

Serial No. 47
Suppl. Cause List

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**CrIa(D) 46/2024
CrIM(1001/2024)**

Owais Khalid Dar **... Appellant**

Through Mr. N.H. Shah, Sr. Adv. with
Ms Suwaiba, Advocate

Vs.

**Union Territory Through Police ...Respondent(s)
Station Sopore**

Through Mr. Abdul Rashid Malik, Sr. AAG with
Ms. Rahella Khan, Assisting Counsel

**CORAM:
HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE**

**ORDER
18.03.2025**

ORAL:

The present appeal has been filed by the appellant, who is aggrieved by the order dated 22.03.2024, passed by the learned court below, by which, the application of the appellant for grant of bail was rejected. The appellant has been, *inter alia*, charged under a provision of the UAPA in which the bar of Section 43 D (5) would also be applicable.

2. The case against the appellant in brief is that he along with two others carried out a Grenade attack on a CRPF post in Sopore. The FIR is against unknown

persons, which is understandable. Subsequently, one of the accused persons was taken into custody based on suspicion, whose disclosure memorandum was recorded, in which he is said to have accepted his guilt and named two others who have participated in this offence, of which the appellant herein is one of them.

3. During the pendency of the trial, accused No. 1 passed away and accused No. 3 was granted the benefit of bail on medical grounds. Presently, the appellant is the only sole accused in this case who is still in custody.
4. The undisputed facts in this case are that the appellant has been under trial for a little over 6 years. There are only 16 witnesses in this case and till date only nine of them have been examined. In the past two years, only one witness has been examined and there are still seven witnesses yet to be examined on behalf of the prosecution.
5. Learned counsel for the appellant has submitted that the appellant is eligible for bail on the grounds of delay in trial as well as on merits. On delay in trial, he has stated that there has already been an inordinate delay in examining the prosecution witnesses where, out of total Sixteen prosecution witnesses, only nine witnesses have been examined and more importantly, in the last two years, only one witness has been examined. This

according to him shows that the prosecution is deliberating dragging the trial, where the trial itself is the punishment.

6. On merits, the learned counsel for the appellant submits that pursuant to the so called disclosure memorandum of the appellant herein, a Grenade (which is to be launched from a UBGL, which is a fixture below the barrel of an assault rifle) was seized from the house of the appellant at his behest. Learned counsel has read out the statement of two prosecution witnesses out of the four witnesses to the seizure memo and to the disclosure memorandum, who are Ghulam Mohammad and Harvinder Singh. Summarizing the testimony of these two witnesses before the trial Court, who have stated in their examination-in-chief that the disclosure memorandum and seizure memorandum bears their signature. However, on cross examination both these witnesses have stated that the disclosure memorandum was not recorded in their presence, and neither was the seizure effected in their presence, meaning thereby that they have subsequently signed these documents. The two other witnesses to the disclosure memorandum and the seizure memorandum are yet to be examined. Both these witnesses along with the other witnesses who have already testified are Police Officials. The Union Territory has not been able

to come out with any reason with regard to the delay in producing the prosecution witnesses who are Police witnesses and are under the command and control of the Union Territory.

7. On the other hand, learned counsel for the Union Territory has argued the nature of the allegations against the appellant is serious, whereby one Grenade, as has been described already hereinabove, was recovered from his possession. He has further placed before this Court the judgment of the Hon'ble Supreme Court passed in "**Gurvinder Singh Vs. State of Punjab**" on 07.02.2024 (2024 INSC 92) wherein a two judge bench of the Hon'ble Supreme Court held that merely because the trial has been protracted would not be sufficient enough grounds to grant bail in a case under the UAPA where a bar under Section 43D(5) would apply.

8. At first blush, it may appear that this judgment is in conflict with the judgment of the Hon'ble Supreme Court in "**Union of India Vs. K.A. Najeeb**" which is passed by a Bench of larger strength, being of three judges. Learned counsel appearing for the Union Territory has drawn this court's attention to paragraph 32 of the judgment passed in Gurvinder Singh's case where the judgment of the three judge Bench in K.A.

Najeeb's judgment was considered and it held that in

K.A. Najeeb's case, the Hon'ble Supreme Court was confronted with a circumstance wherein except the respondent-accused, (before the Supreme Court in K.A. Najeeb's case) other co-accused had already undergone trial and were sentenced to imprisonment not exceeding eight years and, therefore, the Supreme 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 a sizable part of the maximum imprisonment i.e., more than five years, the Hon'ble Supreme Court took it as a factor influencing its assessment to grant bail.

9. This Court examined the judgment of the K.A. Najeeb to ascertain the ratio in the judgment. Undoubtedly, the ratio of the judgment must be extracted in the factual aspects governing the case in which the thought process of the Court is revealed. However, the ratio in certain cases may be wide, laying down a proposition of law which may transcend the mere facts of the case. K.A. Najeeb's case is one such. This Court says so on the basis of the intent of the Hon'ble Supreme Court reflected in paragraph 17 of K.A. Najeeb, wherein the Supreme Court held in unequivocal words to the effect that the presence of statutory restrictions like 43D(5) of the UAPA *per se* does not oust the ability of the

Constitution Courts to grant bail on grounds of violation of Part-III of the Constitution. It further opined that the restrictions under a statute/special statute to grant bail, and consideration as far as exercising powers for restoration of rights under Part III of the Constitution, can be harmonized. The Supreme Court further held that where the proceedings under a statute bar bail on the principle of reverse burden, there is an expectation of the Courts to give effect to the legislative policy against grant of bail but that the rigors of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. It further highlighted that such an approach would be a sufficient safeguard against the possibility of provisions like Section 43D (5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial. This is where this paragraph gives an elucidation of the balance between Article 21 and mandatory provisions under special statutes provided under Section 43D(5) of UAPA, ordinarily barring the grant of bail. Therefore, this Court holds that K.A. Najeeb's judgment was not merely restricted to the facts and circumstances of that specific case but went on further lay down the law

relating to the balance that must be struck between the rights of an under trial under Article 21 and the exacting standards of the statute as in the case of Section 43D(5) of UAPA.

10. Thus, this Court holds that paragraph 17 of K.A. Najeeb's judgment is the ratio of the Supreme Court on the harmonization of the strict provision relating to grant of bail in a special statute providing for reverse burden, and the same being passed by a three judge bench of the Hon'ble Supreme Court, this court feels itself bound by the wisdom reflected in paragraph 17 of K.A. Najeeb's judgment. The judgment of the Hon'ble Supreme Court in **Gurvinder Singh Vs. State of Punjab** is a precedent on what is *prima facie* evidence but does not set the ratio on the harmonization between the constitutional right of an under trial juxtaposed with the statutory bar on bail in a special statute, based on the principle of reverse burden.
11. Coming back to this case, the appellant has already been in judicial custody for a period of six years in a case where there are only sixteen prosecution witnesses. *Prima facie*, it appears that the prosecution is deliberately delaying the trial so that the trial itself is a punishment for the appellant.

12. This Court comes to that opinion with a sense of responsibility. The witnesses against the appellant are all police officials and there is no reason given by the Union Territory with regard to the difficulty in producing the witnesses expeditiously. All the prosecution witnesses are under the command and control of the police authorities. Secondly, one witness has been examined in two years. Therefore, it would be fanciful to expect that the Union Territory to expedite the examination of the remaining prosecution witnesses in a time bound manner.

13. This is sufficient to hold that there has been a delay in trial which would entitle the appellant to bail for violation of his rights under Article 21 of the Constitution of India.

14. On merits, the material to prove the case against the appellant is the seizure memos revealing the seizure of the UBGL Grenade from the appellant herein pursuant to his disclosure memorandum. The cross examination of the two of the four prosecution witnesses, which is already on record, reveals that neither the disclosure memorandum was drawn up in their presence nor the seizure effected in their presence, and they have merely signed the memorandum subsequently. These are the witnesses to the disclosure memorandum and the seizure memorandum.

15. Therefore, on a *prima facie* appreciation of material on record there is dilution of the provision under Section 43D(5) of the UAPA, where this Court cannot hold that there is strong *prima facie* case against the appellant and, therefore, he would be entitled to bail on that ground also.

16. The appeal is allowed, and the appellant is enlarged on bail upon his furnishing a personal bond in the sum of Rs. 50,000/- (Fifty Thousand) with one solvent surety in the like amount to the satisfaction of the Registrar Judicial of this Court. Needless to say, the observations made on the factual aspects of the case shall not prejudice the Ld. Trial Court in any manner and the same have been mentioned herein only for the purpose of deciding this appeal.

(MOHD YOUSUF WANI)
JUDGE

(ATUL SREEDHARAN)
JUDGE

SRINAGAR:

18.03.2025

“Mir Arif”

Whether the order is speaking Yes/No

Whether approved for reporting Yes/No