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Crl.A.No.1614 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.07.2024

PRONOUNCED ON : 12.07.2024

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH
AND

THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Criminal Appeal No.1614 of 2023

S.Shihabudeen @ S.Shihabudeen
@ Sirajudeen @ Khalid ...Appellant/A7

Vs.

Union of India represented by:
Deputy Superintendent of Police,
National Investigation Agency,
Chennai.

(R.C.No.06/2020/NIA/DLI)

...Respondent/Complainant

Criminal Appeal filed u/s.21 (4) of National Investigation Agency Act, 2008, to set aside the impugned order dated 02.12.2023 passed by the learned District and Sessions Judge, Sessions Court under Exclusive Trial of Bomb Blast/POTA/NIA Cases, Chennai at Poonamallee, Chennai in Crl.MP No.2088 of 2023 in Spl.S.C.No.24 of 2022 and enlarge the appellant on bail.

For Appellant : Mr.Vikram Veerasamy

For Respondent : Mr.R.Karthikeyan
Special Public Prosecutor



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JUDGMENT

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

The instant appeal has been preferred by the accused (A7), challenging the order passed in Crl.MP No.2088 of 2023 in Spl.S.C.No.24 of 2022 dated 02.12.2023, by the learned District and Sessions Judge, Sessions Court under Exclusive Trial of Bomb Blast/POTA/NIA Cases, Chennai at Poonamallee, Chennai, dismissing the bail application filed by him.

2. The appeal arises under the following circumstances.

(a) On 08.01.2020 while a Special Sub Inspector of Police Mr.Y.Wilson was on duty, A1 and A2 assaulted him with fire arms and lethal weapons and caused his death, with the intention of striking terror in the minds of people.

(b) A case in Cr.No.9 of 2020 under Sections 302 and 506 (ii), Sections 7, 25(1A) and (1)(b) of Arms Act, 1959 was registered on the file of Kaliyakavilai Police Station, Kanyakumari District. Considering the



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importance of the case, the Government of India transferred the investigation to the respondent and the case was registered as RC No.06/2020/NIA/DLI against A1 and A2.

(c) During the course of investigation, the respondent unearthed the involvement of A3 in the case and that A3 had formed a terror gang and he had also entered into a criminal conspiracy with other accused A1, A2, A4 to A7 (A7 is the appellant herein) to further the activities of the proscribed organisation viz., ISIS in India by committing terrorist activities at various places in Tamil Nadu, Karnataka, Maharashtra, Kerala during 2019 to 2020. A final report was filed against A1 to A6 in Special S.C.No.24 of 2022

(d) According to the prosecution, the appellant/A7 had supported and assisted the prime conspirator A3 by giving legal assistance to him for being released from prison; that the appellant/A7 was in constant touch with A3 and played an active role in the above mentioned conspiracy; that the appellant/A7 helped A3 procure arms and ammunition illegally; that the arms procured by the appellant/A7 were handed over to A4 , who in turn



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handed it over to A1 and A2, which was used for the murder of the police officer-Wilson.

(e) The respondent therefore filed a supplementary final report against the appellant on 02.07.2021. In the meanwhile, during the course of investigation, the appellant was arrested on 06.01.2021. The appellant filed a bail application in Cr.M.P.No.2088 of 2023 before the trial Court. The said petition was opposed to by the respondent on the ground that the appellant was involved in the offences falling under Chapter IV and VI of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the UA (P) Act); that the restriction under Section 43 – D (5) of the UA (P) Act would be applicable and submitted that since *prima facie* case is made out on the basis of the materials filed in support of the final report, the appellant would not be entitled to bail. The learned trial Judge dismissed the bail application on 02.12.2023. Hence, the present Criminal Appeal.

3. (i) Mr.Vikram Veerasamy, the learned counsel for the appellant/A7 submitted that the appellant was not admittedly involved in the alleged



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murder of the Special Sub Inspector- Wilson; that none of the witnesses implicated the appellant and therefore, there are no reasons or grounds to believe that there is a *prima facie* case against the appellant; that no arms were seized from the appellant and there is nothing to suggest that the appellant had gone to Mumbai only to procure arms and that the arms, that were allegedly procured, were used by A1 and A2; that the books seized from the appellant are not prohibited or proscribed books and the recovery of such books would not implicate the appellant in any manner; and that the prosecution relies upon an inadmissible confession and the statement of witnesses, who speak about such confession.

(ii) The learned counsel further submitted that in any case, since the case is still at the charge framing stage; that the prosecution had cited nearly 234 witnesses; and the trial is not likely to be completed in the near future, the appellant's continued incarceration is violative of Article 21 of the Constitution of India and relied upon judgments of the Hon'ble Supreme Court in *Union of India Vs. K.A.Najeeb*, reported in **2021 (3) SCC 713** and in *Shoma Kanti Sen v. The State of Maharashtra and Another* in



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Crl.A.No.2595 of 2023, decided on 05.04.2024.

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(iii) The learned counsel for the appellant/A1 also submitted that the judgment of the Hon'ble Supreme Court in ***Gurwinder Singh v. State of Punjab and Another***, in **Crl.A.No.704 of 2024 decided on 07.02.2024**, would not be applicable to the facts of the instant case and prayed for the grant of bail to the appellant.

4. (i) Mr.R.Karthikeyan, the learned Special Public Prosecutor ***per contra*** reiterated the objections made in the written objections filed by them and also submitted that besides the confession of the appellant, there are other evidences to show that the appellant had gone to Mumbai and had collected a parcel. He relied upon the statement of witnesses viz., A.Nazeer (LW67), S.M.Umar (LW202), A.Kader Baba (LW221), Kuthbudeen (LW222) and Mannadi Abdullah (LW223) to show that the appellant had close association with the prime conspirator-A3

(ii) Besides, the evidence of S.M.Umar (LW202), to show that the



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appellant met A3 in the office of the journal 'Thinnai Thozhargal' published by the appellant, the learned Special Public Prosecutor also relied on the statement of LW221 (the brother-in-law of the appellant), who had stated about the extra judicial confession given to him by the appellant as regards the purpose of his visit to Mumbai and about receiving Rs.6,00,000/- for the said purpose.

(iii) The learned Special Public Prosecutor also pointed out to the statements of Shagaf Shafig Divkar (LW217) and Saif Ateeque Nachan (LW218) to substantiate that the appellant went to Mumbai during October 2019. The learned Special Public Prosecutor also relied upon the statements of witnesses who had witnessed the confession of the appellant and had also filed the written submissions.

(iv) The learned Special Public Prosecutor therefore submitted that a *prima facie* case is made out and the bail ought not be granted in view of the registration under the UA (P) Act and relied upon the observations of the Hon'ble Supreme Court in **Gurwinder Singh's case** [cited supra] and prayed



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for dismissal of the appeal.

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5. We have considered the rival submissions, perused the final report and the available materials on record.

6. The allegation against the appellant/A7, primarily, is that he was a part of the terror gang started by A3 and that he had gone to Mumbai at the instance of A3 to procure arms. The association of the appellant along with A3 is sought to be established through the evidence of LW67, LW202, LW221, LW222 and LW223. It is for the prosecution to establish during trial as to whether this association by itself would amount to being a member of the terrorist gang said to have been formed by A3.

7. The other allegation is that the appellant had gone to Mumbai to procure arms. The prosecution has examined witnesses to show that the appellant had gone to Mumbai to collect a parcel. It has examined one A.Kader Baba (LW221), who is closely related to the appellant, to whom the appellant is said to have made an extra judicial confession that he had gone



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to Mumbai to procure arms as per the directions of A3.

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8. It is also the admitted case of the prosecution that no arms and ammunition were recovered from the possession of the appellant. Though it is claimed by the prosecution that the arms procured by the appellant/A7 were used by A1 and A2 in the murder of the Special Sub Inspector Y.Wilson, we see that no link has been shown by the prosecution. Therefore, in our view, it is for the prosecution during trial to establish the involvement of the appellant/A7 in procuring arms, from Mumbai. However, considering the fact that no arms were recovered from the appellant and the nature of the evidence relied upon by the prosecution, we are of the view that the appellant's continued incarceration would be in violation of Article 21 of the Constitution of India and the observations made by the Hon'ble Supreme Court in *K.ANajeeb' case* [cited supra] would be applicable to the appellant/A7 as he is in custody for more than 3 ½ years.

9. In *K.ANajeeb' case* [cited supra] the Hon'ble Supreme Court has held as follows:



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“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 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.”

10. The prosecution had cited nearly 234 witnesses. The charges were framed very recently on 11.06.2024 against A1 to A7. The prosecution has not examined any witnesses so far. Therefore, the rigours of Section 43 – D (5) of the UA (P) Act would melt in so far as the appellant alone is concerned. However, we make it clear that the observations made by us in respect of the appellant/A7 are only in respect of his role and the evidence relied as against him by the prosecution. The role played by other accused



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and the evidence let in by the prosecution may be different and we express no opinion as regards their cases.

11. In ***Gurwinder Singh's case*** [cited supra], the Hon'ble Supreme Court has distinguished the observations made in ***K.A.Najeeb's case*** on facts and denied bail to the accused therein, observing that mere delay in trial pertaining to grave offences, cannot be the basis to grant bail.

12. As stated earlier, we are of the view that the role of the appellant/A7 and the evidence let in by the prosecution are such that the observations in ***K.A.Najeeb's case*** would be applicable to the appellant. That apart in ***Shoma Kanti Sen's case*** [cited supra] the Hon'ble Supreme Court had considered both the aforesaid judgments and had made the following observations.

37. In the case of ***K.A. Najeeb -vs- Union of India*** [(2021) 3 SCC 713], a three Judge Bench of this Court (of which one of us Aniruddha Bose, J was a party), has held that a Constitutional Court is not strictly bound by the prohibitory provisions of grant of bail in the 1967 Act and can exercise its constitutional jurisdiction to release an accused on bail who has been incarcerated for a long period of time, relying on Article 21 of Constitution of



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India. This decision was sought to be distinguished by Mr. Nataraj on facts relying on judgment of this Court in the case of **Gurwinder Singh -vs- State of Punjab** [2024 INSC 92]. In this judgment, it has been held:-

“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 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



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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.”

38. Relying on this judgement, Mr. Nataraj, submits that bail is not a fundamental right. Secondly, to be entitled to be enlarged on bail, an accused charged with offences enumerated in Chapters IV and VI of the 1967 Act, must fulfil the conditions specified in Section 43D (5) thereof. We do not accept the first part of this submission. This Court has already accepted right of an accused under the said offences of the 1967 Act to be enlarged on bail founding such right on Article 21 of the Constitution of India. This was in the case of Najeed (supra), and in that judgment, long period of incarceration was held to be a valid ground to enlarge an accused on bail in spite of the bailrestricting provision of Section 43D (5) of the 1967 Act. Pre- conviction detention is necessary to collect evidence (at the investigation stage), to maintain purity in the course of trial and also to prevent an accused from being fugitive from justice. Such detention is also necessary to prevent further commission of offence by the same accused. Depending on gravity and seriousness of the offence alleged to have been committed by an accused, detention before conclusion of trial at the investigation and post-chargesheet stage has the sanction of law broadly on these reasonings. But any form of deprivation of liberty results in breach of Article 21 of the Constitution of India and must be justified on the ground of being reasonable, following a just and fair procedure and such deprivation must be proportionate in the facts of a given case. These would be the overarching principles which the law Courts would have to apply while testing prosecution’s plea of pre-trial detention, both at



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investigation and post-chargesheet stage.” [emphasis supplied]

13. Similarly in a very recent judgment in ***Javed Gulam Nabi Shaikh v. State of Maharashtra and Another***, in Crl.A.No.2787 of 2024 decided on 03.07.2024, the Hon'ble Supreme Court had held as follows:

“15. The requirement of law as being envisaged under Section 19 of the National Investigation Agency Act, 2008 (hereinafter being referred to as “the 2008 Act”) mandates that the trial under the Act of any offence by a Special Court shall be held on day-to-day basis on all working days and have precedence over the trial of any other case and Special Courts are to be designated for such an offence by the Central Government in consultation with the Chief Justice of the High Court as contemplated under Section 11 of the 2008.

16. A three-Judge Bench of this Court in *Union of India v. K.A. Najeeb* reported in (2021) 3 SCC 713] had an occasion to consider the long incarceration and at the same time the effect of Section 43-D(5) of the UAP Act and observed as under : (SCC p. 722, para 17)

“17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the 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, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where



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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 the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.”

17. In the recent decision, *Satender Kumar Antil v. Central Bureau of Investigation* reported in (2022) 10 SCC 51, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

“We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is



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a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.”

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.”

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.

20. We may hasten to add that the petitioner is still an accused; not a convict. The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be. [emphasis supplied]

14. We are of the view that the above observations are self explanatory and the appellant/A7 would be entitled to be released on bail,



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and the observations made in the aforesaid judgments of the Hon'ble Supreme Court, would be applicable to the facts in the instance case as against the appellant/A7. Hence, considering the nature of the allegation and the nature of the evidence, we deem it appropriate to release the appellant/A7 on bail on stringent conditions.

15. Accordingly, the Criminal Appeal is 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 District and Sessions Judge, Sessions Court under Exclusive Trial of Bomb Blast/POTA/NIA Cases, Chennai at Poonamallee, 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



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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;

(iv) The appellant shall cooperate with the investigation;

(v) The appellant shall not tamper with evidence and indulge in any other activities which 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 phone throughout the period he remains on bail;

(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.



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[MSRJ] [SMJ]
12.07.2024

ars

Speaking/Non-Speaking order

Neutral Citation: Yes/No

Issue order copy on 12.07.2024

Upload the order forthwith.



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- 1.The District and Sessions Judge,
Sessions Court under Exclusive Trial of
Bomb Blast/POTA/NIA Cases,
Chennai at Poonamallee, Chennai.
- 2.The Inspector of Police,
Deputy Superintendent of Police,
National Investigation Agency,
Chennai.
- 3.The Superintendent of Prisons,
Central Prison, Mysore.
- 4.The Public Prosecutor,
Madras High Court,
Chennai – 600 104.



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M.S.RAMESH, J

and

SUNDER MOHAN, J

ars

Pre-delivery judgment in
Crl.A.No.1614 of 2023

12.07.2024