



Crl.A.No.287 of 2023

Crl.A.No.287/2023

S.S.SUNDAR, J.

AND

SUNDER MOHAN, J.

[Order of the Court was made by S.S.SUNDAR, J.,]

After pronouncement of the judgment in the above criminal appeal, the learned counsel for the appellant requested this Court that a direction may be given to the Trial Court to accept sureties on the basis of the web copy of the judgment.

2. Accordingly, the following direction is given to the Trial Court:-

"It is made clear that the Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial of Bomb Blast Cases, Chennai at Poonamallee, shall accept the sureties on the basis of the web copy to be produced by the Advocates/parties."

[S.S.S.R., J]

[S.M., J]

20.12.2023

AP

Internet: Yes



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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.12.2023

Pronounced on : 20.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

and

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Criminal Appeal No.287 of 2023

Liyakath Ali

...Appellant/A5

Vs.

Union of India represented by:

The Deputy Superintendent of Police,

National Investigation Agency,

Kochi Branch (Camp at Chennai)

(in RC.No.02/2020/NIA/DLI)

...Respondent/Complainant

Criminal Appeal filed u/s.21(4) of National Investigation Agency Act, 2008, to set aside the impugned order dated 31.01.2023 passed in Crl.M.P.No.751 of 2023 on the file of the Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial for Bomb Blast Cases, Chennai at Poonamallee, Chennai and grant bail to the appellant in SPL.S.C.No.23 of 2022 in RC.No.02/2020/NIA/DLI pending on the file of the respondent.



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For Appellant : Mr.I Abdul Basith

For Respondent : Mr.R.Karthikeyan
Special Public Prosecutor (for NIA cases)
assisted by
Mr.Ram Awadh Yadav
Public Prosecutor, NIA, Chennai

JUDGMENT

(Order of the Court was delivered by **SUNDER MOHAN, J.**)

The instant appeal has been preferred by Accused No.5, who is facing trial in Spl.SC No.23 of 2022, challenging the order passed in Crl.M.P.No.751 of 2023 dated 31.01.2023, by the learned Judge, Special Court under the National Investigation Agency Act, 2008, Sessions Court for Exclusive Trial for Bomb Blast Cases, Chennai at Poonamallee, Chennai, dismissing the bail application filed by him.

2. The brief facts leading to the filing of the above appeal are as follows:

(i) The accused was arrested on 31.12.2019 in connection with Crime No.03 of 2019 registered by the Inspector of Police, 'Q' Branch, Chennai for the offence under Sections 465, 468, 471 and 120B IPC.



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(ii) Pursuant to the arrest of the appellant, Sections 13 and 18 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the UA (P) Act), were added. Thereafter, on the arrest of Accused Nos.6 and 7, Section 25 (1-A) of the Arms Act, was invoked.

(iii) On 17.01.2020, the Government of India, in exercise of the powers under sub-section 4 of Section 6 r/w Section 8 of the National Investigation Agency Act, 2008, directed the respondent to take up the investigation. Hence, the case was re-registered as R.C.No.02/2020/NIA/DLI for the offence under Sections 465, 468, 471 r/w 120B IPC and Sections 13 and 18 of the UA (P) Act.

(iv) The National Investigation Agency took all the accused into custody, and during the investigation, the respondent collected the evidence and seized several incriminating materials from the accused. On 23.06.2020, they laid the final report against the appellant and other accused for the



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offence under Sections 120B r/w 465, 468, 471, and 201 of the IPC, Section 25(1-A) of the Arms Act and Sections 17, 18, 18B, 19, and 39 of the UA (P) Act, after obtaining sanction from the Government of India. A5 filed bail applications before the trial Court, which were dismissed. Thereafter, the A5 filed Crl.M.P.No.751 of 2022 for bail, which was dismissed on 31.01.2023. Challenging the said order, A5 has preferred the instant appeal and prayed for the grant of bail.

(v) It is the case of the prosecution as revealed from the final report that the accused person had conspired with each other and fraudulently activated Subscriber Identity Module (SIM) cards of AIRTEL company by using the identity documents of various persons without their knowledge and consent with the help of A1 to A4; that the fraudulently activated SIM cards were purchased by A5/appellant herein and handed over to A11-Khaja Moideen @ Khaja Mohideen @Jalal, who was associated with internationally proscribed terrorist organisation viz., Islamic State of Iraq and Syria (ISIS); that pursuant to the conspiracy, A11 handed over the SIM cards to his associates viz., A6 to A10 for conspiring and preparing for



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terrorist acts to organize conspiracy meetings, recruit persons, collect prohibited arms and ammunition, procure jungle camping equipment and raise funds to wage *jihad* after establishing a *Wilayah* (province) of ISIS/*Daish* near forests of South India and to launch terrorist acts at police and prominent places and prominent Hindu leaders.

(vi) The role played by the appellant/A5 as per the charge sheet is that he is an operative of ISIS/*Daish* and a close associate of ISIS/*Daish* member Khaja Mohideen (A11); that he had conspired with him to further the activities of the proscribed terrorist organisation ISIS/*Daish* and to carry out terrorist acts in the national capital (Delhi) and against prominent Hindu leaders; and that in order to facilitate the said acts, and evade detection by security agencies, on the instructions of A11, the appellant herein/A5 purchased the SIM cards from A1 to A4 with knowledge that the SIM cards would be used by A11 to carry out terrorist acts in Tamil Nadu and other places in India.

3. The learned counsel for the appellant submitted that there is no



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evidence to show that the appellant had procured the SIM cards with the knowledge that they would be used for terrorist activities; that even assuming that he was associated with A11 and had illegally procured SIM cards for him, the offences under UA (P) Act would not be made out and he could be tried only for the offences under Indian Penal Code; that A1 to A4, who had allegedly obtained the SIM cards on the basis of fake identity cards have been released on bail; that there is no evidence to show that the appellant had participated in any of the alleged terrorist activities said to have been committed by A6 to A11; and that in any case, since he is in custody for more than 4 years and as the charges are yet to be framed and the prosecution has cited nearly 166 witnesses, the trial is not likely to be completed near future, he would be entitled to bail as per the dictum of the Hon'ble Supreme Court in *Union of India Vs. K.A.Najeeb*, reported in **(2021) 3 SCC 713**

4.(i) The learned Special Public Prosecutor per contra submitted that the prosecution has collected evidence to show that the appellant/A5 had supported the proscribed terrorist organisation ISIS and its activities; that he



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had participated in the meetings held to promote the ideology of ISIS; and
that LW42 to LW45 speak about the involvement of the appellant/A5 and
A11 in spreading ISIS ideology.



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(ii). The learned Special Public Prosecutor also submitted that the statements of witnesses LWs.13, 15, 19, 20, 25, 30 to 32, 38 and 39 would show that SIM cards were purchased by A5 and handed over to A11; and that the evidence would show that the appellant is part of the conspiracy to commit terrorist acts masterminded by A11.

(iii). The learned Special Public Prosecutor also submitted that the appellant is involved in two other cases viz., one registered by the NIA and for the offence under 120B and 153 of the IPC besides Sections 15(c), 17, 18, 19 and 20 of the UA (P) Act, 1967, in RC-01/2019/NIA/DLI (Keelakarai P.S. Case), and the other registered by the Triplicane Police Station, for the offence under Sections 147, 148, 120B and 302 of the IPC in Crime No.2012 of 2015 and that the appellant was also detained under the National Security Act.

(iv) The learned Special Public Prosecutor therefore submitted that since the materials collected by the prosecution *prima facie* establish that the



appellant had committed the offences under Chapters IV and VI of the UA (P) Act, the restriction under Section 43-D(5) of the UA (P) Act would be applicable.

5. We have carefully considered the rival submissions.

6. On perusal of the materials available on record, we find that there is *prima facie* evidence to show that the appellant had purchased SIM cards, which were created by A1 to A4 by using fake identity cards. The statements of LWs.13, 15, 19, 20, 25, 30, 31, 32, 38, and 39 confirm the said fact. The statement of LW21 would reveal the fact that the appellant purchased four pre-activated AIRTEL SIM cards and that the appellant told him that he was going to hand them over to his friend Khaja Mohideen (A11).

7. In order to establish that the appellant had the knowledge that the SIM cards were not only meant for illegal purposes but also for terrorist activities, the prosecution has relied upon the evidence of LW43, LW44, and



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LW45. The statement of LW43 protected witnesses is to the effect that the appellant was seen with A11 on several occasions and he had participated in meetings and classes held by A11. LW44 another protected witness, corroborates statement of PW43 about frequent visits of A5 to the residence of A11 to participate in the meetings and classes and that A5 was entrusted with the purchase of pre-activated SIM cards to hand them over to A11 for illegal purposes.

8. The prosecution has also relied on the data found in the Facebook account of the appellant, which incriminated him. The materials found were related to “The Methodology of Hizb ut Thahir”, “this is Dawath”, “the Islamic State”, “Democracy is a system of Kufir”, “ How the Khilafa Destroyed”, etc.

9. Therefore, we find that there is a *prima facie* case that A5 was associated with A11 and he had purchased SIM cards and handed them over to A11. The final report states that A5 is guilty of the offence under Sections 120B r/w 465, 468, and 471 of the IPC besides Sections 18 and 39 of the



UA (P) Act.

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10. The question as to whether the SIM cards were purchased and given to A11 with the knowledge that they were meant to aid the other accused in committing terrorist acts, is for the prosecution to establish during trial. There is no evidence against the appellant that he was involved in any other preparatory act for the commission of terrorist acts. No arms or ammunition were seized from the appellant.

11. This Court finds that the Hon'ble Apex Court had occasion to consider the restriction under Section 43 D (5) for the grant of bail for an accused involved in an offence under Chapters IV and VI of the UA (P) Act in the following cases.

- (a) National Investigation Agency Vs. Zahoor Ahmad Shah Watali, reported in (2019) 5 SCC
- (b) Ranjitsing Brahmajeetsing Sharma V. State of Maharashtra, reported in (2005) 5 SCC 294
- (c) Thwaha Fasal and Ors. Vs. Union of India (UOI) and Ors reported in (2021) SCC Online SC 1000.

12. Further, in ***Union of India Vs. K.A.Najeeb*** (cited supra), the Hon'ble Supreme Court had observed as follows:

“18. It is thus clear to us that the presence



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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 Statute 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 the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43 – D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.”

13. After analysing the above judgments of the Hon'ble Supreme Court, in the aforesaid cases, this Court in its order dated 09.11.2023 made



in Crl.A.No.340 of 2023 had made the following observations.

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“7. Thus, from the observations made in the above judgments, it can be seen that in **National Investigation Agency Vs. Zahoor Ahmad Shah Watali's case** (cited supra), the Hon'ble Supreme Court had observed that the degree of satisfaction to hold that there is a prima facie case for denying bail would differ from the degree of satisfaction to dismiss a discharge petition on the ground that there is a prima facie case. While considering a discharge petition and assessing the prima facie case, it is trite law that even grave suspicion is sufficient to frame a charge. However, we are of the view that while denying the liberty of a person, the test to assess the prima facie case would be different. The liberty of a person cannot be denied on grave suspicion alone. The Act specifically employs the words “reasonable grounds for believing that the accusation against such a person is prima facie true”. Further, we are of the view that the accusation must be not only grave, but the materials in support of the accusation must be cogent at whatever stage the bail application is considered. Thus, there must be something more than grave suspicion while holding that there is a prima facie case to deny bail. The Judgements referred to above would also indicate that the above restriction in the proviso to Section 43 D (5) of the UA (P) Act is a slight departure from the bail jurisprudence, namely that bail is the rule and the jail is an exception. It only means that while considering a bail application, the Courts cannot grant bail on mere asking, and there must be reasons for the grant of bail. However, the above restriction found in the proviso to 43 (5) of the UA(P) Act cannot



be read to mean that the basic human right or the constitutional right of a person is taken away. Pre-trial detention is an anathema to the Constitution besides being in violation of the basic human right. The Judgments referred to above would also indicate that where the Constitutional Courts find that there is an infraction of the fundamental right under Article 21 of the Constitution of India, the rigours of the proviso would melt down. As to when pre-trial detention would amount to a violation of Article 21 of the Constitution of India, would depend on the facts and circumstances of each case. In one case, the pre-trial detention, even for six months may be in violation of Article 21 of the Constitution of India. In yet another case, pre-trial detention of even three years would not amount to a violation of Constitutional right. This would depend on the gravity of the offence alleged, the role played by the particular accused, the nature of the evidence relied upon by the prosecution, and the probable punishment that could be imposed on the said accused. The liberty of a person pending trial cannot be ordinarily curtailed unless the law and facts warrant such curtailment.

14. Applying the above principles to the case at hand, we are of the view that even assuming that the materials collected by the prosecution may ultimately lead to a conviction, the detention pending trial cannot be indefinite. We are informed that the charges are yet to be framed. The prosecution has cited 164 witnesses, and in such circumstances, the trial is



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not likely to be completed within a reasonable time. The appellant has been custody for nearly four years. Admittedly, even as per the statement of the learned Special Public Prosecutor, it is only the other accused who are indulging in dilatory tactics and delaying the framing of the charge.

15. We have already referred to the observations of the Hon'ble Supreme Court in *Union of India Vs. K.A.Najeeb's case* (cited supra), wherein it has been held that the rigours of 43-D(5) of the UA(P) Act, would melt down if the accused had been incarcerated for a long time and the trial is not likely to be completed in the near future. Bearing in mind the principles laid down by the Hon'ble Supreme Court as summed up by us in Paragraph No.13 supra, considering the nature of the allegation, the nature of the materials relied upon by the prosecution, and the period of incarceration, we are inclined to exercise our powers to grant bail to the accused.

16. Therefore, for the above reasons, this appeal deserves to be allowed, and the accused is set at liberty on the following conditions:

- (i) The appellant shall execute a bond and furnish



two sureties for a likesum of Rs.50,000/- [Rupees Fifty Thousand only] each, and one of the sureties should be a blood relative to the satisfaction of the learned Judge, Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases) Chennai at Poonamallee, Chennai - 600 056;

(ii) After coming out of jail, the appellant shall stay in Chennai and shall not leave the Chennai city without the permission of the trial court;

(iii) The appellant shall appear and sign before the trial court every day at 10.30 a.m. until further orders;

(iv) The appellant shall surrender his Passport (if any) before the trial court and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the trial court. In the latter case the trial court will if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said period, the trial court will be entitled to act on the statement of the appellant;



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(v)The appellant shall cooperate with the investigation;

(vi) The appellant shall not tamper with evidence and indulge in any other activities which are in the nature of preventing the investigation process;

(vii) The appellant shall inform the trial court the address where he resides and if changes his address, it should be informed to trial court;

(viii)The appellant shall use only one mobile phone during the time he remains on bail and shall inform the trial court his mobile number;

(ix)The appellant shall also ensure that his mobile phone remains active and charged at all times so that he remains accessible over phone throughout the period he remains on bail;

(x)The trial court will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

(S.S.S.R., J.) (S.M., J.)
20.12.2023

Index : yes / no
Speaking/Non-Speaking Order
Neutral citation : yes/no
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1. The Judge,
Special Court under the National Investigation Agency Act, 2008
(Sessions Court for Exclusive Trial of Bomb Blast Cases)
Chennai at Poonamallee,
Chennai - 600 056;
2. The Deputy Superintendent of Police,
National Investigation Agency,
Kochi Branch (Camp at Chennai)
3. The Public Prosecutor,
Chennai.
4. The Superintendent of Prisons,
Central Prison, Vellore.



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S.S. SUNDAR, J.
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SUNDER MOHAN, J.
ars

Pre-delivery Judgment in
Criminal Appeal No.287 of 2023

Dated: 20.12.2023