

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 525 OF 2021

Rizwan Ahmed @ Khali @ Azad
Age 23 yrs; Occu : Student
S/o Nizamuddin Ali Mohammed Ali
Sisvamatiya, Post Parsauna, Tal. Padrauna,
Kasaya Police Station, Dist. Kushinagar,
Uttar Pradesh

...Appellant
(Accused no.1)

Versus

The State of Maharashtra
(through National Investigating Agency)
National Investigating Agency (NIA)

...Respondent
(Complainant)

Mr. Sharif Shaikh, a/w Ms. Kritika Agarwal, Mr. Shahid
Nadeem, Mr. Qurban Hussain, i/b Mr. Mateen Shaikh,
for the Appellant.

Smt. A. S. Pai, Special PP, for the Respondent/NIA.

Mr. S. R. Shinde, APP for the State.

**CORAM: S. S. SHINDE AND
N. J. JAMADAR, JJ.**

RESERVED ON: 30th SEPTEMBER, 2021.

PRONOUNCED ON: 21st DECEMBER, 2021

JUDGMENT:- (Per: N. J. JAMADAR, J.)

1. This appeal under Section 21 of the National Investigation Agency Act, 2008 ("the NIA Act") is directed against an order dated 10th May, 2021, passed by the learned Special Judge (NIA), on an application (Exhibit-174) in NIA Special Case No.3 of 2016, preferred by the appellant – accused no.1 for enlarging him on

bail during the pendency of the said case, whereby the said application came to be rejected.

2. Shorn of unnecessary details, the background facts leading to this appeal can be stated as under:

(a) In Special Case No.3 of 2016, the appellant along with co-accused Mohseen (A2) and Ayaz Mohammed (wanted accused no.1) and Yusuf-Al-Hind @ Yusuf (wanted accused no.2) stand charged for having entered into a criminal conspiracy with unknown persons to instigate wanted accused no.1 Ayaz and other youths of Malvani, Malad, to join Islamic State of Iraq and Syria ("ISIS") and for having supported the ISIS in its terrorist acts and instigated and assisted the youths of Malad, Mumbai to leave India to join the terrorist organization ISIS for Jihad, punishable under Section 18 of the Unlawful Activities (Prevention) Act, 1967 ("UAPA") and Section 120B of the Indian Penal Code, 1860 ("the Penal Code"). The appellant has also been charged for the offence punishable under Section 20 of UAPA for being a member of banned terrorist organization (ISIS and ISIL). In addition, the appellant has been charged for having committed offence relating to membership of a terrorist organization, punishable under Section 38, and also for having

given support to the terrorist organization, punishable under Section 39 of the UAPA.

3. The gravamen of indictment against the appellant is that the appellant was involved in the criminal conspiracy with co-accused no.2 Mohsin and wanted accused Ayaz Mohammed and Yusuf in propagating the jihadi related activities of ISIS with the common objective and intention to join ISIS, a banned terrorist organization, and to participate in its terrorist activities. In pursuance of the aforesaid criminal conspiracy the appellant and co-accused Mohsin started making efforts to instigate, intimidate and influence vulnerable Muslim youths of Malvani (Malad) Mumbai with a view to compel them to become Fidayeen or to leave for Hijart with an ultimate objective of motivating them to join ISIS.

4. The appellant was initially arrested on 22nd January, 2016 in CR No.24 of 2015, registered at ATS Kalachowky Police Station, Mumbai, pursuant to the report lodged by Mr. Satish Mayekar, Police Inspector, to the effect that four youths were missing from Malvani area and one of them Ayaz (wanted accused no.1) had already joined ISIS. After the NIA took over the investigation, the crime was re-registered at RC

No.02/2016/NIA/Mumbai. Post completion of investigation, the appellant stands charged for the offences, as indicated above.

5. The appellant preferred the application for bail (Exhibit-174), with the assertion that there was no material to make out a *prima facie* case against the appellant. The investigating agency failed to collect any evidence to substantiate the allegation that the appellant entered into a conspiracy with the wanted accused and co-accused no.2, he was a member of the banned terrorist organization (ISIS) and gave support to the terrorist organization. In particular, apart from the statement of the accomplice Mohsin (A2), that the appellant was the Nayab Amir of ISIS in India, there was no material to establish the nexus between the appellant and the banned terrorist organization.

6. Apart from the merits, the appellant sought bail on the ground of prolonged incarceration as the appellant had spent almost six years as an under-trial prisoner. It was very unlikely that the trial would be completed in a reasonable time as the prosecution proposed to examine 228 witnesses. The continued incarceration of the appellant without the prospect of the trial being concluded within reasonable time was in

negation of the right to life and liberty guaranteed under Article 21 of the Constitution of India.

7. The learned Special Judge was not persuaded to accede to the prayer of the appellant for release on bail. After advertng to the material on record, including the evidence of witnesses recorded during the course of the trial, the learned Special Judge was of the view that there was *prima facie* material to show the involvement of the appellant for the offences for which he has been arraigned. To arrive at the said finding, the learned Special Judge adverted to the statements of the witnesses and the circumstantial evidence in the nature of the call detail records, the history of online activities of the appellant and the fact that the appellant had travelled to many places in India, during the relevant period, and had established contacts with persons, who were based at Saudi Arabia and Siria, and had taken a room on leave and licence basis at Goa.

8. On the aspect of the period of incarceration as an under-trial prisoner, though the learned Special Judge was of the view that the case of the appellant – accused no.1 would fall within category (b) of the classification delineated in the case of *Shaheen Welfare Association vs. Union of India and others*,¹ yet,

1 (1996) 2 Supreme Court Cases 616.

having regard to the nature of the accusation and the material pressed into service against the appellant, the learned Special Judge declined to exercise the discretion in favour of the appellant. The possibility of the appellant reverting to identical proscribed activities and fleeing away from justice was also adverted to.

9. Being aggrieved by and dissatisfied with the impugned order of rejection of the prayer for bail, accused no.1 – appellant is in appeal.

10. Mr. Vikram Khalate, Superintendent of Police, NIA, has filed an affidavit in opposition of the prayer for bail.

11. Appeal is admitted and, with the consent of the Counsels for the parties, taken up for hearing and final disposal.

12. We have heard Mr. Sharif Shaikh, the learned Counsel for the appellant and Mrs. Pai, the learned Special Counsel for the respondent/NIA, at length. With the assistance of the learned Counsels for the parties, we have perused the material on record including the documents, depositions of witnesses and statements of protected witnesses, compilations of which were tendered by the learned Counsel for the appellant and respondent/NIA.

13. Mr. Shaikh, the learned Counsel for the appellant submitted that the accusation against the appellant of having conspired with wanted accused Ayaz is not at all borne out by the material on record. An endeavour was made to demonstrate that the prosecution case proceeds on the premise that the appellant came to Mumbai in the month of December, 2015. If that be the case, from the own showing of the prosecution, the radicalization of wanted accused no.1 Ayaz had started in the year 2013 itself. Even the co-accused no.2 Mohasin and PW-15 and PW-18, who were allegedly instigated by the appellant to join ISIS and commit terrorist acts, were already radicalized. Except, co-accused no.2 Mohsin and PW-15, no other person had the occasion to meet the appellant. To bolster up this submission, Mr. Shaikh took us through the charge-sheet (paragraphs 17.4 to 17.6), the statements of protected witnesses and the evidence of PW-15 and PW-18. It was urged, with a degree of vehemence, that even if the prosecution case is taken at par, it cannot be said that there is material to demonstrate that the accusation against the appellant is *prima facie* true.

14. In the backdrop of the aforesaid nature of the evidence and the material arrayed against the appellant, the learned Special Judge committed a grave error in rejecting the

application, despite recording, in clear and explicit terms, that there was no material to suggest that the appellant had contacted wanted accused no.1 Ayaz, submitted Mr. Shaikh.

15. Assailing the order on the score of refusal to exercise the discretion in favour of the appellant, though the learned Special Judge observed in no uncertain terms that the case of the appellant would fall in category “b” of the classification in the case of ***Shaheen Welfare Association*** (supra), Mr. Shaikh submitted that the said refusal to exercise the discretion tantamounts to denial of life and personal liberty. Thus, on merits as well as on the count of prolonged incarceration, which is in teeth of the judgments of the Supreme Court in the cases of ***Shaheen Welfare Association*** (supra) and ***Union of India vs. K. A. Najeer***², the appellant deserves to be enlarged on bail, urged Mr. Shaikh.

16. Reliance was also placed on the judgments of this Court in the cases of ***Vikram Vinay Bhave vs. State of Maharashtra and others***³, ***National Investigation Agency vs. Areeb Ejaz Majeed***⁴ and recent judgment delivered by us in the case of ***Iqbal Ahmed Kabir Ahmed vs. State of Maharashtra***,⁵ wherein, this Court has

2(2021) 3 SCC 713.

3MANU/MH/1213/2021

42021 SCC Online Bom 239.

52021 Online Bombay 1805.

granted bail to accused, who stood charged for the offences under UAPA.

17. In opposition to this, Smt. Pai, the learned Special PP for the respondent – NIA stoutly resisted prayer for bail. At the threshold, it was submitted that in the backdrop of the grave nature of the allegations and the material on record, including the evidence of PW-15 and PW-18, which *ex facie* indicate that the allegations against the appellant are true, the interdict contained in Section 43D of the UAPA comes into play with full force and vigour and, therefore, the appellant cannot be released on bail. In the light of the overwhelming material on record, according to the learned Special PP, the learned Special Judge was wholly justified in declining to exercise the discretion in favour of the appellant, especially, in the face of the interdict contained in Section 43D of UAPA. Smt. Pai, the learned Special PP took the Court through the statements of protected witnesses, statements of PW-15 and PW-18 recorded under Section 164 of the Code, and the depositions of PW-15 and PW-18, as well as the circumstantial evidence formed by the Call Detail Records and the panchnamas. Banking upon the pronouncement of the Supreme Court in the case of ***National Investigation Agency vs. Zahoor Ahmad Shah Watali***⁶, Smt. Pai

⁶2019(5) Supreme Court Cases 1.

forcefully submitted that since, in the facts of the case, the bar under Section 43D of UAPA operates with full force, the Court would not be justified in releasing the appellant on bail.

18. On the aspect of the prolonged period of incarceration, Smt. Pai would urge that, as of the date of the submissions, the prosecution had examined 34 witnesses. The prosecution proposes to examine 70 to 80 more witnesses. In the case at hand, the delay was not attributable to the prosecution as the accused took three months each to cross-examine PW-15 and PW-18. In this backdrop, since the trial is being conducted in right earnest and 34 witnesses, including PW-15 and PW-18, who are the material witnesses, have been examined, the appellant does not deserve to be enlarged on bail on the count of delay in trial, submitted Smt. Pai.

19. We have carefully perused the material on record and considered the submissions canvassed across the bar.

20. In the matter of grant of bail, ordinarily the nature and seriousness of the offence, the circumstances in which the offences were allegedly committed, the nature and character of the evidence, the circumstances peculiar to the accused, the possibility or otherwise of the presence of the accused not being secured at the trial, reasonable apprehension of evidence/

witnesses being tampered with, and the larger public interest are the factors which weigh in, in exercising the discretion. It is trite law that at the stage of considering the prayer for bail, meticulous examination of evidence and elaborate documentation on merits of the case are not to be made. The Court is, however, expected to give reasons for granting or refusing to grant bail. Yet, the said exercise of ascribing reasons is markedly different from discussing merits/demerits of the case, as a Court would do at the stage of determination of guilt. This requirement of ascribing reasons assumes critical significance where there are statutory restrictions in the matter of grant of bail like Section 43D of the UAPA. Section 43D(5) contains an interdict against the grant of bail unless the public prosecutor has been given an opportunity of being heard and, on a perusal of the case diary or the report lodged under Section 173 of the Code, the Court is of the opinion that there are no reasonable grounds for believing that the accusation against the accused is *prima facie* true. Section 43D(6) further provides that the restriction on granting of bail, envisaged in Section 43D(5), is in addition to the restriction under the Code or any other law for the time in force for grant of bail.

21. The aforesaid being the contours of sphere of exercise of discretion, in the matter of grant of bail, particularly when the accused stands charged for the offence punishable under UAPA, the task at hand becomes more delicate, in the sense that, the evidence of the witnesses, who have been examined so far, cannot be subjected to such scrutiny as is warranted while determining the guilt of the accused. We are, thus, required to exercise due circumspection in considering import of evidence, lest the exercise does not partake the character of appreciation of evidence.

22. With the aforesaid clarity, we revert to the facts of the case. As indicated above, the charge against the appellant is that of entering into a criminal conspiracy with unknown persons to instigate wanted accused no.1 Ayaz and other youths of Malvani, Malad to join ISIS, and to instigate, advocate, advise and incite them to leave India to join the terrorist organization, ISIS. In pursuance of the said conspiracy the appellant, allegedly being a member of the said terrorist organization, ISIS and ISIL, indulged in acts and participated in the meetings to achieve the aforesaid objective. Is there material which renders the aforesaid accusation, *prima facie*, true?

23. The statements of protected witnesses recorded during the course of investigation and PW-15 and PW-18 under Section 164 of the Code indicate that the appellant had visited Mumbai in the month of December, 2015. Co-accused no.2 Mohsin had introduced the appellant to PW-15. In his deposition before the Court, PW-15 has given a vivid account of the circumstances in which he came to be indoctrinated. Undoubtedly, a significant role is attributed to co-accused no.2 Mohsin. However, the part played by the appellant in the indoctrination of PW-15 is also deposed to with reference to the meetings between co-accused no.2 Mohsin, appellant and PW-15, the arrangements made for the stay of appellant, precautionary action taken when it was apprehended that the appellant was being pursued by police. PW-15 specifically deposed to a meeting which he had at Haji Ali, Mumbai and the endeavour made by the appellant to indoctrinate him.

24. Mr. Shaikh, the learned Counsel for the appellant, endeavoured to persuade us to appreciate the manner in which PW-15 fared in the cross-examination. Our attention was invited to the omissions and improvements in the version of PW-15 qua the statements recorded during the course of investigation. Emphasis was laid on the circumstances which

allegedly forced PW-15 to attempt to commit suicide, attributing the alleged acts of harassment to the officers of the investigating agency.

25. As indicated above, at this juncture, we would not be justified in delving into the manner in which PW-15 fared in the cross-examination. At the cost of repetition, we are not called upon to appreciate the evidence as the trial court would do. The testimony of PW-15 indicates that the appellant had visited Mumbai in the month of December, 2015. He was introduced by co-accused no.2 Mohsin as the Nayab Amir of ISIS in India and the appellant made an endeavour to indoctrinate PW-15.

26. Mr. Shaikh, the learned Counsel for the appellant, would strenuously urge that apart from the said assertion that co-accused no.2 Mohsin had introduced appellant as the Nayab Amir, there is no material to establish the nexus between the appellant and the banned organizations. The aforesaid submission is required to be appreciated in the light of the fact that the said assertion is made by a witness, who was allegedly a privy to the plot to leave India to join ISIS. There is material on record to indicate that PW-15 and PW-18 had in fact left their home with the said objective along with co-accused no.2 Mohsin and travelled to various places in the South.

27. The aforesaid submission also loses sight of the true nature and import of criminal conspiracy. It is well recognized that conspiracy is hatched in secrecy. The degree of secrecy, where the allegations are of the conspiracy to commit terrorist acts, is compounded by pseudo-names, aliases and devices adopted to conceal the identity. It would be naive to expect that there would be direct evidence of conspiracy in such matters. The prosecution is thus not necessarily enjoined to establish that the conspirators expressly agreed to do or cause to be done the illegal act. The agreement may be proved by necessary implication and inferred from the act, conduct and attendant circumstances. Law is settled that the conspiracy to commit an offence is by itself a substantive offence and thus entails punishment. Every individual offence committed in pursuance of such conspiracy is separate and distinct offence for which the offenders are liable to be punished, independent of the offence of conspiracy.

28. In the backdrop of the aforesaid principles which govern the law of conspiracy we are afraid to accede to the broad submission on behalf of the appellant that there should be either direct evidence or a direct nexus between all the co-conspirators. From this stand point, the absence of material to

indicate that PW-18 had known or met the appellant or that the appellant had met wanted accused Ayaz, does not assume decisive significance. The law recognizes that there can be a general conspiracy and separate conspiracy wherein a group of persons act together in furtherance and execute a part of the general conspiracy. In such cases, the doctrine of plurality means in execution of a larger and general conspiracy comes into play.

29. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of *Ajay Agarwal Vs. Union of India & Ors.*⁷, wherein the Supreme Court expounded several or different models or techniques to broach the scope of conspiracy. One of the model was that of a chain, where each party performs, even without knowledge of other, a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. The Supreme Court gave the illustration of procuring and distributing narcotics or an illegal foreign drug for sale in different parts in which confederates in the general conspiracy execute their respective parts in the larger conspiracy. The observations of the Supreme Court in paragraph No. 24 are instructive and thus extracted below :

“24. Thus, an agreement between two or more

persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. Conspiracy itself is a substantive offence and is distinct from the offence to commit which the conspiracy is entered into. It is undoubted that the general conspiracy is distinct from number of separate offences committed while executing the offence of conspiracy. Each act constitutes separate offence punishable, independent of the conspiracy. The law had developed several or different models or techniques to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of other a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. An illustration, of a single conspiracy, its parts bound together as links in a chain, is the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers, middlemen and retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers knew that the middlemen must sell to retailers-, and the retailers knew that the middlemen must buy of importers of someone or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers, and those at the other end knew that it had not begun with their settlers. The accused embarked upon a venture in all parts of which each was a participant and an abettor in the sense that, the success of the part with which he was immediately concerned, was dependent upon the success of the whole. It should also be considered as a spoke in the hub. There is a rim to bind all the spokes to gather in a single conspiracy. It is not material that a rim is found only when there is proof that each spoke was aware of one another's existence but that all promoted in furtherance of some single illegal objective. The traditional concept of single agreement can also accommodate the situation where a well defined group conspires to commit multiple crimes so long as all these crimes are the objects of the same agreement or continuous conspiratorial relationship, and the conspiracy continues to subsist though it was entered in the first instance.....”

(emphasis supplied)

30. The aforesaid pronouncement was followed with approval by a three Judge Bench of the Supreme Court in the case of

*State of Maharashtra & Ors. Vs. Som Nath Thapa and Ors.*⁸ In the said case, (Bombay bomb blasts), the Supreme Court held that, it would not be necessary to establish that the accused knew that the RDX and/or bomb was/were meant to be used for bomb blast at Bombay, so long as they knew that the material would be used for bomb blast in any part of the country. The Supreme Court adverted to the principle of plurality of means. The observations of the Supreme Court in paragraphs 22 to 24 illuminatingly postulate the legal position :

“22. As in the present case the bomb blast was a result of chain of actions, it is contended on behalf of the prosecution, on the strength of this Court's decision in Yash Pal Mittal vs. State of Punjab 1977 (4) SCC 540, which was noted in para 9 of Ajay Aggarwal's case that of such a situation there may be division of performances by plurality of means sometimes even unknown to one another; and in achieving the goal several offences may be committed by the conspirators even unknown to the committed. All that is relevant is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy, even though there may be sometimes misfire or over-shooting by some of the conspirators.

23. Our attention is pointedly invited by Shri Tulsi to what was stated in para 24 of Ajay Aggarwal's case wherein Ramaswamy, J. stated that the law has developed several or different models or technique to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of the other, a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. The illustration given was what is done in the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers. Middleman privies to a single conspiracy to smuggle and distribute narcotics. The smugglers know that the middlemen must sell to retailers and the retailers know that the middlemen must buy from importers. Thus the conspirators at one end at the chain know that the unlawful business would not, and could not,

stop with their buyers, and those at the other end know that it had not begun with settlers. The action of each has to be considered as a spoke in the hub - there being a rim to bind all the spokes together in a single conspiracy.

24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use. When can charge be framed ?”

(emphasis supplied)

31. Thus, the Supreme Court has explicated in clear and explicit terms that when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

32. Readverting to the facts of the case, in the light of the aforesaid legal position, it is pertinent to note that the statement made by co-accused no.2 Mohsin, about the position of the appellant in the banned terrorist organization cannot be said to be bereft of any evidentiary value. The said statement was made when the conspiracy was allegedly afoot. PW-15 has

categorically deposed to the said fact and, *prima facie*, even stood his ground during the course of cross-examination. In this state of affairs, the provisions contained in Section 10 of the Evidence Act render such statement relevant and admissible against the co-conspirator on the basis of “doctrine of agency”, which the said section embodies.

33. The circumstantial evidence in the nature of the use of multiple mobile phones, visit to multiple locations by the appellant in proximity to the period during which the appellant visited Mumbai and met co-accused Mohsin and PW-15, the use of the accounts online in pseudo names and alises, also deserves requisite consideration. If the circumstantial evidence is considered in juxtaposition with the evidence of PW-15 and PW-18, and the statements of the rest of the protected witnesses, it would be audacious to record a finding that there are no reasonable grounds to believe that the accusation against the appellant is *prima facie* true. In the facts of the case at hand, the reliance placed by the learned Special PP, on the judgment of the Supreme Court in the case of ***Zahoor Ahmad Watali*** (supra) appears to be well-founded. Once such a *prima facie* finding is recorded, the interdict contained in Section 43D(5) of the UAPA precludes the Court from releasing the

accused on bail, unless a case is made out to exercise the jurisdiction to uphold the constitutional guarantee.

34. This propels us to the second limb of the submission on behalf of the appellant rested in the long period of incarceration as an under-trial prisoner. The appellant came to be arrested on 22nd January, 2016. The appellant is in custody for almost six years. Post filing of the charge-sheet by NIA, charge was framed against the appellant and co-accused no.2 on 3rd August, 2018. Indisputably, the recording of evidence has commenced and the prosecution had examined 34 witnesses. It would be contextually relevant to note that the prosecution cited 228 witnesses; however, the learned Special PP had made a statement that now the prosecution proposes to examine 70 to 80 witnesses out of the rest of the witnesses.

35. In the aforesaid factual backdrop, as regards the stage of trial and the course it is expected to take, Mr. Shaikh, the learned Counsel for the appellant would urge that in the light of the punishment which the offences entail, namely Section 120B of the Penal Code, Sections 18, 20, 38 and 39 of the UAPA, for which the appellant is being prosecuted, further detention of the appellant as an under-trial prisoner would be in gross violation of the right of the appellant – accused to speedy

trial, which is a facet of right to life under Article 21 of the Constitution.

36. In the case of *Iqbal Ahmed* (supra), we had an occasion to deal with the prayer for bail on the count of prolonged incarceration, as an under-trial prisoner, in the context of the fundamental right to life and personal liberty and the reasonability of the procedure which deprives an under-trial prisoner of the right to speedy trial. In the said case, after consulting the pronouncements in the cases of *Shaheen Welfare* (supra) and *K. A. Najeeb* (supra), we had stated the legal position as under:

“39. This right to speedy trial, in the prosecutions where the special enactments restrict the powers of the Court to grant bail, faces a competing claim of the interest of society and security of State. In such prosecutions, if the trials are not concluded expeditiously, the procedure which deprives the personal liberty for an inordinate period is then put to the test of fairness and reasonableness, envisaged by Article 21 of the Constitution. Where the period of incarceration awaiting adjudication of guilt become unduly long, the right to life and the protection of fair and reasonable procedure, envisaged by Article 21, are jeopardized.

40. In the case of *Saheen Welfare Association* (supra) the Supreme Court considered the conflicting claims of personal liberty emanating from Article 21 and protection of society from the terrorist acts, which the Terrorist and Disruptive Activities (Prevention) Act, 1987 professed to achieve. The Supreme Court reconciled the conflicting claims of individual liberty and the interest of the community by issuing directions for release of the under trial prisoners, who had suffered long incarceration, depending upon the gravity of the charges. The observations of the Supreme Court in para 9 to 11 and 13 to 14 are material and hence extracted below:

9] The petition thus poses the problem of reconciling conflicting claims of individual liberty versus the right of the community and the nation

to safety and protection from terrorism and disruptive activities. While it is essential that innocent people should be protected from terrorists and disruptionists, it is equally necessary that terrorists and disruptionists are speedily tried and punished. In fact the protection to innocent civilians is dependent on such speedily trial and punishment. The conflict is generated on account of the gross delay in the trial of such persons. This delay may contribute to absence of proper evidence at the trial so that the really guilty may have to be ultimately acquitted. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted, but who remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA. They suffer severe hardship and their families may be ruined.

10] Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh's case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.

11] These competing claims can be reconciled by taking a pragmatic approach.

13] For the purpose of grant of bail to TADA detentes, we divide the under trials into three classes, namely, (a) hardcore under trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general arid to the complainant and prosecution witnesses in particular; (b) other under-trials whose overt acts or involvement directly attract Sec.3 and/or 4 of the TADA Act; (c) under trials who are roped in, not because of any activity directly attracting Sec.3 and A, but by virtue of Sec.120B or 147 I.P.C., and; (d) those under trials who were found possessing Incriminating articles in notified areas & are booked under Section 5 of TADA.

14] Ordinarily, it is true that the provisions of Sections 20(8) and 20(9) of TADA would apply to all the aforesaid classes. But while adopting a

pragmatic and just approach, no one can dispute the fact that all of them cannot be dealt with by the same yardstick. Different approaches would be justified on the basis of the gravity or the charges. Adopting this approach we are of the opinion that under-trials falling within group (a) cannot receive liberal treatment. Cases of under-trials falling in group (b) would have to be differently dealt within. in that, if they have been in prison for five years or more and their trial is not likely to be completed within the next six months, they can be released on bail unless the court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant the family members of the complainant, or witnesses. Cases of under-trials falling in groups (c) and (d) can be dealt with leniently and they can be released if they have been in sail for three years and two years respectively....."

41. The aforesaid judgment was referred with approval, by the Supreme Court in the case of *K. A. Najeeb* (supra) wherein the Supreme Court while emphasizing that under trials cannot be indefinitely detained pending trial, expounded in clear terms that once it is found that timely conclusion of trial would not be possible and accused has suffered incarceration for a significant period of time, the Court would be obligated to enlarge the accused on bail. The observations in paragraph 15 and 17 are instructive and thus extracted below:

15] This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Under-trial Prisoners v. Union of India, it was held that under trials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time,

Courts would ordinarily be obligated to enlarge them on bail.

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

(emphasis supplied)

42. The Supreme Court has thus explicated the legal position that the statutory restriction like section 43-D(5) of the UAPA *per se* does not operate as an impediment on the powers of the constitutional Court to grant bail, if a case of infringement of the constitutional guarantee of protection of life and personal liberty is made out, and the rigours of such statutory restriction would melt down in the face of long incarceration of an under trial prisoner. In such a situation, the prayer of entitlement for bail on the count of prolonged delay in conclusion of trial is required to be appreciated in the backdrop of period of incarceration, the prospect of completion of trial in a reasonable time, the gravity of the charge and attendant circumstances.”

37. The aforesaid observations were recorded in the backdrop of the fact that in the said case the appellant – accused therein had undergone more than five years imprisonment as an under-trial prisoner and the recording of evidence had yet not commenced.

38. Applying the aforesaid principles to the facts of the case at hand, in our view, the distinctive features which emerge are: firstly, the trial has commenced and a substantial number of witnesses, including PW-15 and PW-18, who appeared to be prime witnesses, have been examined. Secondly, in the impugned order also, the learned Special Judge has adverted to the circumstances, especially the exigency of situation which arose on account of Covid-19 Pandemic for the delay in trial. Thirdly, the quality of the material pressed into service against the appellant also assumes importance. Fourthly, in the light of the nature of the accusation and the gravity of the offences, the apprehension entertained by the learned Special Judge that there is a strong possibility of the appellant reverting to the proscribed activities cannot be said to be totally unfounded. At this juncture, it deserves mention that the appellant's name is revealed as an accused in the report filed by the NIA, Delhi in the NIA Court, New Delhi, arising out of RC/14/2015/NIA/DLI. We refrain to observe anything more in that context. Yet, this fact cannot be brushed aside when the question of exercise of discretion on account of delay in trial is considered on the touchstone of the likelihood of the appellant indulging in the proscribed activities. We are thus not persuaded to accede to the prayer of the appellant to enlarge

him on bail on the count of the prolonged period of incarceration as an under-trial prisoner. At the same time, the fact that the appellant has already undergone the minimum period of imprisonment prescribed for the offence punishable under Section 18 and more than half of the maximum punishment prescribed for the offences punishable under Sections 38 and 39, cannot be lost sight of.

39. In the circumstances of the case, since we have noted that the trial is being conducted with reasonable dispatch, we deem it appropriate to direct the learned Special Judge to conclude the trial as expeditiously as possible. We are of the view that, since material witnesses have been examined, the examination of the rest of the witnesses ought not consume long time. In the totality of the circumstances, we deem it appropriate to grant liberty to the appellant to renew prayer for bail if the trial is not concluded by December, 2022.

40. For the foregoing reasons, we do not find any justifiable reason to interfere with the impugned order. The appeal thus deserves to be dismissed, subject to aforesaid direction and liberty to the appellant.

41. Hence, the following order:

: O R D E R :

- (i) The appeal stands dismissed.
- (ii) The learned Special Judge NIA, Mumbai is, however, requested to conclude the trial in NIA Special Case No. 3 of 2016, as expeditiously as possible and preferably by the end of December, 2022.
- (iii) In the event, the trial is not concluded by December, 2022, the appellant shall be at liberty to renew the prayer for bail.
- (iv) By way of abundant caution, it is clarified that the consideration is confined to the entitlement of the appellant for bail and the NIA Court shall not be influenced by any of the observations made hereinabove in the determination of the guilt of the appellant and/or the co-accused.

[N. J. JAMADAR, J.]

[S. S. SHINDE, J.]