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Crl.A.No.220 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.04.2024

PRONOUNCED ON: 12.04.2024

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH
AND

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Criminal Appeal No.220 of 2024

Buhari @ Kitchan Buhari

...Appellant/A15

Vs.

State represented by:

The Additional Deputy Superintendent of Police,

Special Investigation Division,

Crime Branch CID, Madurai.

(Crime No.1/2013 of CBCID, Tirunelveli)

...Respondent/Complainant

Criminal Appeal filed u/s.21 of National Investigation Agency Act, 2008, to set aside the impugned order dated 24.11.2023 passed by the learned Judge, Special Court under the National Investigation Agency (Sessions Court under Exclusive Trial of Bomb Blast Cases), Chennai at Poonamallee, Chennai in Crl.MP No.1312 of 2023 in Spl.S.C.No.9 of 2022 and enlarge the appellant on bail in Cr.No.1 of 2013

For Appellant : Mr.S.Manoharan



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Crl.A.No.220 of 2024

For Respondent : Mr.E.Raj Thilak
Additional Public Prosecutor

JUDGMENT

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

The instant appeal has been preferred by the accused/A15, challenging the order passed in Crl.MP No.1312 of 2023 in Spl.S.C.No.9 of 2022 dated 24.07.2023, by the learned Judge, Special Court under the National Investigation Agency (Sessions Court under Exclusive Trial of Bomb Blast Cases), Chennai, dismissing the bail application filed by him.

2. The appeal arises under the following circumstances.

(i) The appellant is the accused in Spl.S.C.No.9 of 2022 for the offences under Section 4(i) r/w 4(a)(b) and 6 of the Explosives Act, 1908, 25(1-B) (a) of the Arms Act, 1959, Sec. 16, 17 and 18 of the Unlawful Activities (Prevention) Act (hereinafter referred to as the UA (P) Act), 1967, 153(A), 109 r/w 120(b) of the IPC. He was originally arrested in Crime No.118 of 2013 on the file of Vayalikalaval Police Station, Bangalore and is in judicial custody ever since then. The respondent found that the



Crl.A.No.220 of 2024

petitioner was involved in the instant case and filed a final report against him, before the learned Judicial Magistrate No.I, Tirunelveli, showing him as absconding. Thereafter on PT warrant he was produced and formal arrest was shown as 22.01.2016.

(ii) It is the case of the prosecution that all the accused conspired under the leadership of the appellant to teach a lesson to the Government for not releasing the muslim convicts suffering sentence in various prisons and to create disharmony, disturb public order and tranquillity with an intent to strike terror and annihilate the Hindu leaders in the name of Jihad. It is further alleged that incriminating materials such as gelatin explosives, electric detonators and huge quantity of explosives were seized from the co-accused and the appellant is said to be involved in the offence of conspiracy to achieve the aforesaid object.

(iii) The appellant filed a bail application before the trial Court in Crl.M.P.No.1312 of 2023. The respondent opposed it stating that they had committed offences falling under Chapters IV and VI of the UA (P) Act



Crl.A.No.220 of 2024

and therefore, the restriction under the proviso to Section 43 – D (5) of the UA (P) Act, is applicable to the appellant. The trial Court found that the accusation against the appellant is *prima facie* true and held that in view of the bar under Section 43 – D (5) of the UA (P) Act, he is not entitled to bail.

3. Mr.S.Manoharan, the learned counsel for the appellant submitted that there is no evidence to connect the appellant with the alleged offence of conspiracy except for the confession of co-accused; that the appellant is in custody from 2013; and that the trial is not likely to be completed in the near future as the prosecution has cited nearly 149 witnesses and had examined only 7 witnesses so far. Therefore, the learned counsel submitted that since no *prima facie* case is made out, the appellant is entitled to bail and in any case, since the appellant is in custody from 2013 and in this case from 2016, he is 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. The learned Additional Public Prosecutor *per contra* submitted that the appellant is involved in the offence of conspiracy and the prosecution



Crl.A.No.220 of 2024

has sufficient evidence to connect the appellant with the crime. He also submitted that since the appellant is involved in the offence falling under Chapters IV and VI of the UA (P) Act, he would not be entitled to bail and relied upon the recent judgment of the Hon'ble Supreme Court in ***Gurwinder Singh v. State of Punjab & Another***, reported in 2024 LiveLaw (SC) 100 and prayed for dismissal of the appeal.

5. We have perused the final report and the available materials on record.

6. To a specific question as to the nature of the evidence collected by the respondent to connect the appellant with the offence of conspiracy, the learned Additional Public Prosecutor submitted that the co-accused had confessed about the involvement of the appellant. The learned trial Judge had referred to statements of two witnesses viz., LW80 and LW81 who had also seen the appellant with the other accused viz., A1 to A6, A14 and A16. Admittedly, there is no other evidence to connect the appellant with the offence of conspiracy.



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7. The provisions of the Act makes it very clear that bail cannot be granted on mere asking for the offences under Chapters IV and VI of the UA (P) Act. This has been reiterated by the Hon'ble Supreme Court in the recent decision in *Gurwinder Singh v. State of Punjab & Another*, reported in **2024 LiveLaw (SC) 100**, wherein the Hon'ble Supreme Court was pleased to observe as follows:

“32. The Appellant’s counsel has relied upon the case of KA Najeeb (supra) to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and substance. In KA Najeeb’s case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court’s decision to consider bail was grounded in the anticipation of the impending sentence that the respondent-accused might face upon conviction and since the respondent-accused had already served portion of the maximum imprisonment i.e., more than five years, this court took it as a factor influencing its assessment to grant bail. Further, in KA Najeeb’s case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be



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examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of trial in near future. However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail. Hence, the aforesaid argument on the behalf the appellant cannot be accepted.”

8. Therefore, mere delay in trial by itself would not be a ground for the grant of bail. However, in the instant case, on facts, we find that the allegation against the appellant is that he is involved in conspiracy which was discovered on the confession of the co-accused. The observations of the Hon'ble Supreme Court in ***K.A.Najeeb's case*** [cited supra] would be squarely applicable, to the facts of this case. The relevant observations of the Hon'ble Supreme Court read as follows:

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



Crl.A.No.220 of 2024

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.”

9. This Court had earlier considered the degree of satisfaction required to hold that a *prima facie* case is made out to deny bail to a person accused of an offence under Chapters IV and VI of the UA (P) Act in ***Mohamed Irfan v. Union of India***, reported in **2023 SCC OnLine Mad 7210**. The relevant portion reads as follows:

*“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*



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CrL.A.No.220 of 2024

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



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Crl.A.No.220 of 2024

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.

10. Admittedly, the appellant has been in custody for more than 10 years and was arrested on a PT Warrant and he was in custody in the instant case from January 2016. The prosecution has cited nearly 149 witnesses and only 7 have been examined so far. Considering the period of incarceration, allegation against the appellant and the nature of the evidence relied upon by the prosecution, we are of the view that the judgment of the Hon'ble Supreme Court in ***K.A.Najeeb's case*** [cited supra] would be applicable to the facts of this case. Further, the co-accused has been granted



Crl.A.No.220 of 2024

bail by this Court on the ground that he was in custody for 10 years and hence, we are inclined to exercise our powers to grant bail to the appellant herein.

11. 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 (Sessions Court under Exclusive Trial of Bomb Blast Cases), Chennai;

(ii) The appellant shall appear and sign before the trial court once in a week i.e., on every Monday at 10.30 a.m. until further orders and on all hearing dates;

(iii) 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,



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Crl.A.No.220 of 2024

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;

(iv)The appellant shall cooperate with the investigation;

(v) The appellant shall not tamper with evidence or indulge in any other activities that are in the nature of preventing the investigation process;

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

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

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



Crl.A.No.220 of 2024

WEB COPY

(ix)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.

[MSRJ] [SMJ]
12.04.2024

ars

Speaking/Non-Speaking order

Neutral Citation: Yes/No

Issue order copy by 12.04.2024

Upload the order forthwith.



Crl.A.No.220 of 2024

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- 1.The Judge,
Special Court under the National Investigation Agency,
(Sessions Court under Exclusive Trial of Bomb Blast Cases), Chennai
- 2.The Additional Deputy Superintendent of Police,
Special Investigation Division,
Crime Branch CID, Madurai.
- 3.The Superintendent of Prisons,
Central Prison, Parappana Agraharam, Bangalore.
- 4.The Public Prosecutor,
Madras High Court,
Chennai – 600 104.



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Crl.A.No.220 of 2024

M.S.RAMESH, J

and

SUNDER MOHAN, J

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Pre-delivery Judgment in
Crl.A.No.220 of 2024

12.04.2024