



*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 10.04.2024

Judgment delivered on: 24.04.2024

+ CRL.A. 51/2024

JAMSHEED ZAHOOR PAUL

..... Appellant

VERSUS

STATE OF NCT OF DELHI

..... Respondent

Memo of Appearance:

For the petitioner: Mr. Nizam Pasha, Mr. Ahmad Ibrahim, Ms. Ayesha Zaidi, Mr. Siddharth Kaushik and Ms. Awastika Das, Advocates

For the Respondents: Ms. Manjeet Arya, APP for the State with Insp. Alok Kumar and SI Manoj Singh

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. Present appeal has been filed by appellant under Section 21(4) of the National Investigation Agency Act, 2008 (in short NIA) praying therein that impugned order¹, whereby his bail plea has been rejected, be set aside and consequently, he may be released on regular bail.

¹ Order dated 16.11.2023 passed by learned Addl. Sessions Judge-02, New Delhi, Patiala House Court in case related to FIR No. 106/2018 PS Special Cell, New Delhi



FACTUAL MATRIX

2. Special Cell (New Delhi Range), Lodhi Colony received information that two persons i.e. Parvaiz Rashid Lone and Jamsheed Zahoor Paul (appellant herein) were radicalized youths of Jammu & Kashmir, having allegiance to banned terrorist organization ISIS/SI/DAESH. As per intelligence inputs, they had procured arms and ammunition from UP for their cadres for executing some terrorist act in Jammu & Kashmir and would come at Netaji Subhash Park, near Lal Quila (Red Fort), Delhi on 07.09.2018 to proceed to Kashmir and if raided, they could be caught with illegal weapons. A raiding team was accordingly constituted to nab them.

3. Information was found to be correct as both the aforesaid named suspects were found moving towards Lal Qila. They were immediately overpowered. Their names and addresses were ascertained and their search was conducted.

4. Search of the appellant yielded recovery of one pistol, containing five live cartridges in its magazine. From the possession of Parvaiz Rashid Lone (A-1) also, one pistol was recovered. These were seized.

5. Both the accused disclosed that they had procured the recovered weapons, in lieu of money from four persons from UP. We may add, right here, that during further investigation, the police tracked them



down. They were found to be juvenile in conflict with law (JCL) and, therefore, separate report was prepared against them, which was filed before concerned Juvenile Justice Board (JJB).

6. At the time of apprehension of the appellant, he was found carrying one black Samsung mobile phone having Airtel SIM Card and one black colour mobile (partially damaged) having brand name as LYF. One Lenovo mobile phone was recovered from A-1 which was containing SIM Card of Jio.

7. During investigation, both the accused divulged that they were propagating ideology of terrorist outfit ISIS in India and were in touch with another ISIS militant, namely, Abdullah Basith. Said militant had already been arrested by NIA in case RC 04/2016/NIA/DLI.

8. Though, initially, FIR had been registered for commission of offence under Section 25 Arms Act, after detailed investigation and on the basis of the incriminating material collected during investigation, penal provisions of Section 18 & 20 of Unlawful Activities (Prevention) Act (in short UAPA) were added.

9. When appellant was interrogated, he revealed names of various cadres of ISIS (J&K Module) with whom he was in touch through social media, Black Berry Messenger (BBM) and Facebook etc. Some of such cadres of ISIS had already been shot dead in encounter.



10. The mobile phones, recovered from both the accused, were sent to CERT-In² for retrieval of data and its forensic analysis. Such analysis indicated that they both were not only involved in procuring sophisticated weapons for banned terrorist organization but also shared information about the movement of Army to other terrorists in Kashmir. Role, involvement and complicity of the appellant also stood exposed whose profile picture on BBM contained four terrorists, two of whom carrying AK-47 Rifles.

11. Both the accused were accordingly charge-sheeted for commission of offences under Section 25 Arms Act and for Sections 18 & 20 of UAPA.

12. Main charge-sheet was submitted on 28.02.2019.

13. During the pendency of the matter, two supplementary charge-sheets were also submitted before learned Trial Court.

14. It also needs to be highlighted, right here, that learned Trial Court heard arguments on charge and found that *prima facie case* for commission of offences under Section 18 & 20 of UAPA and Section 25 Arms Act was made out against both of them. Charge was framed on 25.04.2022 to which they pleaded not guilty and claimed trial.

15. The case is already at the stage of recording of prosecution evidence.

² Indian Computer Emergency Response Team



16. Appellant had earlier also moved one application seeking bail which was dismissed as withdrawn on 06.06.2019. He moved another bail application which, too, was dismissed on 01.05.2020. Feeling aggrieved, he preferred Criminal Appeal 345/2021 which was, however, not pressed and resultantly, the same was dismissed by this court on 31.01.2022.

17. As already noticed above, charges were framed on 25.04.2022.

18. It was thereafter only that the appellant moved another bail application which also did not find favour and was dismissed by the learned trial court vide impugned order dated 16.11.2023.

19. Such order is under challenge and this is how the appellant is now before us.

RIVAL CONTENTIONS

20. According to the learned counsel for appellant, allegations on record, even if those are taken on their face value, do not show commission of any offence under Section 18 & 20 of UAPA and at best, without admitting anything, it can be said to be a case of recovery of arms. It is contended that though the charges have been ascertained by the learned Trial Court and these have not been assailed so far, it is still legally permissible for the appellant to seek bail and to demonstrate that the bar provided under Section 43D(5) of UAPA does not stand attracted.

21. The prime contentions of appellant, *inter alia*, are as under: -



- i. *There is no material to show that appellant had indulged into any unlawful or terrorist act, much less attribution of any overt act on his part.*
- ii. *The entire case of prosecution is dependent upon the disclosure statements of the accused persons and these statements have no evidentiary value, being inadmissible in law.*
- iii. *There is nothing to indicate that any message or BBM chat retrieved from the electronic device of the appellant had any potential to indicate that he was in contact with any terrorist.*
- iv. *Appellant could not be branded as 'terrorist' or a 'person involved in terrorist act' merely on the basis of the recovery of a pistol and, therefore, invocation of draconian provision of UAPA is totally mis-founded and unwarranted.*
- v. *There is nothing to indicate that the appellant was a member of ISIS or their purported fronts. There is nothing to suggest that he was radicalized and was associated or was otherwise furthering the activities of ISIS.*



- vi. *Merely because there was some BBM Chat retrieved from the electronic devise of his co-accused, appellant could not have been held to be a co-conspirator.*
- vii. *Mere framing of charge does not create any embargo against grant of bail as the consideration for framing the charge is different from the one required for grant of bail. At the stage of consideration of bail, Court is merely required to undertake surface-level analysis of probative value of the evidence in order to satisfy test of “prima facie true” and if such analysis is carried out, it would clearly go on to show that there is no admissible evidence on record indicating commission of offences under Section 18 & 20 of UAPA.*
- viii. *Appellant has undergone incarceration for more than five and half years and the trial is not likely to conclude any time soon and, therefore, his fundamental right as enshrined under Article 21 of the Constitution of India has been seriously jeopardized, entitling him to be released on bail on that count alone.*



22. Learned counsel for appellant has placed his reliance upon judgments viz. *Shoma Kanti Sen v. The State of Maharashtra & Anr.*³, *Vernon v. State of Maharashtra*⁴, *Ashim Alias Asim v. National Investigation Agency*⁵, *Waheed-ur-Rehman Parra v. UT of Jammu and Kashmir*⁶, *Jahir Hak v. State of Rajasthan*⁷, *Union of India v. K. A. Najeeb*⁸, *Thwaha Fasal v. Union of India*⁹, *National Investigation Agency v. Zahoor Ahmad Shah Watali*¹⁰, *Gulam Sarbar v. State of Bihar*¹¹, *Jyoti Babasaheb Chorge v. State of Maharashtra*¹², *Ranjitsingh Brahmajeetsing Sharma v. State of Maharashtra*¹³, *State of Kerala v. P. Sugathan*¹⁴, *Kartar Singh v. State of Punjab*¹⁵, *Hitendra Vishnu Thakur v. Ors. v. State of Maharashtra*¹⁶, *Kehar Singh v. State (Delhi Administration)*¹⁷, *Baseerat-ul-Ain v. National Investigation Agency*¹⁸, *Indra Mohan Bora v. National Investigation Agency*¹⁹, *Chandeep Singh v. National Investigation Agency*²⁰, *Shaheen Welfare Association v. Union of India*²¹, *Devender Gupta v. NIA*²² and *Mohd. Hakim v. State (NCT of Delhi)*²³.

³2024 SCC Online SC 498

⁴ 2023 SCC OnLine SC 885

⁵ (2022) 1 SCC 695

⁶ (2022) 12 SCC 240

⁷ 2022 SCC OnLine SC 441

⁸ (2021) 3 SCC 713

⁹ (2021) SCC Online SC 1000

¹⁰ (2019) 5 SCC 1

¹¹ (2014) 3 SCC 401

¹² 2012 SCC Online Bom 1460

¹³ (2005) 5 SCC 294

¹⁴ (2000) 8 SCC 203

¹⁵ (1994) 3 SCC 569

¹⁶ (1994) 4 SCC 602

¹⁷ (1988) 3 SCC 609

¹⁸ 2024 SCC OnLine J&K 36

¹⁹ Crl. A. 275/2023 decided on 11.01.2024

²⁰ 2023 SCC Online P&H 6332

²¹ (1996) 2 SCC 616

²² 2014 SCC Online AP 192

²³ 285 (2021) DLT 125



23. All such contentions have been refuted by respondent.

24. It is contended that there are serious allegations against the appellant and the learned Trial Court has already come to a definite conclusion that there is a *prima facie case* against him for offences under Section 18 & 20 UAPA and since such order has not been assailed by the appellant, it does not lie in his mouth to say that the statutory bar is not attracted.

25. According to the respondents, there are following clear-cut allegations against him and if all these allegations are read conjunctively, it would clearly reveal his complicity qua offences under Section 18 & 20 UAPA: -

- i. One loaded pistol was recovered from his possession and he disclosed that he had purchased the same from four juveniles. Such fact was found to be correct as the police was able to reach those juveniles and they were apprehended and admitted that weapons in question had been sold by them to the accused persons, in lieu of money.
- ii. Appellant was found in possession of two electronic devices and when the data was retrieved, it was found that he was found using Black Berry Messenger for communicating with his associates. His BBM ID was deciphered and the profile picture of Black Berry Messenger depicted four terrorists holding AK47 rifles and pistols in their hands.



- iii. Appellant and his co-accused had procured illicit arms and had come to Delhi together and were to leave for Kashmir together in furtherance of their conspiracy.
- iv. BBM chats retrieved from the electronic devices from his co-accused clearly suggested that there was incriminating communication of precarious nature between him and Adil Thokar.
- v. Appellant had, on the directions of Omar @ Umar Iban Nazir, met one Abdullah Basith. Such Abdullah Basith was later arrested by NIA and the fact of there being a meeting between them was confirmed and substantiated by NIA. Motive of such meeting was to procure weapons for terrorist activity and the record of Shaka Guest House confirmed his such visit.
- vi. Appellant with his co-accused not only conspired to commit terrorist act but also procured weapons and in pursuit of their abominable objective for perpetuating terror, they both, on the direction of Adil Thokar and Umar Iban Nazir, arranged weapons through JCLs and came to Delhi via flight and even sent the images of recovered pistol to their handlers through BBM.
- vii. The BBM chats from the electronic device of his co-accused clearly indicated that he was even discussing about the movement of Army in Kashmir which clearly exposes their nefarious design.

26. Thus, according to the respondents, on the basis of overall conspectus of material so collected, it becomes evident that both the



accused had conspired together. It is also supplemented that the role of accused cannot be isolated at this initial juncture and in view of the totality of the material collected during investigation, the tone and tenor of BBM chat, profile picture of BBM, recovery of weapons and the meeting of appellant with ISIS terrorist Abdullah Basith in Delhi on the direction of their handlers go on to show that he, too, has committed serious crime by indulging in procuring arms and ammunition and transporting the same for banned terrorist groups for carrying terrorist acts.

27. It is, therefore, prayed that appeal may be dismissed.

LIMITATION ON CONSIDERATION OF BAIL UNDER UAPA

28. As noted above, appellant has been charged for offences under Section 18 & 20 UAPA as well.

29. Section 18 & 20 UAPA fall under Chapter IV of UAPA which deals with punishment for terrorist activities. Section 15 defines ‘terrorist act’ and Section 16 provided punishment for ‘terrorist act’. Section 17 deals with punishment for receiving funds for terrorist act. Section 18, which deals with punishment for conspiracy, stipulates that whoever conspires or attempts to commit, or advocates, abets, advises or incites, directly or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but



which may extend to imprisonment for life, and shall also be liable to fine. Section 20 deals with punishment for being member of a terrorist gang or organization and it provides that any person who is a member of a terrorist gang or a terrorist organization, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.

30. Chapter VI of UAPA deals with terrorist organization. Fact remains that in the present matter, accused have not been charged with any offence pertaining to said Chapter.

31. Though in adversarial system, there is presumption of innocence in favour of accused and, therefore, bail is generally a rule, UAPA contains modified application of certain provisions of Criminal Code of Procedure and thus commands that no person accused of an offence punishable under Chapter IV and/or Chapter VI shall, if in custody, be released on bail if there are reasonable grounds of believing that the accusation against such person is *prima facie true*.

32. Relevant portion of Section 43D of UAPA reads as under: -

“43D. Modified application of certain provisions of the Code

.....

.....

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public



Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in Sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorizedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

(emphasis supplied)

33. Thus, there are four important facets which need to be considered.

34. Firstly, whether in view of the fact that charges have already been framed and such charges have not been challenged by the appellant, whether bail plea can be considered and whether the court can go on to opine that there are no reasonable grounds for believing the accusation to be *prima facie true*. Secondly, what should be the level of scrutiny for believing the same. Thirdly, whether the appellant has been able to show that there is no *prima facie* case against him. Lastly, whether despite such statutory bar being in place and when *prima facie* is found to be made out, bail can still be granted in order to safeguard his fundamental rights.



35. In a recent decision given by Hon'ble Supreme Court in *Gurwinder Singh Vs. State of Punjab & Anr.* 2024 SCC OnLine SC 109, the impact of Section 43D(5) of UAPA was delineated and it was observed that the conventional idea in bail jurisprudence - *bail is the rule and jail is the exception* - does not find any place in UAPA. It further observed that exercise of general power to grant bail under UAPA is severely restrictive in scope. It went on to hold that in view of said statutory bar contained under Section 43D (5) of UAPA, if the offences fall under Chapter IV and/or Chapter VI of UAPA and there are reasonable grounds for believing that the accusation is *prima facie true*, bail must be rejected as a rule. *Gurwinder Singh (supra)* also discussed *National Investigation Agency v. Zahoor Ahmad Shah Watali*: 2019 SCC OnLine SC 461 which lays down elaborate guidelines about the approach that the Courts must partake in, while considering bail application under UAPA. In context of the meaning attributable to '*prima facie true*', it observed that material collected by the investigating agency, on the face of it, must show the complicity of the accused in relation to the offence and must be good and sufficient to establish a given fact or chain of facts constituting the stated offence, unless rebutted or contradicted by other evidence. It also observed that at the stage of giving reasons for grant or rejection of bail, the elaborate examination or dissection of evidence was not required and the Court is merely expected to record a finding on the basis of broad probabilities. Para-34 of said judgment of *Gurwinder*



Singh (supra) summarizes the guidelines for deciding bail application in UAPA matters which reads as under: -

“Test for Rejection of Bail : Guidelines as laid down by Supreme Court in Watali's Case

34. In the previous section, based on a textual reading, we have discussed the broad inquiry which Courts seized of bail applications under Section 43D(5) UAP Act r/w Section 439 CrPC must indulge in. Setting out the framework of the law seems rather easy, yet the application of it, presents its own complexities. For greater clarity in the application of the test set out above, it would be helpful to seek guidance from binding precedents. In this regard, we need to look no further than Watali's case which has laid down elaborate guidelines on the approach that Courts must partake in, in their application of the bail limitations under the UAP Act. On a perusal of paragraphs 23 to 29 and 32, the following 8-point propositions emerge and they are summarised as follows:

• **Meaning of ‘Prima facie true’** [para 23] : *On the face of it, the materials must show the complicity of the accused in commission of the offence. The materials/evidence must be good and sufficient to establish a given fact or chain of facts constituting the stated offence, unless rebutted or contradicted by other evidence.*

• **Degree of Satisfaction at Pre-Chargesheet, Post Chargesheet and Post-Charges - Compared** [para 23] : *Once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under*



Section 173 CrPC), do not make out reasonable grounds for believing that the accusation against him is prima facie true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.

• **Reasoning, necessary but no detailed evaluation of evidence** [para 24] : *The exercise to be undertaken by the Court at this stage--of giving reasons for grant or non-grant of bail--is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage.*

• **Record a finding on broad probabilities, not based on proof beyond doubt** [para 24]:*“The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.”*

• **Duration of the limitation under Section 43D(5)** [para 26] : *The special provision, Section 43-D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof.*

• **Material on record must be analysed as a ‘whole’; no piecemeal analysis** [para 27] : *The totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance.*

• **Contents of documents to be presumed as true** [para 27] : *The Court must look at the contents of the document and take such document into account as it is.*

• **Admissibility of documents relied upon by Prosecution cannot be questioned** [para 27] : *The materials/evidence collected by the investigation agency in support of the accusation against the accused in*



the first information report must prevail until contradicted and overcome or disproved by other evidence...... In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible.”

(emphasis supplied)

36. Thus, once charges are framed, it can be easily assumed that there is a very strong suspicion against the accused. Therefore, in such a situation, the task of any such accused becomes much more onerous and challenging as it is never going to be easy for anyone to satisfy that the same set of material, which compelled the court to frame charges on the basis of strong *prima facie case*, would persuade it to hold to the contrary, by declaring that such accusation was not *prima facie true*.

37. Be that as it may, there can never be any restriction or embargo on moving application seeking bail.

38. Such unfettered right remains available as long as the proceedings are alive.

39. Moreover, in view of specific observations made in *National Investigation Agency v. Zahoor Ahmad Shah Watali* (supra) as elaborated in *Gurwinder Singh* (supra), Court can always consider such bail application, even after framing of charges, the rider being the onus on accused would be much more rigorous in such a situation.

40. The first two facets stand answered accordingly.



BRIEF EVALUATION OF THE ALLEGATIONS

41. Let us evaluate the impact of such allegations.
42. We have already taken note of the allegations appearing against the accused persons.
43. We may hasten to supplement that the intelligence inputs were very specific and pinpointed.
44. It came to fore through reliable sources that radicalized youths, who had pledged allegiance to banned terrorist organizations and who had procured sophisticated weapons through their contacts in Uttar Pradesh, would come at Netaji Subhash Park, near Lal Qila and would further proceed to Kashmir. Information was also to the effect that they had already procured arms and ammunitions for their cadres ISIS-JK for executing some terrorist act in Jammu & Kashmir. Both the accused, including appellant herein were named as well.
45. Therefore, it is not a case of chance recovery.
46. After the appellant was apprehended, a pistol of 7.65 caliber with five live cartridges loaded in its magazine was recovered from him. When his personal search was conducted, he was found in possession of two mobile phones. One mobile was also recovered from the possession of his co-accused. They both made comprehensive disclosure statements. As per respondent, appellant admitted that he was in contact with ISIS-JK Umar Iban Nazir (no more alive now) and Adil Thokar (absconding



and untraceable) over Black Berry Messenger (BBM), a safe chat application and at their directions, he along with his co-accused had collected weapons from UP for their outfit. He also admitted that he had met Abdullah Basith (cadre of ISIS-JK) at Jama Masjid in Delhi in connection with supply of arms and ammunition for *Tanjeem*. He revealed that he was following cadres of ISIS (JK Module) through social media, BBM and Facebook and that his BBM account was with the name of PEHRAAN CHUN. Forensic analysis has also verified the same. It is also a fact that on the basis of disclosure made by them, police were able to reach those juveniles offenders who had sold the weapons to them. He also led police to Hotel Shaka where he had stayed on 28.07.2018. During his said period of stay only, he had met Abdullah Basith. The documents showing his stay at said hotel were collected. Thus, his disclosure has actually led to recovery of some vital facts and, therefore, such part cannot be labelled as inadmissible.

47. Forensic report given by CERT-In had been placed before learned Trial Court along with the data retrieved from electronic devices/mobiles of both the accused.

48. BBM display picture of account of appellant has image of four terrorists, two of whom are carrying AK47 rifles. Such profile picture of BBM account of appellant reveals his frame of mind and cannot be brushed aside casually, in view of the peculiar factual matrix of the case in hand. The involvement of co-accused is much deeper as BBM Chat



retrieved from his mobile contained discussion about Army movement in Kashmir. Both the accused had procured weapons from UP. They both had come to Delhi together and were planning to go to Kashmir together. Therefore, at this initial juncture, it cannot be said that there was no agreement or tacit understanding or meeting of minds between them. They seemed to know each other very well and despite being fully conversant about their respective antecedents, they chose to stick together.

49. Learned counsel for respondent has drawn our attention to the BBM chat which contains discussion about procurement of weapons and movement of Army, insufficiency of funds to purchase weapons etc. Such chat revealed that his co-accused was concerned about the alarming situation on account of Army movement in Kashmir and even enquired about the safety of his colleagues.

50. Thus, it is, certainly, not a simple case of recovery of a pistol.

51. As per allegations appearing on record and facts and circumstances placed before the court, the appellant was continuously in touch with his co-accused, travelling with him and arranging weapons. He was in touch with militants as well and met one of them in Delhi. As per prosecution, these weapons were being arranged for perpetuating terror and, therefore, at this stage, testing the case on broad probabilities, there is material to show that there is a *prima facie true* case against the appellant. As



noticed already, appellant had allegedly met Abdullah Basith in Delhi in the month of July, 2018 in connection with supply of arms and ammunition for Tanzeem. He led police party to the hotel where he had stayed and the relevant documents from said hotel were also recovered. Said Abdullah Basith, who has been charge-sheeted in FIR No. RC-04/2016 PS NIA, New Delhi, is member of a banned terrorist outfit ISIS (JK). In the charge-sheet of said FIR No. RC-04/2016, it is clearly mentioned that when Abdullah Basith had come to Delhi, he met appellant herein and the appellant had informed him that the weapons would be procured in a couple of days.

52. Thus, appellant, being supporter of ideology of ISIS, arranged illegal weapons and was involved in providing other logistic support to its cadres. It is also quite obvious that appellant had not only personally met Abdullah Basith but was communicating with Umar Iban Nazir and Adil Thokar. Merely because some of the incriminating BBM chats were found on the mobile of his co-accused would not mean that at this point of time, the said fact cannot be taken as a circumstance against the appellant. Conspiracy, as the cliché goes, is hatched in secrecy and very rarely, there would be any visible evidence suggesting clear-cut conspiracy. On most of the occasions, conspiracy has to be inferred by connecting dots from bunch of circumstances. Moreover, Section 10 of Evidence Act cannot be kept aside which visualizes such type of situation and makes the actions and the statements of co-conspirator to be relevant



as against the others. Such action or statement can even be used for proving the existence of conspiracy.

53. Thus, at this stage, appellant does not seem to be in any position to wriggle out of the statutory bar contained in proviso of Section 43D (5) of UAPA as there are clear-cut allegations which go on to indicate that accusation against him is *prima facie true*. This observation is based on broad probabilities and surface analysis of material collected by respondent.

54. We have also gone through the precedents cited at the bar.

55. Fact, however, remains that none of these advance the case of appellant, particularly at this juncture. On the strength of *Jyoti Babasaheb Chorge (supra)* and *Waheed ur Rehman Parra (supra)*, it is contended that mere association with persons of doubtful credentials isn't enough to attract provisions of UAPA. *Thwaha Fasal (supra)* has been relied to contend that there is no evidence to suggest the Appellant was radicalized, associated, supporting, or was otherwise furthering the activities of ISIS. Relying on *Nalini (supra)* and *Firozuddin Basheruddin (supra)*, it is argued that there is nothing to imply conspiracy.

56. Suffice it to say that each case has to be evaluated in the backdrop of its factual background. Moreover, in view of our forgoing discussion and material on record, the appellant seems part of conspiracy and when a full-fledged trial is already underway, we would refrain from



embarking upon a mini-trial to dissect each circumstance, threadbare. The appellant was in touch with cadres of ISIS which is sufficient to give insight of his culpable mind. In *Arup Bhuyan v. State of Assam*, (2023) 8 SCC 745, it has been observed that mere membership of banned organization is also sufficient to incriminate, without there being any overt act. Moreover, the factum of connection and association with any banned outfit has to be inferred from the attendant circumstances and the activities of the person concerned. There will never be a tangible piece of evidence or any kind of documentary proof in this regard, particularly once any such organization is banned. In *Shoma Kanti Sen (supra)*, in view of the peculiar allegations appearing therein, the Hon'ble Supreme Court reached the opinion that there was no reasonable ground for believing that the accusations against the appellants for commission of the offences incorporated in Chapter IV and VI of UAPA were prima facie true. Here, the situation is somewhat dissimilar. The procurement of sophisticated weapons cannot be brushed aside casually, particularly in the context of the present matter.

WHETHER INCACERATION AMOUNTS TO INFRINGEMENT OF FUNDAMENTAL RIGHTS

57. Learned counsel for the appellant has prayed that accused has already undergone incarceration for more than 5 ½ years and trial is not likely to conclude in near future. It is argued that he was just 19 years of age when he was arrested and at that time, he was at an important



threshold of his educational and professional career. It is argued that though case is already at the stage of trial and the prosecution has examined nine out of cited twenty-seven witnesses, there is no likelihood of case getting disposed of in near future and, therefore, on the strength of *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713, it is prayed that despite the aforesaid statutory bar, Constitution Court can always grant bail so that the right of speedy trial and that of life and liberty do not stand defeated.

58. We have gone through *Union of India v. K.A. Najeeb* (supra) and notice that the facts in the said case were little different. In that case, concerned accused had earlier absconded and the trial proceeded against his other co-accused who were eventually sentenced to imprisonment for term, not exceeding eight years. The accused therein had already served under-trial incarceration for more than five years and there was no likelihood of completion of trial in near future and it was in the aforesaid factual matrix that the Hon'ble Supreme Court granted bail while observing as under: -

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 Undertrial Prisoners) v. Union of India, it was held that undertrials 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, the 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, the courts would ordinarily be obligated to enlarge them on bail.

16. As regards the judgment in NIA v. Zahoor Ahmad Shah Watali, cited by the learned ASG, we find that it dealt with an entirely different factual matrix. In that case, the High Court had reappreciated the entire evidence on record to overturn the Special Court's conclusion of their being a prima facie case of conviction and concomitant rejection of bail. The High Court had practically conducted a mini-trial and determined admissibility of certain evidence, which exceeded the limited scope of a bail petition. This not only was beyond the statutory mandate of a prima facie assessment under Section 43-D(5), but it was premature and possibly would have prejudiced the trial itself. It was in these circumstances that this Court intervened and cancelled the bail.

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 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.

59. Thus, as per *K.A. Najeeb* (supra), despite the above statutory restriction contained in UAPA, the Constitutional Courts can consider grant of bail on the ground of violation of Part-III of the Constitution.



60. However, in the case in hand, the maximum sentence provided under Section 18 & 20 UAPA is imprisonment for life and there is nothing which may indicate that prosecution is acting in a manner which is detrimental to his fundamental rights as provided under Part-III of the Constitution of India. Trial Court Record does not suggest any deliberate attempt on the part of prosecution to slow down the trial and, therefore, at this juncture, merely because of the above incarceration period, the accused does not become entitled to bail.

61. In *Gurwinder Singh (supra)* also, the accused had spent 5 years behind the bars and the similar contention was rejected observing that mere delay in trial pertaining to grave offences could not be used as a ground to grant bail.

62. In *Mohd. Hakim (supra)*, the situation was different as the coordinate bench of this court had observed that the appellant therein had spent more than 12 years in custody as an undertrial; 256 witnesses had been examined over the last about 12 years and 60 prosecution witnesses were still to be examined. It was in the above background that it was observed that regardless of how much longer the trial may take, the incarceration of more than 12 years suffered by the appellant in custody as an undertrial would certainly qualify as a long enough period for the system to acknowledge that the appellant's right to speedy trial continues to be defeated.



63. We may also note that the learned trial court has already observed in para 32 of the impugned order that it, being already conscious about such fundamental right of the accused, was taking up the matter diligently by giving shortest possible dates. Therefore, there is no further requirement of passing any further direction in this regard.

64. Resultantly, finding no substance in the appeal, we hereby dismiss the same.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

APRIL 24, 2024/dr