UNION OF INDIA
v.
K. A. NAJEEB

(Criminal Appeal No. 98 of 2021)

FEBRUARY 01, 2021

[N.V. RAMANA, SURYA KANT,* ANIRUDDHA BOSE, JJ.]

Bail:

Grant of bail – By High Court – To the accused charged for offences u/ss. 143, 147, 148, 120-B, 341, 427, 323, 324, 326, 506(H), 201, 202, 153A, 212, 307 and 149 IPC; u/s. 3 of Explosive Substances Act, 1908 and ss. 16, 18, 18-B, 19 and 20 of Unlawful Activities (Prevention) Act, 1967 – On the ground that the undertrial-accused could not be kept in custody for too long when the trial was not likely to commence in near future – By setting aside the order of Special Court who had declined to grant bail to the accused primarily in view of the bar against grant of bail u/s. 43-D(5) of Unlawful Activities (Prevention) Act – Appeal to Supreme Court – Held: 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 speedy trial – Undertrials cannot indefinitely be detained, pending trial – Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, courts would ordinarily be obliged to enlarge them on bail– The statutory restrictions per se do not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution – Such statutory restrictions and the powers exercisable under constitutional jurisdiction can be harmonised – The restriction u/s. 43-D(5) under Unlawful Activities (Prevention) Act is less stringent than the restriction provided under s. 37 of NDPS Act – The accused in the present case has been in jail for more than five years; none of the convicted thirteen co-accused have been sentenced for more than 8 years RI and that 276 witnesses are left to be examined – In the facts of the case, High Court was left with no other option, but to grant bail – However, in addition to the conditions to be imposed by the trial Court while releasing the accused on bail, some more conditions are imposed – Appeals are dismissed.

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* Author

Shaheen Welfare Association v. Union of India **(1996) 2 SCC 616 : [1996] 2 SCR 1123; *Hussain v. Union of India* (2017) 5 SCC 702 : [2017] 2 SCR 626; *Paramjit Singh v. State (NCT of Delhi)* (1999) 9 SCC 252; *Babba alias Shankar Raghuman Rohida v. State of Maharashtra* (2005) 11 SCC 569; *Umarmia alias Mamumia v. State of Gujarat* (2017) 2 SCC 731; *Angela Harish Sontakke v. State of Maharashtra* 2021 (2) SCALE 301; *Sagar Tatyaram Gorkhe v. State of Maharashtra* 2021 (2) SCALE 302; *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India* (1994) 6 SCC 731 : [1994] 4 Suppl. SCR 386 – relied on.**

National Investigation Agency v. Zahoor Ahmad Shah Watali **(2019) 5 SCC 1 : [2019] 5 SCR 1060- distinguished**

Puran v. Rambilas **(2001) 6 SCC 338 : [2001] 3 SCR 432; *Gurcharan Singh v. State (Delhi Admn.)* (1978) 1 SCC 118 : [1978] 2 SCR 358; *State of Bihar v. Rajballav Prasad* (2017) 2 SCC 178 : [2016] 9 SCR 652 – referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 98 of 2021.

From the Judgment and Order dated 23.07.2019 of the High Court of Kerala at Ernakulam in Crl. M. Appl. 1/2019 in Criminal Appeal No. 659 of 2019.

Ms. Aishwarya Bhati, ASG, R. Basant, Sr. Adv., Kanu Agrawal, Mohd. Akhil, B.V. Balaram Das, Ramesh Babu M. R., Advs. for the appearing parties.

The Order of the Court was passed by

SURYA KANT, J.

1. Leave Granted.

2. The present appeal has been preferred by the Union of India through the National Investigation Agency (in short, "NIA") against an order dated 23.07.2019 of the High Court of Kerala at Ernakulam, whereby bail was granted to the respondent for an offence under Sections 143, 147, 148, 120-B, 341, 427, 323, 324, 326, 506(H), 201, 202, 153A, 212, 307, 149 of the Indian Penal Code, 1860 ("IPC"), Section 3 of the Explosive Substances Act, 1908 and Sections 16, 18, 18-B, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 ("UAPA").

FACTS

3. The prosecution case in brief is that one Professor TJ Joseph while framing the Malayalam question paper for the second semester B.Com. examination at the Newman College, Thodupuzha, had included a question which was considered objectionable against a particular religion by certain sections of society. The respondent in association with other members of the Popular Front of India (PFI), decided to avenge this purported act of blasphemy. On 04.07.2010 at about 8AM, a group of people with a common object, attacked the victim-professor while he was returning home with his mother and sister after attending Sunday mass at a local Church. Over the course of the attack, members of the PFI forcefully intercepted the victim's car, restrained him and chopped-off his right palm with choppers, knives, and a small axe. Country-made bombs were also hurled at bystanders to create panic and terror in their minds and to prevent them from coming to the aid of the victim. An FIR was consequently lodged against the attackers by the victim-professor's wife under Sections 143, 147, 148, 120-B, 341, 427, 323, 324, 326, 506(H), 307, 149 of IPC; and Section 3 of Explosive Substances Act.

4. It emerged over the course of investigation that the attack was part of a larger conspiracy involving meticulous pre-planning, numerous failed attempts and use of dangerous weapons. Accordingly, several dozen persons including the present respondent were arraigned by the police. It was alleged that the respondent was one of the main conspirators and the provisions contained in Sections 153A, 201, 202, 212 of IPC, along with Section 16, 18, 18-B, 19 and 20 of the UAPA were also thus invoked against him. However, owing to him being untraceable, the respondent was declared an absconder and his trial was split up from the rest of his co-conspirators. The co-accused of the respondent were tried and most of them were found

guilty by the Special Court, NIA vide order dated 30.04.2015 and were awarded cumulative sentence ranging between two and eight-years' rigorous imprisonment.

5. The respondent could be arrested on 10.04.2015 only and a chargesheet was re-filed by the National Investigation Agency against him, pursuant to which the respondent is now facing trial. The respondent approached the Special Court and the High Court for bail as many as six times between 2015 and 2019, seeking leniency on grounds of his limited role in the offence and claiming parity with other co-accused who had been enlarged on bail or acquitted. Save for the impugned order, bail was declined to the respondent, observing that *prima facie* he had prior knowledge of the offence, had assisted and facilitated the attack, arranged vehicle and SIM cards, himself waited near the place of occurrence, transported the perpetrators, sheltered, and medically assisted them afterwards. The Courts were, therefore, of the view that the bar against grant of bail under Section 43-D (5) of the UAPA was attracted.

6. The respondent again approached the High Court in May, 2019 for the third time, questioning the Special Court's order denying bail. The High Court through the impugned order, released the respondent on bail noting that the trial was yet to begin though the respondent had been in custody for four years. Placing emphasis on the mandate for an expeditious trial under the National Investigation Agency Act, 2008, the High Court held that the undertrial-respondent could not be kept in custody for too long when the trial was not likely to commence in the near future, for not doing so would cause serious prejudice and suffering to him. The operation of the aforementioned bail order was, however, stayed by this Court. Resultantly, the respondent has spent nearly five years and five months in judicial custody.

CONTENTIONS

7. Learned Additional Solicitor General, for the appellant, argued that the High Court erred in granting bail without adverting to the statutory rigours of Section 43-D(5) of UAPA. Relying upon judgment in ***National Investigation Agency v. Zahoor Ahmad Shah Watali***[1], it was highlighted that bail proceedings under the special enactment

1 (2019) 5 SCC 1.

were distinct and the Courts are duty-bound to refuse bail where the suspect is *prima facie* believed to be guilty. It was further contended that in numerous prior rounds before the Special Court and the High Court, there emerged enough reasons to believe that the respondent was, *prima facie,* guilty of the accusations made against him. The fact that the respondent had absconded for years was pressed into aid as legitimate apprehension of his not returning if set free. As regard to the early conclusion of trial, NIA has filed an additional affidavit suggesting to examine 276 witnesses and at the same time expecting to conduct the trial on a day-to-day basis and complete it within around a year.

8. Learned Senior Counsel appearing for the respondent, on the other hand, highlighted that many of the co-accused had been acquitted, and although a few had been convicted as well, but those convicts had also been awarded a sentence of not more than eight years. Given how the respondent has already suffered incarceration of almost five-and-a-half years without the trial having even started, it would violate his Constitutional liberty and rights to have him serve most of his sentence without any adjudication of guilt by a judicial authority. He urged that once the High Court had exercised discretion to grant bail, the same ought not to be interfered with except in rare circumstances. Relying upon ***Shaheen Welfare Association v. Union of India***[2] and ***Hussain v. Union of India***,[3] it was argued that such protracted incarceration violates the respondent's right to speedy trial and access to justice; in which case, Constitutional Courts could exercise their powers to grant bail, regardless of limitations specified under special enactments.

ANALYSIS

9. It must be emphasised at the outset that there is a vivid distinction between the parameters to be applied while considering a bail application, vis-à-vis those applicable while deciding a petition for its cancellation. In ***Puran v. Rambilas***[4], it was re-iterated that at the time of deciding an application for bail, it would be necessary to record reasons, albeit without evaluating the evidence on merits. In turn, ***Puran*** ***(supra)*** cited ***Gurcharan Singh v. State (Delhi***

2 (1996) 2 SCC 616.
3 (2017) 5 SCC 702
4 (2001) 6 SCC 338

Admn.)*[5]*; wherein this Court observed that bail once granted by the trial Court, could be cancelled by the same Court only in case of new circumstances/evidence, failing which, it would be necessary to approach the Higher Court exercising appellate jurisdiction.

10. In ***State of Bihar v. Rajballav Prasad*[6]**,** this Court ruled that deference must be given to the discretion exercised by Superior Courts in matters of bail, save for exceptional circumstances. The afore-cited decision holds as follows:

> *"14. We may observe at the outset that we are conscious of the limitations which bind us while entertaining a plea against grant of bail by the lower court, that too, which is a superior court like High Court.* ***It is expected that once the discretion is exercised by the High Court on relevant considerations and bail is granted, this Court would normally not interfere with such a discretion, unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such a discretion are ignored or bypassed....There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting the bail. These material considerations are also spelled out in the aforesaid judgments viz. whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence.*** …"
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> *(emphasis supplied)*

11. It is a fact that the High Court in the instant case has not determined the likelihood of the respondent being guilty or not, or whether rigours of Section 43-D(5) of UAPA are alien to him. The High Court instead appears to have exercised its power to grant bail owing to the long period of incarceration and the unlikelihood of the trial being completed anytime in the near future. The reasons assigned by the High Court are apparently traceable back to Article 21 of our Constitution, of course without addressing the statutory embargo created by Section 43-D (5) of UAPA.

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5 (1978) 1 SCC 118
6 (2017) 2 SCC 178

12. The High Court's view draws support from a batch of decisions of this Court, including in ***Shaheen Welfare Association (supra)***,laying down that gross delay in disposal of such cases would justify the invocation of Article 21 of the Constitution and consequential necessity to release the undertrial on bail. It would be useful to quote the following observations from the cited case:

> *"10. Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail.* ***Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh case [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] , on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21***."
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> *(emphasis supplied)*

13. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS") which too have somewhat rigorous conditions for grant of bail, this Court in ***Paramjit Singh v. State (NCT of Delhi)***[7]***, Babba alias Shankar Raghuman Rohida v. State of Maharashtra***[8] and ***Umarmia alias Mamumia v. State of Gujarat***[9] enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

14. We may also refer to the orders enlarging similarly-situated accused under the UAPA passed by this Court in ***Angela Harish Sontakke v. State of Maharashtra***[10]***.*** That was also a case under Sections 10, 13, 17, 18, 18A, 18B, 20, 21, 38, 39 and 40(2) of the UAPA. This Court in its earnest effort to draw balance between the seriousness of the charges with the period of custody suffered and the likely

7 (1999) 9 SCC 252.
8 (2005) 11 SCC 569
9 (2017) 2 SCC 731
10 SLP (Crl.) No. 6888 of 2015, Order dated 04.05.2016.

period within which the trial could be expected to be completed took note of the five years' incarceration and over 200 witnesses left to be examined, and thus granted bail to the accused notwithstanding Section 43-D(5) of UAPA. Similarly, in ***Sagar Tatyaram Gorkhe v. State of Maharashtra***[11], an accused under the UAPA was enlarged for he had been in jail for four years and there were over 147 witnesses still unexamined.

15. The facts of the instant case are more egregious than these two above-cited instances. Not only has the respondent been in jail for much more than five years, but there are 276 witnesses left to be examined. Charges have been framed only on 27.11.2020. Still further, two opportunities were given to the appellant-NIA who has shown no inclination to screen its endless list of witnesses. It also deserves mention that of the thirteen co-accused who have been convicted, none have been given a sentence of more than eight years' rigorous imprisonment. It can therefore be legitimately expected that if found guilty, the respondent too would receive a sentence within the same ballpark. Given that two-third of such incarceration is already complete, it appears that the respondent has already paid heavily for his acts of fleeing from justice.

16. 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***[12], 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, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail.

11 SLP (Crl.) No. 7947 of 2015, Order dated 03.01.2017.
12 (1994) 6 SCC 731, 15.

17. As regard to the judgment in ***NIA v. Zahoor Ahmad Shah Watali (supra),*** cited by learned ASG, we find that it dealt with an entirely different factual matrix. In that case, the High Court had re-appreciated 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 evidences, 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.

18. 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.

19. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

20. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43-D(5) of the UAPA is comparatively less stringent than Section 37 of the NDPS. Unlike the NDPS where the competent Court needs to be satisfied that *prima facie* the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, Section 43-D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc.

CONCLUSION

21. In light of the above discussion, we are not inclined to interfere with the impugned order. However, we feel that besides the conditions to be imposed by the trial Court while releasing the respondent, it would serve the best interest of justice and the society-at-large to impose some additional conditions that the respondent shall mark his presence every week on Monday at 10 AM at the local police station and inform in writing that he is not involved in any other new crime. The respondent shall also refrain from participating in any activity which might enrage communal sentiments. In case the respondent is found to have violated any of his bail conditions or attempted to have tampered the evidence, influence witnesses, or hamper the trial in any other way, then the Special Court shall be at liberty to cancel his bail forthwith. The appeal is accordingly dismissed subject to above- stated directions.

Headnotes prepared by: Kalpana K. Tripathy

Result of the case: Appeal dismissed.