

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE : 12.10.2018

CORAM
THE HONOURABLE DR. JUSTICE S.VIMALA
AND
THE HONOURABLE MRS. JUSTICE S.RAMATHILAGAM

CRL. A. NO. 363 OF 2018

Subair

.. Appellant

- Vs -

Union of India rep. by
The Superintendent of Police
National Investigation Agency
MHA Government of India
New Delhi .

... Respondent

Criminal Appeal filed u/s 439 Cr.P.C. r/w Section 21 of NIA Act to set aside the impugned order passed by the learned Special Judge for NIA Cases/Sessions Court for Exclusive Trial for Bomb Blast Cases, Poonamallee, Chennai in Bail Application in Crl. M.P. No.142 of 2018 in R.C. No.03/2018/NIA/DLI dated 7.6.2018 and enlarge the appellant on bail.

For Appellant : Mr. S.Shanmugavelayutham, SC
for M/s. A.Nowfal

For Respondent : Mr. R.Karthikeyan,
Spl. PP for NIA Act Cases
Mr. N.Chandrasekaran for intervener

Reserved on	Pronounced on
03.08.2018	12.10.2018

JUDGMENT

DR. S.VIMALA, J.

The petition filed by the appellant herein, before the Special Court, seeking bail in Crl. M.P. No.142 of 2018 in R.C. No.03/2018/NIA/DLI was dismissed vide order dated 7.6.2018 against which the present appeal has been filed.

2. It is the case of the prosecution that on 22.9.2016, one Sasikumar, a person belonging to Hindu Munnani party was murdered by some unknown persons. FIR was initially registered by the Thudiyalur Police in Crime No.735/2016, which was

subsequently transferred to CB-CID by the order of the Director General of Police and re-registered as Crime No.1/2016. It further transpires that secret information was received with regard to absconding of two persons, who were suspected to be involved in the said murder. During the course of investigation, two persons were arrested and remanded. In the course of investigation, on the basis of confessional statements, it came to light that the murder was in consequence of terror strikes wielded against the Hindus in the name of Jihad - war against Anti-Islamic activities. From the confession of the said accused persons, it came to light that the recitals therein attract the provisions of the special enactment and, accordingly, the section of offence was altered to one under Section 302, 153 (A), 120 (b) IPC and Section 16 and 18 of the Unlawful Activities (Prevention) Act, 1967 (for short 'UAP' Act).

3. It is the case of the petitioner that on the alleged confession of one of the accused, the petitioner was implicated and he was arrested on 11.10.2017 and remanded to judicial custody. It is the specific case of the petitioner that his arrest is a stage-managed one and that the recovery said to have been made is a highly fabricated one, which does not show any connection to the petitioner.

4. It is the further case of the petitioner that he has no bad antecedent and that the other two co-accused, who are stated to be the main accused, have already been released on bail and, therefore, there would be no impediment for releasing this petitioner on bail. Further, the main accused having already been released on bail, the petitioner, being shown only as an accomplice, that too, based on the confession of the co-accused, is equally entitled to similar treatment as has been meted out to the other accused.

5. Contentions and counter contentions on behalf of the accused as well as the prosecution was placed before the Trial Court. The Trial Court, on consideration of the same, held that while the co-accused were released on statutory bail on completion of 90 days of remand prior to invoking the provisions of the UAP Act and, therefore, the case of the petitioner would not stand on similar footing. On the above reasoning, the bail sought for was rejected. Aggrieved by the said order, the present appeal has been filed.

6. Mr. Shanmugavelayutham, learned senior counsel appearing for the appellant submitted that the trial court has not taken into consideration very many important aspects which strikes at the root of the rejection order. It is the submission of the learned counsel for the appellant that the motive put forth by the prosecution is not sustainable, as even according to the

prosecution, initially it is their case that no personal animosity existed between the accused and the deceased, whereas, in the alteration report, personal animosity has been projected.

7. It is further contended by the learned senior counsel that the discovery of the weapon used in the commission of the offence, said to be at the behest of the appellant, is fabricated, as according to the prosecution, the confession of the accused was on 11.10.17, whereas the alleged recovery, that too without the presence of the appellant, was made on 28.10.17. Further, there was no blood stains in the weapon said to have been allegedly used in the commission of the offence. Therefore, in fine, it is submitted that the weapon being not recovered from the possession of the accused, presumption u/s 43-E of the UAP Act is not substantiated and that there being no recovery, the murder said to have been committed in pursuance of a terrorist activity u/s 15 and 16 of the UAP Act is to be rejected.

8. It is the further contention of the learned senior counsel that though as per the provisions of the UAP Act, investigation ought to have been done by the person in the rank of a Superintendent of Police, however, the relegation of investigation to persons, below the rank of Superintendent of Police, is in contravention of Section 43 of the UAP Act.

9. It is the further contention of the learned senior counsel for the appellant that the alleged weapon, said to be used in the commission of the offence, being an aruval, could in no way be termed as a deadly weapon to attract the provisions of the UAP Act and, therefore, just to ensure that he shall not be released on bail immediately, the Section of offence has been altered to fall under the UAP Act.

10. In a nutshell, it is the submission of the learned senior counsel that the learned Special Judge, without taking into consideration the above provisions of law has passed the impugned order, which is not only without application of mind, but is also a non-speaking order, which is bereft of reasons and, therefore, the order is liable to be set aside and the appellant is entitled to be enlarged on bail.

11. Learned Senior counsel also objected to the impleadment of the intervener, who is the brother of the deceased, contending that it is only the Public Prosecutor, who is vested with the right to continue the proceedings against the accused and the intervener has no right to address the court. It is further submitted that the intervener, at best, can bring the materials to the knowledge of the Court through the Public Prosecutor and, therefore, necessity of impleading the intervener is not required.

12. In support of his contentions, learned senior counsel for the appellant relied upon the following decisions :-

- i) Seeni Nainar Mohammed - Vs - State (2017 (13) SCC 685)
- ii) Hitendra Vishnu Thakur & Ors. - Vs - State of Maharashtra (1994 (4) SCC 662)
- iii) Rajendran - Vs - State (1999 (1) LW (Cri.) 102)
- iv) Vanam & Anr. - Vs - State 2001 (1) LW (Cri.) 60)
- v) Syed Mohd. Ahmad Kazmi - Vs - State (Govt. of NCT of Delhi) (2012 (12) SCC 1)
- vi) P.M.C. Mercantile Pvt. Ltd. - Vs - The State (2014 (3) MWN 454)
- vii) State of Kerala - Vs - Raneef (2011 (1) SCC 784)
- viii) Lt. Col. Prasad Shrikant Purohit - Vs - State of Maharashtra (2017 (13) SCC Online 962)
- ix) Dhariwal Industries Ltd. - Vs - Kishore Wadhvani & Ors. (2016 (10) SCC 378)
- x) Shiv Kumar - Vs - Hukum Chand & Anr. (1999 (7) SCC 467)
- xi) P.S.Saravanabhavanandam & Anr. - Vs - S.Murugaiyyan & Anr. (MANU/TN/0027/1986)

13. Per contra, it is the contention of the learned Special Public Prosecutor appearing on behalf of the respondents that the act of the appellant is not a murder simpliciter, but is a brutal and targeted violence unleashed in pursuance of Jihad activity against non-Muslim community and, therefore, the act of the accused falls squarely within the four corners of Section 15 of the UAP Act.

14. Learned Special Public Prosecutor submits that the recovery of the weapon used in the commission of offence was recovered from a drainage, which was pointed out by the accused, which is subsequent to the disclosure made by the accused and, therefore, squarely falls within Section 27 of the Evidence Act. Further, it is submitted that the water had to be drained out of the drainage before recovery of the weapon, which has led to the delay in the recovery and, therefore, no mala fides can be attributed to the prosecution.

15. It is the contention of the learned Special Public Prosecutor that the contention of the appellant that presumption u/s 43-E of UAP Act cannot be raised is a misconception as the weapon of offence was recovered subsequent to the disclosure and pointing out made by the accused.

16. It is countered by the learned Special Public Prosecutor that the investigation by the National Investigating Agency is Pan India and that the investigation has been done by persons under the control of the Superintendent of Police, who is the designated Chief Investigation Officer and, therefore, the subordinates following the orders of the designated officer would in no way vitiate the investigation.

17. Learned Special Public Prosecutor submitted that the bodily harm likely to be caused by the weapon is the criteria to decide whether the weapon is a lethal weapon and that the weapon, which has been used in the commission of the offence, being a sharp edged weapon, falls squarely under Section 2 (c) of the Arms Act and, therefore, the contention of the appellant is liable to be rejected.

18. Learned Special Public Prosecutor, in support of his contentions, relied upon the following decisions :-

- i) Kangujam Ravi Kumar Singh - Vs - UOI (MANU/WB/1088/2013)
- ii) Sadanala Ramakrishna & Ors. - Vs - N.I.A. (C.R.A. No.197/2014 - dt. 26.8.2016)
- iii) State of Maharashtra - Vs - Viswanath Maranna Shetty (2012 (10) SCC 561)
- iv) Mohd. Khalid - Vs - State of W.B. (2002 (7) SCC 364)
- v) R.A.H.Siguran - Vs - Shankare Gowda & Anr. (2017 (16) SCC 126)

19. Mr.Chandrasekaran, learned counsel for the complainant submits that he may be permitted to intervene in the matter by filing an impleadment petition. This Court, however, allowed the learned counsel appearing for the intervener to file written submissions.

20. It is the submission of the learned counsel for the intervener that the deceased was an active member in Hindu Munnani and persons, who were opposed to his philosophy had conspired to do away with him. It is the submissions of the learned counsel that the NIA, after detailed investigation, had arrested the accused of whom the appellant is one. The appellant was missing for more than a year and only on 11.10.2017, he was arrested. The murder has been perpetrated only to strike panic and terror among the general public and that panic situation was caused by the use of aruval by the accused, which squarely attracts the relevant sections of the UAP Act.

21. It is the submission of the learned counsel that the FIR filed by the intervener would clearly reveal the injuries suffered by the deceased, which are brutal and which sends a

warning to the members of the public that none will be spared, which is nothing but a way to create a panic situation among the general public. Therefore, in short, it is submitted that the denial of bail by the trial court, in the facts of the case, is just and warranted and no interference is called for with the well considered order passed by the Special Judge.

22. This Court bestowed its attention to the contentions advanced by the learned counsel on either side and also the learned counsel appearing for the intervener and also browsed through the various decisions cited by either side in support of their contentions and also the other materials available in the typed set of documents.

23. Before advertng to the contentions advanced by the learned counsel on either side, it would be just and proper to sift through the various decisions relied on by the parties to have a bird's eye view of the ratio laid down in the matter of consideration of bail in cases relating to national security.

24. In *Seeni Nainar Mohammed - Vs - State* (2017 (13) SCC 685), the Supreme Court had occasion to consider the issue as to whether the act of the accused was such that it created terror in the minds of the public at large. In such circumstances, the Supreme Court held that the aftermath of the happenings in and around the vicinity of the incident has a bearing upon the nature of the act to term it as a terror act.....

25. In *Hitendra Vishnu Thakur & Ors. - Vs - State of Maharashtra & Ors.* (1994 (4) SCC 602), the Supreme Court had occasion to consider the definition of 'terrorism' as defined under the TADA Act and held that the mere mental or physical damage caused would not be enough to bring an act within the ambit of terrorism, but the act should have prolonged psychological effect on the victim to be branded as a terrorist act.

26. In *Rajendran - Vs - State* (1999 (1) LW (Cr1.) 102), this Court had considered the impropriety of the investigation conducted by an officer not authorised by law to conduct the investigation and in that context the Court held that the investigation done by an officer not competent or authorised by the Government, is liable to be set aside. Similar is the view expressed by the Division Bench of this Court in *Vanam & Anr. - Vs - State* (2001 (1) LW (Cr1.) 60).

27. In *Sayed Mohd. Ahmad Kazmi - Vs - State* (Govt. of NCT of Delhi) & Ors. (2012 (12) SCC 1), the Supreme court held that the right of an accused to grant of statutory bail before the charge sheet is filed stands extinguished, if the same is not exercised by that time and after the said period, the accused is

only entitled to apply for regular bail. In the said case, the Supreme Court further went on to hold that the right of appellant to grant of statutory bail remained unaffected by the subsequent application for extension of remand filed by the prosecution. Following the said ratio in Ahmad Kazmi's case (supra), similar view has been taken by this Court in P.M.C. Mercantile Pvt. Ltd. - Vs - The State (2014 (3) MWN (Cri.) 454).

28. In State of Kerala - Vs - Raneef (2011 (1) SCC 784), the Supreme Court sent a word of caution that delay in concluding trial, which takes several years, should be borne in mind while deciding grant of bail, lest Art. 21 of the Constitution, which guarantees fundamental rights, would stand violated. The Supreme Court further held that just because an organisation is termed as an illegal outfit, it is yet to be considered whether all the members of the organisation can be automatically held to be guilty.

29. In Lt. Col. Prasad Shrikant Purohit - Vs - State of Maharashtra (2017 SCC Online SC 962), the Supreme Court reiterated that grant of bail lies within the discretion of the court and no detailed or elaborate consideration of merits of the issue needs to be gone into. The Supreme Court further held that bail is not to be denied merely because of sentiments of a community against the accused.

30. In Shiv Kumar - Vs - Hukam Chand & Anr. (1999 (7) SCC 467), the Supreme Court quoted with approval the Full Bench decision of the Allahabad High Court in Queen Empress - Vs - Durga (ILR 1894-96) 16 All 84), wherein the role of the Public Prosecutor to conduct the case has been enunciated. For better clarity, the relevant portion is extracted hereunder :-

"15.

It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and, in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. In our opinion, a Public Prosecutor should not refuse to call or put into the witness box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination."

31. In R.A.H. - Vs - Shankare Gowda @ Shankara & Anr. (2017 (16) SCC 126), the Supreme Court, after detailed analysis of the various decisions on the point as to the competency of the person to conduct investigation, held that investigation done under the command and authority of a competent person cannot be said to be bad. The Supreme Court held that it would not be right to quash the proceedings merely on the ground that the investigation was not valid.

32. In Kangujam Ravi Kumar Singh - Vs - Union of India (MANU/WB/1088/2013), the Calcutta High Court held that recording of statements by officers under the control of the competent authority would not be barred. Similar view has been held by another co-ordinate Bench of the Calcutta High Court in Sadanala Ramakrishna & Ors. - Vs - National Investigation Agency (C.R.A. No.197 of 2014), wherein it was held that investigation by an officer under the command of the competent officer, authorised by law, cannot be treated as bad.

33. In State of Maharashtra - Vs - Vishwanath Maranna Shetty (2012 (10) SCC 561), the Supreme Court reiterated the necessity to record a finding as to the possibility of an accused in committing a crime after grant of bail and the part of the accused in the involvement of the organised offence, either directly or indirectly. In fine, the Apex Court held that though "reasonable grounds" has not been defined under the Maharashtra Control of Organised Crime Act, however, it is presumed that recording of satisfaction under clauses (a) and (b) of sub-section (4) of Section 21 of MCOCA, with reference to the involvement of the accused in the crime and the possibility of the accused in indulging in crimes in future, is sine qua non for grant of bail.

34. The decision in Mohd. Khalid - Vs - State of W.B. (2002 (7) SCC 334), Dhariwal Industries Ltd. - Vs - Kishore Wadhvani & Ors. (2016 (10) SCC 378) and P.S.Saravanabhavanandam & Anr. - Vs - S.Murugaiyyan & Anr. (Cr. M.P. Nos.9167 of 1985 & 16 of 1986, dated 17.2.1986), have been relied upon by the intervenor to stress that the acts of terrorism conjures up emotional responses in the victims as well as in the practitioners and that the psychological effect that impacts on the individual is more disturbing than the physical and mental damage that it causes on the victims and, therefore, the said acts have the potential of affecting the society.

35. Keeping the above decisions relied on by the learned counsel appearing for the parties, this Court, before deciding the main issue relating to the rejection of the bail application filed by the petitioner, embarks upon the ancillary issue as to whether the intervenor can be permitted to address the Court.

While it is the contention of the appellant that at best the intervenor could bring materials to the knowledge of the Court through the Public Prosecutor and not directly and, therefore, impleading the intervenor as party respondent is not sustainable, learned counsel for the intervenor submits that the main object of the intervenor is to bring facts to the notice of this Court so that this Court may appreciate the order passed by the trial court.

36. From the contentions of either party, as noticed above, it is clear that the primary object is to bring certain materials to the knowledge of this Court so that the Court can peruse the same for the purpose of arriving at a justiciable finding. It is needless to state that materials, which have a bearing on the case, needs to be placed before the Court so that the same is analysed in proper perspective so as to arrive at a proper finding.

37. From the above contentions, it is clear that the intervenor can be permitted to place certain facts before the Court to further the cause of justice, which, in the considered opinion of this Court, could even have been done through the Public Prosecutor, which is the stand of the learned counsel for the appellant.

38. In the case on hand, the intervenor merely wants to submit his arguments, though not through the Public Prosecutor, but directly addressing the Court. It is to be pointed out that the intervenor is not claiming any relief for his self, but only trying to further the cause of justice by placing materials before the Court, so that the Court can appreciate the same for deciding the issue. In such view of the matter, when the intervenor is not seeking any relief, this Court is of the considered opinion that the written arguments placed before the Court either through the Public Prosecutor or directly by the intervenor would not make any difference. In such view of the matter, this Court is of the considered view that impleadment of the intervenor is not necessary, but the written arguments placed by him can be taken into consideration for the purpose of arriving at the proper finding.

39. The impugned order of the trial court for non-grant of bail to the appellant is attacked by the appellant on four grounds, viz.,

(i) that the weapon used for the commission of the offence cannot be said to be a deadly weapon as defined under the UAP Act;

(ii) that the recovery of the alleged weapon used in the commission of offence was recovered belatedly after the arrest of the appellant and therefore, the confession statement is barred u/s 25 and 26 of the Evidence Act and, therefore, no

sanctity can be given to the said recovery;

(iii) that the investigation has been done by an officer lower in rank than the officer contemplated under the UAP Act and, therefore, the said investigation stands vitiated; and

(iv) that the appellant has been roped in as an accused alleging personal animosity, that too by way of an alteration report, when no motive had been attributed for over 14 months and all of a sudden by way of alteration report, motive has been attributed and, therefore, the said inclusion of the appellant is only an afterthought for the purpose of bringing the offence under the purview of UAP Act.

Whether Aruval is a Deadly Weapon - Used in the commission of offence

40. It is the contention of the learned counsel for the appellant that even according to the prosecution, the weapon said to have been used in the commission of the offence is an aruval, which is a weapon used in doing the day-to-day chores and, therefore, by no stretch of imagination could this weapon be termed as a deadly weapon.

41. In Seeni Nainar Mohammed's case (supra), the Supreme Court had occasion to consider the issue as to whether the act of the accused was such that it created terror in the minds of the public at large. In such circumstances, the Supreme Court held that the aftermath of the happenings in and around the vicinity of the incident has a bearing upon the nature of the act to term it as a terror act. The Supreme Court, in the said case, held as under :-

"14. We have also noticed that the sanctioning authority under Section 20-A(2) of TADA i.e. PW 28 IG, CBI in the present case, had granted permission to file a case under TADA on 16-9-1997 vide permission order being Ext. P-46 and in his deposition PW 28 stated that:

"... I verified the TADA Rules very carefully. Upon perusing the said documents as I was satisfied that there is ample evidence to file a case against A-1 to A-5, namely, Shahul Hameed, Raja Hussain, Subair, Zahir Hussain and Aziz alias Abdul Aziz under the TADA Act, I issued orders granting permission to file a case under Section 3 of the TADA Act..."

We may straightaway observe that the sanctioning authority did not have necessary material before him to show that the alleged act of causing death of the deceased was done with

intent to create terror in the minds of the public at large. Had there been any such terror in the minds of the people, then as an aftermath of the death of the deceased there would have been an adverse effect on the harmony amongst different sections of people in the vicinity of the place of incident. However, no such incident of striking terror in the minds of the people or adverse effect on the harmony amongst any section of society was reported. The alleged act of causing death of an individual was only an attack by the appellant-accused with weapons on the deceased who later succumbed to the injuries.

* * * * *

18. The learned counsel further relied upon the judgment of this Court in *Girdhari Parmanand Vadhava v. State of Maharashtra* [*Girdhari Parmanand Vadhava v. State of Maharashtra*, (1996) 11 SCC 179 : 1997 SCC (Cri) 159] wherein it was enunciated that: (SCC p. 194, para 39)

"39. A crime even if perpetrated with extreme brutality may not constitute "terrorist activity" within the meaning of Section 3(1) of TADA. For constituting "terrorist activity" ... the activity must be intended to strike terror in people or a section of the people or bring about other consequences referred to in the said Section 3(1). Terrorist activity is not confined to unlawful activity or crime committed against an individual or individuals but it aims at bringing about terror in the minds of people or section of people disturbing public order, public peace and tranquillity, social and communal harmony, disturbing or destabilising public administration and threatening security and integrity of the country."

(Emphasis supplied)

42. In the abovesaid decision, the Supreme Court has categorically held that the aftermath of the happenings consequent upon the act committed by the accused has a bearing to stamp the act as a terrorist act. It is the case of the prosecution that the alleged act of causing death of the deceased was done with intent to create terror in the minds of the public at large. Due to the said act, the peace and harmony in the area stood disrupted as riots broke in and around the area leading to registering of many cases against the different religious entities. The harmony of the different sections of

the people in the vicinity of the place of incident stood affected, thereby, the safety and security of the citizens in and around the vicinity of the place of occurrence was put in question.

43. Allegedly the safety and security of the community was under threat due to the act of the accused. Could, in the above scenario, the use of the aruval, a day-to-day tool, be termed as a deadly weapon.

44. Section 15 of the UAP Act defines terrorist act and the ingredients that would be required for an act to fall under the said ambit. For better clarity, the same is extracted hereunder :-

"15. Terrorist act.—Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, [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,—

(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—

(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

[(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 6 [an international or inter-governmental organisation or any other person to do or abstain from doing any act; or] commits a terrorist act."

(Emphasis supplied)

45. From the above definition, it is abundantly clear that whoever does any act with intent to threaten or likely to threaten the unity, integrity, security and sovereignty of India by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons, etc., and causes death of or injuries to any person or persons or loss of, or damage to, or destruction of property, would fall within the meaning of terrorist act.

46. In P.Ramanatha Aiyar's 'The Law Lexicon' (4th Edn.), 'Lethal Weapon' is defined as under :-

"Lethal Weapon. A deadly weapon. The term "lethal weapons" means deadly weapons. "Guns, Swords, pistols, knives and the like are lethal weapons as a matter of law, when used within striking distance of the party assaulted. Others are lethal or not according to their capability of producing death or great bodily harm in the manner in which they are used."

47. From the above definition it is unambiguously clear that any weapon, which when used within striking distance of the party with the capability of producing death or great bodily harm are categorized as deadly weapons.

48. The term deadly weapon has been defined in Black's dictionary to mean "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury". The word deadly means causing a fatal injury. The Delhi High Court had occasion to consider the term deadly weapon in the case of Sukhvinder Singh - Vs - State (Govt. of NCT of Delhi - CrI. a. No.1358/2012) and held as under :-

"5. Knives are weapons available in various sizes and may just cause little hurt or may be the deadliest. They are not deadly weapons per se such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is

calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was a deadly one."

49. In the case on hand, the purpose for which the aruval has been used clearly signifies that the weapon has been used for causing a deadly assault, not only on the person, but also to create a panic-like situation in and around the vicinity of the place where the occurrence took place and, therefore, the weapon should stand categorized as a deadly weapon. However, the size and the design of the weapon are incidental to hold it as a deadly weapon, which could be done only after full-fledged trial.

50. Therefore, the contention of the learned counsel for the appellant that the weapon alleged to have been used in the commission of the offence, viz., aruval, could not be termed as a deadly weapon, does not merit acceptance at this point of time.

Personal Animosity :

51. It is the contention of the learned senior counsel for the appellant that though in the FIR registered immediately after the occurrence, no personal animosity has been projected between the appellant and the deceased, however, the alteration report filed discloses personal animosity between the appellant and the deceased. This clearly shows that the prosecution is trying to further its case at every stage and, placing reliance on such a theory to deny bail to the accused is nothing but analysing the evidence on record before all the evidence could be put forth, which is against the well established ratio laid down by the Supreme Court and, therefore, the non-grant of bail deserves to be interfered.

52. A careful perusal of the original FIR as also the alteration report reveals that no personal animosity has been alleged in the alteration report. The alteration report merely speaks about the way in which the appellant has been roped into the offence, mainly on the confession of the co-accused, who has already been enlarged on statutory bail. The FIR as well as the alteration report could not be in any way said to be contradictory. They reveal the prosecution web on which the edifice of the prosecution theory is built. Therefore, the contention that personal animosity has been shown in the alteration report and, therefore, the facts have been distorted after the filing of the alteration report cannot be accepted.

Recovery on the basis of the confession of appellant unbelievable :-

53. It is the contention of the learned senior counsel for

the appellant that the aruval, alleged to have been used by the appellant is said to have been recovered from a septic tank on 28.10.17, after the arrest of the appellant on 11.10.17; the occurrence is said to have taken place on 22.09.2016; the alleged recovery, after a period of almost a year, at the behest of the alleged confession of the appellant is merely a cooked up recovery to suit the prosecution version and is hit by Section 25 and 26 of the Evidence Act and no reliance can be placed on the said recovery.

54. Per contra, it is the submission of the learned Special Public Prosecutor that the recovery was made only after the arrest of the appellant, as at the initial point of time, on the confession of the co-accused, the involvement of the appellant was only known and that the co-accused had not spoken about the weapon used by the appellant. Only after the arrest of the appellant, on the basis of his confession, the weapon used in the commission of the offence was recovered, more especially on the appellant pointing out the place where the weapon was discarded and from where the weapon was recovered. The pointing out of the place by the appellant clearly shows that the appellant had knowledge about the place where the weapon was and, therefore, the said recovery is admissible u/s 27 of the Evidence Act.

55. Though much reliance has been placed on Sections 25, 26 and 27 of the Evidence Act by the learned counsel appearing on either side, at this stage of consideration of bail, detailed discussion on the admissibility of the confession need not be looked into.

56. Recovery of the weapon used in the commission of offence has to be proved by the prosecution in a manner as contemplated u/s 25, 26 and 27 of the Evidence Act as also u/s 43-E of UAP Act. It is not for this Court, at this point of time, while deciding the question of bail, to find out whether the prosecution has proved the recovery. At best, at this point of time, it could only be said that the prosecution has placed before the Court a weapon, alleged to have been used in the commission of offence. In such view of the matter, this Court is not inclined to dwell much into the recovery aspect for the purpose of deciding grant of bail.

Investigation by an officer not authorised under the Act :

57. It is the submission of the learned counsel for the appellant that part of the investigation has been conducted by an officer lower in rank than the officer envisaged under the UAP Act and, therefore, the investigation is not proper. However, the said stand is controverted by the learned Special Public Prosecutor by contending that statements of certain witnesses have been recorded by the Inspector of Police, who is

under the direct control of the investigating officer authorised by the UAP Act. Further, the charge sheet has been laid by the Superintendent of Police, NIA, who is the designated Chief Investigation Officer under the UAP Act. Mere recording of statements by an officer, who is under the control of the Chief Investigating Officer authorised by the UAP Act would not render the investigation illegal and not proper.

58. It is true that the Superintendent of Police is the Chief Investigating Officer for the NIA, who is said to have filed a charge sheet before the Court. The said statement is not controverted by the appellant. However, it is the contention of the appellant that certain statements were recorded by an officer, who is lower in rank and is not an authorised officer under the UAP Act.

59. It is to be pointed out that the National Investigation Agency has PAN India operations and oversees investigation throughout the country, even involving international involvement of terrorists organisations. The Superintendent of Police has been authorised to conduct the investigation and he is said to have filed the charge sheet in the present case. An officer, investigating a matter, involving PAN India, it would not be possible for the said officer to record statements from each and every individual on his own accord, but would definitely require the assistance of his subordinates to carry out the investigation. Though statements have been recorded by an officer subordinate to the officer, who has been authorised under the UAP Act, however, the charge sheet is said to have been filed by the authorised officer, before the Court, after browsing through the various documents placed before him. In such a scenario, it cannot be said that the recording of statements by an officer subordinate and under the command of his superior officer, viz., the Chief Investigating Officer could be termed as illegal.

60. Useful reference in this regard can be had to the decision of the Kolkata High Court in Kangujam Ravi Kumar Singh - Vs - Union of India (2014 CrL. L.J. 3013 :: MANU/WB/1088/2013), wherein it has been held as under :-

"18. Prima facie, in our opinion, recording of the statements by a police officer below the rank of Assistant Commissioner of Police would not be barred. The investigation has been conducted under the command of the Assistant Commissioner of Police/Superintendent of Police, NIA, New Delhi. Therefore, in our opinion, this submission is unacceptable."

61. On a careful consideration of the above, this Court holds that the statements recorded by an officer subordinate to

the Chief Investigating Officer cannot be said to be illegal or barred and, therefore, this contention fails.

62. Insofar as the contention of the learned senior counsel for the appellant that though the charge sheet was laid on 7.4.2018, the seal of the court on the charge sheet is that of 18.5.2018 and, the charge sheet having been laid after 180 days, there being no charge sheet against the appellant as on the expiry of the period of 180 days and, therefore, the appellant is entitled to be released on bail, the said contention is controverted by the learned Special Public Prosecutor by submitting that the charge sheet has been laid on 7.4.2018, however, the seal of the court on the charge sheet is shown as 18.5.18 and, therefore, the Court may call for the records and peruse the same.

63. This Court, accordingly, directed calling for the records and in continuation whereof, copies of part of the file before the trial court has been placed before this court. A perusal of the same reveals that the accused has filed the bail application on 3.4.18. The records further reveal that notice was ordered on the said application on 3.4.18 and from 4.4.18 till 18.5.18, the arguments of the accused as well as the Special Public Prosecutor as well as the counsel for the intervener were heard by the trial court and the court, after consideration, passed orders on 7.6.18. On 6 occasions, the Court has heard the learned Special Public Prosecutor and on 5 other occasions, for various reasons, the matter has been carried over. More specifically on 7.4.18, the day on which the charge sheet is stated to have been laid, the markings on the court records reveal as under :-

"Petitioner's counsel present. Spl. P.P. present. At request of Spl. P.P., for counter by 11.4.2018."

64. On 11.4.2018, when the case was taken up, the following markings were made on the court records :-

"Petitioner's/Accused counsel is present. Spl. P.P. present and counter filed. For enquiry by 16.4.18."

65. The above markings reveal that no mention has been made about the filing of charge sheet on 7.4.18, though the same finds place at the last line of the counter filed in the bail application before the trial court on 11.4.2018. Curiously, no mention of the filing of the charge sheet before the expiry of 180 days finds a place in the order passed by the trial court. Though the trial court has taken into consideration the procedures to be followed in investigation and filing of report on completion of investigation and more so has dealt into the word 'charge sheet' or 'final report', curiously the filing of

the charge sheet, alleged to have been made on 7.4.18 does not find a place in the impugned order. Therefore, there is nothing on record to show that the charge sheet was laid on 7.4.18, i.e., within the expiry of the period of 180 days. The date seal found on the copy of the charge sheet is 18.5.2018, thereby indicating that it could not have been laid on 7.4.2018.

66. It is further seen from the charge sheet filed by the prosecuting agency as also the order passed by the trial court, the charge sheet has been laid only as against two of the accused in the case, though five persons have been named in the FIR. In the above backdrop of the facts as is evident from the record, the questions that arise for consideration before this Court are :-

“Whether the detention of the appellant is justified beyond the period of 180 days, as ordered by the trial court?”

67. It is the basic contention of the learned counsel for the appellant that the charge sheet filed only against A-2 and A-3 in the above C.C. No.3/2018, is unknown to criminal law. It is submitted that charge sheet has to be filed as against all the persons involved in the offence and piecemeal report cannot be filed only against few of the accused and, therefore, the said charge sheet cannot be said to be a final report/charge sheet as envisaged u/s 173 (2) Cr.P.C.

68. Section 167 of the Criminal Procedure Code contemplates the period within which the enquiry shall be completed and final report filed. In the absence of completion of enquiry and filing of final report/charge sheet, the accused is entitled to statutory bail, if he is prepared to and furnishes the bail. The Supreme Court has laid down the principles relating to grant of bail to the accused for lapse on the part of the investigating agency to file the charge sheet in the case of Uday Mohanlal Acharya - Vs - State of Maharashtra (2001 (5) SCC 453). For better clarity, the relevant portion of the judgment, as is found in Para-13 of the judgment is quoted hereinbelow:-

“13.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on

account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated."

69. The above view of the Supreme Court still holds the filed and has been consistently followed by the Supreme Court in a catena of decisions.

70. From the principles laid down above, it is categorically clear that a right accrues on the accused for being released on bail on account of the lapse on the part of the investigating agency to complete the investigation within the period prescribed and, application, if any, filed, shall be disposed of by the Magistrate/Court on being satisfied that the accused has been in custody for the period as envisaged u/s 167 Cr.P.C. and that no charge sheet has been filed by the investigating agency.

71. In the case on hand, while it is the contention of the learned counsel that no charge sheet, as envisaged u/s 173 (2) of the Code has been filed, learned Special Public Prosecutor submits that charge sheet as against A-2 and A-3 in C.C. No.3 of 2018 has been filed on 7.4.2018, but the date seal of the Court shows that it has been received on 18.5.2018.

72. However, a perusal of the copy of the charge sheet reveals that it was despatched on 7.4.2018 by the officer authorised under the UAP Act and that the said charge sheet has been filed against Sadham @ Sadham Hussain & another. The charge sheet further reveals the persons, who have not been charge sheeted in the said charge sheet. From the above, it is clearly evident that the charge sheet was despatched only on 7.4.2018 and, therefore, it would have been a physical impossibility for the said charge sheet to have been filed before the trial court on 7.4.18. In essence, the only construction that fits into proper logic is that the charge sheet which was despatched on 7.4.18, has been filed before the Court on 18.5.2018, which is evident from the date seal affixed by the Court. Therefore, it cannot be said that the charge

sheet has been filed on 7.4.18.

73. It is further evident from the charge sheet that the same has been filed only as against two persons, though according to the FIR, totally 5 persons have been said to be involved in the offence. Can the prosecution file piecemeal charge sheet against only a few persons, which could be considered as a final report for the purpose of Section 173 (2) of Cr.P.C.

74. A perusal of the impugned order reveals that the trial court has accepted the charge sheet as against two persons alone, though the FIR speaks of five persons involved in the offence. The trial court has held that cognizance is being taken insofar as the offence committed by the persons shown in the charge sheet against whom investigation is completed and, therefore, it cannot be said that the charge sheet is incomplete.

75. Section 173 (2) and 173 (8) empowers the investigating officer to file final report and to file supplementary report. Such being the case, no right accrues on the investigating officer to keep the investigation pending against a particular accused.

76. Useful reference in this regard can be had to the judgment of the Apex Court in Joginder Singh & Anr. - Vs - State of Punjab & Anr. (1979 CrL. L.J. 333), wherein the Apex Court held as under :-

"6. It will be noticed that both under Section 193 and S. 209, the commitment is of 'the case' and not of 'the accused' whereas under the equivalent provision of the old Code, viz., S. 193 (1) and Section 207-A, it was 'the accused' who was committed and not 'the case'.

* * * * *

8. It will thus appear clear that under S. 193 read with S.209 of the code when a case is committed to the court of session in respect of an offence the court of session takes cognizance of the offence and not of the accused."

77. Once this Court has held that the final report/charge sheet could not be construed as a charge sheet/final report on the lines enunciated in Joginder Singh's case (supra), and that the same has not been filed within the period of 180 days as prescribed under the UAP Act, whether the appellant is entitled for bail is the pivotal question that falls for consideration.

78. The Supreme Court, in a very recent judgment in Achpal @ Ramswaroop & Anr. - Vs - State of Rajasthan (CrL. A. No.1218 of 2018 - dated 24.09.2018) tracing the historical background,

which led to the enactment of Section 167 Cr.P.C. as has been dealt with in the judgment of the Apex Court in Rakesh Kumar Paul - Vs - State of Assam (2017 (15) SCC 67), considering the provisions as suggested by the Law Commission in its 41st report and the Statement of Objects and Reasons dated 07.11.1970, held as under :-

"11. Unfortunately, all laws tend to be misused whenever opportunity knocks, and Section 167 of the Code of Criminal Procedure, 1898 was no exception. Since there was a practical difficulty in completing investigations within the 15-day time limit, the prosecution often took recourse to the provisions of Section 344 of the Code of Criminal Procedure, 1898 and filed a preliminary or incomplete report before the Magistrate to keep the accused in custody. The Law Commission of India noted this in its 41st Report (after carefully studying several earlier Reports) and proposed to increase the time-limit for completion of investigations to 60 days, acknowledging that:

"14.19. ... such an extension may result in the maximum period becoming the rule in every case as a matter of routine; but we trust that proper supervision by the superior courts will prevent that."

(emphasis supplied)

The view expressed by the Law Commission of India and its proposal is as follows:

"14.19. Section 167.—Section 167 provides for remands. The total period for which an arrested person may be remanded to custody—police or judicial—is 15 days. The assumption is that the investigation must be completed within 15 days, and the final report under Section 173 sent to court by then. In actual practice, however, this has frequently been found unworkable. Quite often, a complicated investigation cannot be completed within 15 days, and if the offence is serious, the police naturally insist that the accused be kept in custody. A practice of doubtful legal validity has therefore grown up. The police file before a Magistrate a preliminary or "incomplete" report, and the Magistrate, purporting to act under Section 344, adjourns the proceedings and remands the accused to custody. In the Fourteenth Report, the Law Commission doubted if such an order could be made under Section 344, as that section is intended to operate only after a Magistrate has

taken cognizance of an offence, which can be properly done only after a final report under Section 173 has been received, and not while the investigation is still proceeding. We are of the same view, and to us also it appears proper that the law should be clarified in this respect. The use of Section 344 for a remand beyond the statutory period fixed under Section 167 can lead to serious abuse, as an arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner. It is, therefore, desirable, as was observed in the Fourteenth Report, that some time-limit should be placed on the power of the police to obtain a remand, while the investigation is still going on; and if the present time-limit of 15 days is too short, it would be better to fix a longer period rather than countenance a practice which violates the spirit of the legal safeguard. Like the earlier Law Commission, we feel that 15 days is perhaps too short, and we propose therefore to follow the recommendation in the Fourteenth Report that the maximum period under Section 167 should be fixed at 60 days....."

79. The Supreme Court, noticing the 41st report of the Law Commission, more especially paragraph 14.19, opined that wrongful practice by the Police in filing incomplete reports leads to prolonged remand of the accused which defeats the letter of and spirit behind enactment of Section 167 of the Code. The mandate of Section 167 provides completion of investigation within the period prescribed.

80. The Supreme Court has categorically held that the Magistrate cannot extend the period of remand over the period stipulated under the Act. In the case on hand, UAP Act prescribes a maximum period of remand of 180 days for completion of investigation and on expiry of such period, the accused person shall be entitled for bail. Further, charge sheet/final report, if any, should also be filed within the said period. The custody of the person beyond the period prescribed under the Act ought not to be guided by mere suspicion that he may have committed an offence.

81. In the case on hand, on the date of filing the bail petition, the period of 180 days as contemplated under the UAP Act had not come to an end, which is accepted by both sides. The contention that charge sheet has been filed on 7.4.18 cannot be accepted as there is evidence to show that charge sheet is filed only on 18.5.18. Therefore, on the completion of extended

period upto 180 days, which falls after 9.4.2018, there being no charge sheet/final report as contemplated u/s 173 (2) of the Act and, therefore, the accused is entitled for statutory bail.

82. The trial court has not taken note of all the facets of the matter, as discussed above and, therefore, the dismissal of the bail application is not justified.

83. Further, it is to be pointed out that the main accused, viz., A-1 and A-2 in the above case have already been granted statutory bail by the court below. The NIA has not taken any further steps after the addition of offences under the UAP Act. In the above circumstances, rejecting bail for the appellant, who is the 3rd accused in the case, cannot be countenanced, for the infirmities pointed out above.

84. For the reasons aforesaid, this criminal appeal is allowed and the order dated 7.6.2018 passed in Crl. M.P. No.142 of 2018 in R.C. No.03/2018/NIA/DLI on the file of the Special Court for NIA Cases, Poonamallee at Chennai is set-aside. The appellant is ordered to be released on bail on his executing a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a likesum to the satisfaction of the said Court and on further condition that the appellant should appear before the said Court as and when directed by the Trial Court. The appellant is also directed to surrender passport before the trial court.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Special Judge
Special Court for NIA Cases/Sessions Court
for Exclusive Trial for Bomb blast cases
Poonamallee, Chennai.
2. The Special Public Prosecutor
for NIA Cases
High Court, Madras.

3. The Superintendent of Police,
Union Of India,
National Investigation Agency
MHA Government of India,
New Delhi.

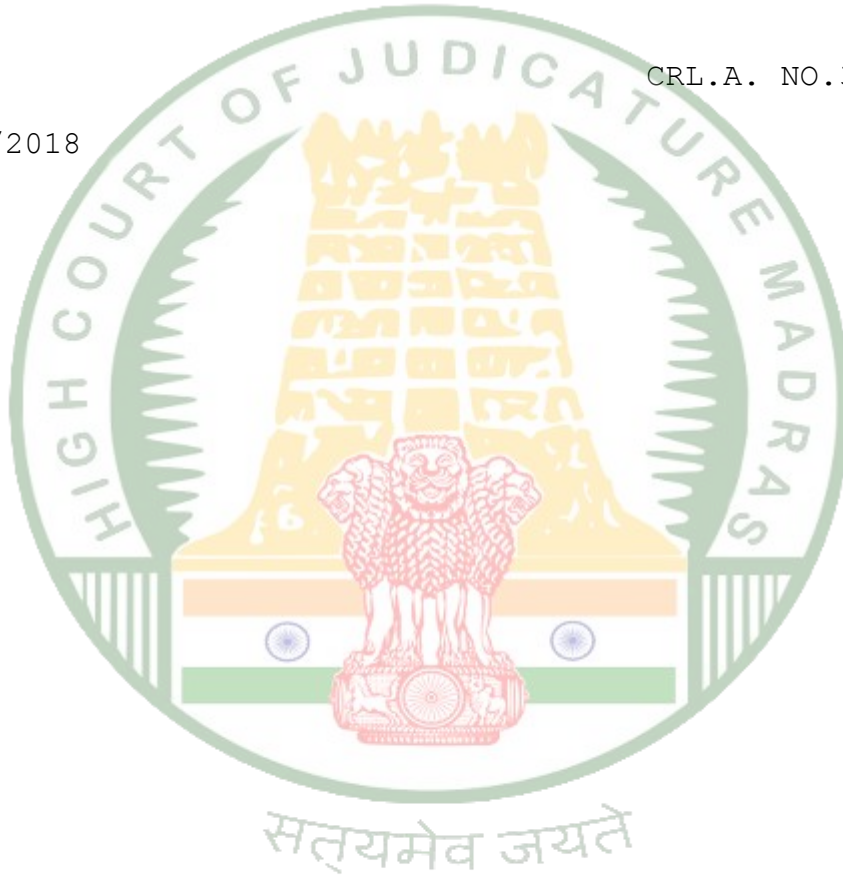
4. The Superintendent,
Central Prison,
Salem.

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.70960

+5ccs to Mr.A.Nowfal, Advocate, S.R.No.71216

CRL.A. NO.363 OF 2018

rrs 12/10/2018



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