

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

CrIA (D) No. 61/2023

CrIM. No. 1528/2023

Khursheed Ahmad Lone

...Appellant(s)

Through: Mr. Sajad Ahmad Geelani, Advocate

Vs.

Union Territory through Police Station
Anantnag (Home Department)

...Respondent(s)

Through: Mr. A.R.Malik, Sr. AAG, with Mr. Muneeb Wani, Dy.AG, and
Mr. Mohammad Younis, AC.

CORAM:

HON'BLE MR JUSTICE ATUL SREEDHARAN, JUDGE

HON'BLE MR JUSTICE MOHAMMAD YOUSUF WANI, JUDGE

ORDER

19.04.2024

Atul Sreedharan-J, (Oral):

The present appeal has been filed by the appellant, who is aggrieved by the Order dated 12th September, 2023, passed by the Special Judge (Designated Court under NIA), Anantnag, in a case arising from FIR No. 87/2013 registered at Police Station, Anantnag, for offences, *inter alia*, under Section 13(1) B, 18,20,23,40 of the Unlawful Activities (Prevention) Act. (for short "UAP Act").By the said order, the appellant's bail application was rejected.

2. Before advertng to the facts of the case, this court feels it essential to note down the procedure that has been followed by the Jammu and Kashmir Police while investigating this case. The FIR was registered on 7th April, 2013. On 10th April, 2013, the appellant herein was arrested along with co-accused persons including Tariq Ahmad Shah. While the appellant was in

custody as an under trial, the Union Territory government, on 23rd May, 2013, placed the appellant under preventive detention under the Public Safety Act, which order was challenged by the appellant before this Court, which quashed the order of detention vide its judgement dated 29th October, 2013. After the order of detention is quashed, the appellant, as so stated by learned counsel for the appellant, was released by the Jammu and Kashmir Police on his personal bond, notwithstanding the fact that he was still under arrest in the FIR case for offences *interalia* under the UAPA. Once a person is arrested for the offences under the UAPA, it was only the court of competent jurisdiction which could have granted him bail after observing that the bar under the UAPA to grant bail would not be applicable in the facts and circumstances of the given case.

3. After release of the appellant on his personal bond by the Jammu and Kashmir Police in the year 2013, the appellant remained a free person till 22nd October, 2022, when he was arrested once again when the charge sheet was filed before the Special Court. It is also relevant to mention here that the investigation of the case took nine years for its conclusion. After that, the learned counsel for the appellant has stated that the learned trial court has also framed charges against the appellant and has dismissed the application for grant of bail against which order the present appeal has been preferred.
4. The brief facts of this case are as follows. As per the allegations in the FIR, the appellant along with other co-accused persons used to meet certain under trials when they were brought to court for hearings. These undertrials were also detained under the PSA. It is further alleged that those persons directed the appellant and other co-accused persons to collect money from the people

and also influence youngsters to take to the path of terrorism and wage a war against the Union of India.

5. The learned counsel for the Union Territory of the Jammu and Kashmir, while opposing the appeal, has referred to the disclosure memorandum of co-accused Tariq Ahmad Shah, in which, the co-accused states that he along with appellant herein and other co-accused persons, collected money and influenced persons for the purpose of waging war against the Union of India and that he has hidden the money so collected under a bridge and that he is willing to get the same recovered. Pursuant to the disclosure and on the identification of the spot by the co-accused Tariq Ahmad Shah, an amount of Rs. 29000/- was recovered from the place indicated by Tariq Ahmad Shah. Learned counsel for the Union Territory has submitted that this is the *prima facie*, material against the appellant. It is however not denied that Tariq Ahmad Shah continues to remain a co-accused and has not been made an approver whose statement can be used against the appellant herein. It is also undisputed that there is no disclosure memorandum of the appellant (u/s. 27 of the Evidence Act) and therefore, nothing has been seized at the appellant's behest.
6. We gave ample opportunity to the learned counsel for the Union Territory to place before us the statement of a single independent witness which implicates the appellant or such material evidence which would give rise to a *prima facie* view of the appellant's involvement through circumstantial evidence. The learned counsel for the Union Territory has had more than an hour's time to peruse the charge sheet, to pore over the statement of witnesses, but no such material has been forthcoming and so none has been placed before us. However, learned counsel for the Union Territory submits

that as charge has been framed by the learned trial court, and the extent of appreciating the evidence at the stage of framing charge and grant of bail under the UAPA is the same, viz., that of *prima facie* evidence, bail cannot be granted by this court as the appellant has not challenged the order framing charge. He further submits that as charge has been framed by the learned court below which has not been challenged by the appellant, the only presumption is that there was a *prima facie* case against the appellant and, therefore, till such time that prosecution witnesses have been examined before the learned court below and thereafter, if it appears to the court that nothing incriminating has appeared against the appellant herein, a fresh application for grant of bail cannot be considered by the Ld. Trial Court or by this Court.

7. Besides the above, the usual stock arguments that are made in a case under the UAPA that the offence is heinous, it is against the interest of the nation to let the appellant out on bail, that if the appellant is let out on bail, he would interfere with the judicial process and may influence the witnesses and that the appellant would repeat the offences, and that his release would be counterproductive for the unity and integrity of India, have also been advanced. These arguments are “copy paste” in every case under the UAPA. In fact, experience has shown that the main thrust of the prosecution’s arguments is usually on these aspects, rather than the specific material, which appears, against an accused person. The initial and main thrust of the UT’s arguments is to make an attempt to psychologically overawe the Court by bringing in elements of National Security, Nationalism, Allegiance to Pakistan (of the accused), Radical Islam – Islamist and Islamism (as the influence on the accused), Secession of Jammu and Kashmir from India and

its accession to Pakistan (as the goal of the accused) etc., which this Court acknowledges as elements relevant in a case under the UAPA but which should be supplemental submissions in addition to the material raising a *prima facie* view that the accused may have committed the offence. But to be influenced by the often forceful submission of internal security of the State, and to reject a bail application where the State has utterly failed to disclose any material against the accused which could raise a *prima facie* view of the involvement of the accused as charged by the State, is a sure shot recipe for miscarriage of justice.

8. The question of internal security may be real, or a bogie which the State attempts to compel the Court to believe as real, by impressing upon the Court on aspects of internal/national security and thereby try to get the Court to dismiss the application for bail by contending that the imperatives of internal security demand that the accused remain incarcerated even in the absence of judicially cognizable material against the accused only because there is a suspicion that the accused may be involved in the offence as charged. An overbearing subliminal belief in the primacy of internal security of the State in the sub conscious mind of the judge, could result in the inadvertent oppressive application of a draconian law resulting in the denial of liberty, unsupported by judicially cognizable material. The words of the French thinker Voltaire on internal security are relevant when he says, **"Beware of the words "internal security," for they are the eternal cry of the oppressor"**.

WHETHER FRAMING OF CHARGE PRECLUDES GRANT OF BAIL IN UAPA CASES?

9. This Court is conscious that where there is *prima facie* evidence disclosing a reasonable cause to believe that the appellant may be involved in an offence

under the UAPA to which the proviso to s. 43D(5) applies and additionally, poses a “clear and present danger” to the unity and integrity of India, this Court shall reject the bail application. However, we deem it essential to examine the correctness of the argument put forth by the Ld. Counsel for the UT that, where the trial court has framed charge against the accused, this Court cannot grant bail for an offence under the UAPA where the abovementioned restriction of the proviso to s. 43D(5) of the UAPA applies. It has also been argued that once charge is framed by the Special Court for offences under the UAPA and where an appeal (under the NIA Act) against an order of the Trial Court rejecting bail is filed before this Court, the same cannot be entertained in isolation without the accused challenging the order framing charge as well because the appreciation of evidence at the stage of framing charge for UAPA offences is the same as that of considering an application for bail under that law.

10. With due respect, we are not impressed by the argument put forth by the learned counsel for the Union Territory. Though the Court agrees with the Ld. Counsel for the UT that the appreciation of evidence at the stage of framing charge and for granting bail for an offence under the UAPA to which the rigours of the proviso to s. 43D(5) apply is the same, i.e., *prima facie*, the Court is unable to agree with the latter part of his argument. The legislative intent at the stage of framing charge is different from that of deciding an application for grant of bail. At the stage of framing charge, the legislative intent is to empower to Trial Court to examine the necessity to subject an accused to the rigours of a trial while, at the stage of considering a bail application, the Court is to examine the necessity of subjecting the accused to incarceration during trial.

11. There is no limitation on this Court while examining an order of the Trial Court rejecting bail under the UAPA, where the Trial Court has also framed charge against the appellant/accused, *inter alia* for offences which restrict the grant of bail on account of the operation of the proviso to s.43D(5) of the UAPA, and which order framing charge has not been challenged before this Court by the appellant. At the stage of framing charge, even “strong suspicion” may be construed as *prima facie* evidence as also the broad probabilities of the case which may warrant subjecting the appellant to a full-fledged trial while, at the stage of considering an application for grant of bail, or an appeal to this Court from an order rejecting a bail application, in addition to the existence of a *prima facie* case against the appellant, the case against the appellant must pass the test of “clear and present danger” that a co-ordinate bench of this Court has enunciated in **Peerzada Shah Fahad Vs. UT of J & K and another**¹. This Court, as a Court of appeal, suffers no fetters while examining the correctness of the order passed by the learned court below as a court of appeal. Besides that, the plenary jurisdiction of the Court under Section 482 Cr.P.C and Article 226 of the Constitution which inheres in this Court may be invoked as per the facts and circumstances of a case, *ex debito justitiae*. The Court cannot be a mute spectator where the order passed by the learned trial court reflects injustice on the face of it. In view of the discussion hereinabove, this Court is of the considered opinion that an appeal under the NIA act against an order of the Trial Court dismissing an application for bail can be heard and decided in favour of the appellant in the facts and circumstances of a given case even if the Ld. Trial Court has framed charges against him, *inter alia* for offences under the

¹ 2023 SCC OnLine J&K 954

UAPA, and where the said order framing charge has not been challenged before this Court.

ON MERITS

12. Learned counsel for the appellant has stated that the case against the appellant is one of no evidence. He has further stated that if the appellant was a case of clear and present danger to the unity and integrity of India, then the conduct of Jammu and Kashmir Police is put to grave doubt as they released him on personal bond for a period of nine years during the time when the investigation was in progress even after he was arrested by the police and in a case, where only the trial court could have granted him bail on merits or a default bail on account of investigation not having been completed within the stipulated period. Apparently, a co-accused, Yasir, who was arrested on 20th April, 2013 was enlarged on bail by the court below on 1st August, 2013. The bail order is not before us to assess whether the same was granted on merits or whether it was a default bail.
13. The objections which have been filed by the Union Territory itself reflect that the co-accused, Yasir was initially released on temporary bail by the court below which was confirmed subsequently, so the chances are that the co-accused Yasir may have been granted bail on merits. The allegations against the co-accused Yasir are identical to that of the appellant herein as stated by the learned counsel for the appellant. He has also drawn the attention of this Court to page no. 36 of his appeal memo, which is a medical report of Medical Officer of District Jail, Anantnag, which reads as follows:-

“

Medical Report

It is certified that I have examined patient namely Khursheed Ahmad Lone S/O Gh. Nabi Lone R/O Qazibagh, Anantnag today on 01.12.2022 at District Jail Anantnag. The patient is suffering from Carcinoma Stomach (GE Junction Growth Locally Advanced).

EGD has been done which shows GE Junction growth going to proximal stomach. Besides, this patient has multiple co-morbidities like thyroid dysfunction, Hyperuricemia, Dyslipidaemia oncologist, Surgon in GMC Anantnag on 30.10.2022 who has advised adjuvant Chemotherapy and repeat Biopsy. The patient is planned for repeat EGD on 15th December, 2022. Keeping in view of above ailments, patient may develop GL Bleed which is a grave medical emergency and can be managed only at tertiary care hospital. Hence the report is submitted.”

14. The said medical report as extracted hereinabove reflects that the appellant is suffering from Carcinoma of the GE Junction with Growth locally Advanced. The doctor has also observed that besides cancer, the appellant also suffers multiple co-morbidities like thyroid dysfunction, Hyperuricemia, Dyslipidaemia and HTN. Thereafter, the doctor has opined that in view of the ailment suffered by the appellant, he may develop a GI bleed which is a grave medical emergency and can be managed only at tertiary care hospital. This document is dated 1st December, 2022.
15. Heard learned counsel for the parties and perused the record of the case.
16. As the facts disclose, the Jammu and Kashmir Police arrested the appellant on 10th April, 2013 and released him on personal bond in the year 2013. Thereafter, the appellant remained a free citizen till 22nd December, 2022. The contention put forth by the learned counsel for the Union Territory of Jammu and Kashmir that the appellant can influence witnesses if he is enlarged on bail or that he may try to influence the course of justice if he is enlarged on bail on account or in view of the serious and grave allegations against him, he be denied bail. This Court rejects the same as the learned counsel for the Union Territory has no answer as to why the appellant was released for a period of nine years by the police when the appellant could have only

been released pursuant to an order by a court of competent jurisdiction, as he was an under trial. Besides, if the appellant wanted to influence witnesses, the best time to do so was when the case was under investigation for nine years and he was a free man, thanks to the oversight of the Jammu and Kashmir Police. However, there is no allegation by the counsel for the Union Territory of Jammu and Kashmir that during the period he was free, he had tried to win over the witnesses. It is also essential to note here that there should be compelling reasons for the re-arrest of the appellant after a period nine years. Unfortunately, the learned court below has also not given a finding on such compelling circumstances which mandate the arrest of the appellant even though he was free man for nine years, only because the charge sheet was being filed.

17. This Court has gone through the impugned order in great detail. The findings of the trial court are in paragraphs 16 and 17 itself, it merely says that the allegations and material on record clearly disclose a *prima facie* case against the appellant herein. As stated hereinabove the only evidence which has been shown against the appellant is the statement of co-accused Tariq Ahmad Shah in his memorandum u/s. 27 of the Evidence Act, in which he says that the appellant was involved in collection of the money and influencing the youth to carry out war against the Union of India. The statement of the co-accused is worthless unless he/she is made an approver. However, it is not disputed that the Tariq Ahmad Shah has not been made an approver in this case and therefore, his 27 memorandum does not constitute *prima facie* evidence against the appellant herein. The learned counsel for

the Union Territory of Jammu and Kashmir, has been unable to place before this Court any independent witnesses' evidence which would have gone to disclose the involvement of the appellant in the offence.

18. In view and what has been argued and considered by this Court hereinabove, this appeal is **allowed**. The impugned order is set-aside and the appellant is granted bail on the ground that no *prima facie* case has been made out by the Union Territory to warrant further incarceration of the appellant as an under trial, He shall be released forthwith, subject to furnishing a personal bond of Rs. 50,000/- and one surety of the like amount to the satisfaction of the learned trial court. The appellant shall not leave the territorial jurisdiction of the UT of Jammu and Kashmir without the prior permission of the trial Court and shall remain present as and when required by the I.O.
19. We make it clear that our observations in this Order have been made only for the purpose of deciding this appeal and shall not influence the learned trial court which shall conduct the trial strictly in accordance with law, uninfluenced by this Order.

(Mohammad Yousuf Wani)
Judge

SD/-
(ATUL SREEDHARAN)
JUDGE

SRINAGAR
19.04.2024.
"Shamim Dar"

Whether the Judgment is speaking ? Yes/No
Whether the Judgment is approved for reporting? Yes/No

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrIA (D) No. 61/2023
CrIM No. 1528/2023.

Khursheed Ahmad Lone

.....Appellant (s)

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V/s

**Union Territory th. Police Station
Anantnag (Home Department).**

..... Respondent(s)

Through: Mr. A.R. Malik, Sr. AAG with
Mr. Muneeb Wani, Dy. AG and
Mr. Mohammad Younis, AC.

Coram:

Hon'ble Mr. Justice Atul Sreedharan, Judge.
Hon'ble Mr. Justice Mohammad Yousuf Wani, Judge.

ORDER
19.04.2024

Per-Mohammad Yousuf Wani,J:

I have gone through the Order dated today authored by his Lordship brother Mr. Justice Atul Sreedharan, in the above titled matter heard by us.

Except for the observations made through Paras No. 7 and 8 of the order, I am in agreement with the decision on merits and the conclusion drawn in allowing the appeal and admitting the appellant/accused to bail.

SD/-
(Mohammad Yousuf Wani)
Judge

SRINAGAR
19.04.2024.
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