u/s. 18 of the UAPA. Though there is prima facie material for the Appellant to stand trial for the offence u/s. 13 of the UAPA and s. 35 and 39 of the FCRA, the same does not become an impediment to the Appellant being enlarged on bail. Under the circumstances, upon furnishing a personal bond of Rs. 50,000/- (rupees fifty thousand) and one surety of the like amount to the satisfaction of the Trial Court, the Appellant shall be enlarged on bail forthwith if not required in any other case. Criminal Appeal No. 42/2022 is allowed.

35. For the same reasons as hereinabove, the quash petition of the Petitioner being CRM (M) N0. 472/2023 partly succeeds. Charge framed for offence u/s.18 of the UAPA, 121 IPC and 153B are quashed. The Petitioner shall stand trial for offences u/s 13 of the UAPA and 35 and 39 of the FCRA.

(MOHAN LAL)
JUDGE

(ATUL SREEDHARAN)
JUDGE

SRINAGAR
17.11.2023.
Altaf

Whether approved for reporting? Yes