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

Date of decision: 07th JULY, 2025

IN THE MATTER OF:

\+ **CRL.A. 1087/2024**

ARSALAN FEROZE AHENGER .....Appellant

Through: Mr. Siddharth Satija, Mr. Sowjhanya Shankaran, Mr. Akash Sachan, Ms. Anuka Bachawat, Advocates

versus

NATIONAL INVESTIGATION AGENCY .....Respondent

Through: Mr. Rajesh Mahajan, SPP with Mr. R.K. Bora, Advocate with DSP Surender Pal.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The present appeal is filed by the Appellant challenging the Order dated 10.09.2024 passed by the Ld. Principal District & Sessions Judge, Patiala House Court, New Delhi District, Delhi (*hereinafter referred to as "Trial Court"*) dismissing the bail application of the Appellant herein who has been charge-sheeted for the offences punishable under Sections 120-B, 121 & 122 of IPC and Sections 13, 17, 18, 18B, 38 & 39 of the Unlawful Activities (Prevention) Act, 1967 (*hereinafter referred to as "UAPA"*).

2. Short of unnecessary details, facts leading to the filing of the present appeal as noted by the Ld. Trial Court are that against the backdrop of

abrogation of Article 370 of the Constitution of India, conspiracies were being hatched by various terrorist organizations like Lashkar-e-Toiba ['LeT'] and The Resistance Front ['TRF'] for targeted attacks on minorities, security forces, political leaders and other important persons. Some of these conspiracies were allegedly planned and have also been executed to create unrest, instability and fear in the region of Kashmir and other parts of the country.

3. The facts of the case further reveal that the conspiracies and attacks made by the TRF are not merely confined to the physical attacks but also extended to radicalising and recruiting local youth for disseminating provocative narrative and carrying out various militant activities, thereby extending support to the terrorist organisations, in whichever way possible.

4. It was further alleged that the material on record indicates that the internet was being used extensively by the members of the TRF for the purpose of disseminating information and radicalising local youth. Various digital and social media platforms like Facebook, WhatsApp, Telegram, Instagram and Twitter etc., were being used for disseminating false and provocative narrative against the nation, creating unrest and militancy tendencies in the local youth by drawing them towards the terrorist organisations and their radical ideology.

5. The Ld. Trial Court records that a new term has been coined i.e. Over Ground Workers ['OGW'] whose services were being utilized for various terrorist activities such as training and recruitment of local youth and propagation of radical ideology in every feasible and possible manner.

6. The specific allegation against the Appellant herein is that the Appellant was associated with one Mehran Yaseen Shalla, who was

associated with TRF/LeT. The said Mehran Yaseen Shalla along with two other persons was killed in an encounter on 24.11.2021. It is alleged that under the influence of said slain Mehran Yaseen Shalla, the Appellant was digitally active on various social media platforms, on which radical content has been shared. It is stated that the Appellant created certain groups on social media like Ansar Gazwat-UI-Hind (AGH) and Shaikoo Naikoo etc. and created multiple Gmail IDs *via* which radical views were expressed, thereby motivating and radicalizing vulnerable youth to join terrorist groups like TRF and for this purpose, the Appellant used social media platforms like Facebook, WhatsApp, Telegram, Instagram and Twitter etc.

7. The Appellant was arrested on 30.12.2021 and was produced before the Ld. Special Judge, UAPA, Srinagar on 31.12.2021. Thereafter, the Appellant was granted transitory remand till 04.01.2022. On 04.01.2022, the Appellant was produced before the Ld. Trial Court, Patiala House Courts, Delhi and he was sent to police custody. Thereafter, chargesheet was filed by the investigating agency on 18.06.2022.

8. The Ld. Trial Court, in the Impugned Order dated 10.09.2024, extracted the details of the documents and material showing the involvement of the Appellant for the offences punishable under various provisions of the UAPA. The said details, which contains the document numbers, purpose of filing of these documents and the witnesses have been given in a tabulated manner, which reads as under:

Document No./PW No.	What it will prove
D-9	Arsalan Feroz was closely associated with LeT/TRF terrorist Mehran Yaseen Shalla and was also in contact with Owais Raja Dar, terrorist of LeT/TRF.
D-11	Mehran Yasheen Shalla was a terrorist of LeT/TRF.
D-12 & D-13	Association of TRF with LeT.
D-15	Arsalan Feroz was closely associated with LeT/TRF terrorist Mehran Yaseen Shalla. He created a whatsapp LeT/TRF terrorist group namely "AGH" (Ansar Gazwat-ul-Hind) and used to regularly share content related to LeT/TRF on this group. He used to motivate youths of Jammu & Kashmir to join terrorist activities of LeT/TRF.
D-16	Arsalan Feroz used to share images/videos/posts/audio clips glorifying terrorist activities to his friends. Arsalan Feroz created a whatsapp LeT/TRF terrorist group namely "AGH" (Ansar Gazwat-ul-Hind) and used to regularly share content related to LeT/TRF on this group.
D-20	It will prove that Owais Raja Dar was terrorist of LeT/TRF.
D-21, D-22 & D-23	It will prove that Arsalan Feroz was highly radicalised. Mehran Yasheen Shalla was a terrorist of LeT/TRF. He used to share images/videos/posts/audio clips glorifying terrorist activities to his friends. It will prove that Arsalan Feroz used to propagate the

	ideology of LeT/TRF through various social media means to motivate/radicalise the youth of Jammu & Kashmir.
PW-3 Sh. Faheem Qadir Bhat, PW-26 Sh. Suhail Ahmad Kashoo & PW27 Sh. Saqib Altaf	Association of Arsalan Feroz with Mehran Yasheen Shalla. A-4 used to propagate the ideology of LeT/TRF.
PW4 Sh. Sahil Farooq Bhat, PW5 Sh. Saqib Farooq Bangroo, PW6 Sh. Ubaid Ahmed Kagazgar, PW7 Sh. Amaan Manzoor Najar, PW-8 Sh. Momin Firdous Mir	Association of Arsalan Feroz with Mehran Yasheen Shalla. Arsalan Feroz used to propagate the ideology of LeT/TRF. Arsalan Feroz created AGH Whatsapp group for propagating the ideology of LeT/TRF. Arsalan Feroz used to work as OGW for LeT/TRF
PW10 Sh. Sahil Manzoor Sheikh	Association of Arsalan Feroz with Mehran Yasheen Shalla. Arsalan Feroz used to propagate the ideology of LeT/TRF. Arsalan Feroz used to have knowledge of killings carried out by LeT/TRF in Jammu & Kashmir.
PW11 Sh. Burhan Shafi Sheikh, PW12 Sh.Mohd. Ilabran Dar, PW13 Sh. Furkan Imran, PW19 Sh. Irfan Farooq Dar, PW20 Sh. Junaid Shabir Mir, PW22 Sh. Sarhan Shafi Mir, PW23 Sh. Syed Tanvir Hasan, PW24 Sh. Muazin Mumtaz and PW27 Sh. Saqib Altaf	Association of Arsalan Feroz with Mehran Yasheen Shalla. Arsalan Feroz used to propagate the ideology of LeT/TRF.
PW17 Ms. Ishrat Gull	Arsalan Feroz used to contact Owais Raja Dar through mobile phone of PW-17.
PW18 Sh. Shahid Majid Bhat	Arsalan Feroz was associated with Mehran Yasheen Shalla. Arsalan Feroz had full knowledge of killings carried out by LeT/TRF operatives.
Protected witness X-1	Association of Arsalan Feroz with Mehran Yasheen Shalla.

	Arsalan Feroz used to propagate the ideology of LeT/TRF.
Protected witness X-2	Association of Arsalan Feroz with Mehran Yasheen Shalla Arsalan Feroz used to propagate the ideology of LeT/TRF Arsalan Feroz used to motivate the youth of Jammu & Kashmir to join them the fold of LeT/TRF

9. The chargesheet dated 18.06.2022 contains material against the Appellant such as screenshots of chats, news articles, books, social media posts, pictures of weapons and slain terrorists and other miscellaneous activities, including data retrieved from the Appellant, indicating his active involvement and intention to incite people. One of such materials is being extracted below:

> *"Once again the Incumbent JK Police has shown an cowardice act and proved how criminal minded this force has become. To appease Occupier regime and to cover their failure this Sangi force has once again spell the blood of innocent. Today's so called encounter at Pulwama and in Srinagar is fake and these two innocent boys were arrested in the name of ongoing investigation and then murdered. Terming this cold blooded murder as an encounter is the demonic act of JK Police/SOG. This force is implementing the brutal and sangi agenda of Occupier from such draconian acts of custodian murders otherwise freedom fighters won't differential between you and your near & dear ones.*
> *We pay our tribute to these innocent souls and pledge to avenge these custodial murders. The perpetrators*

won't be spared and they will feel the pain deep down their spine."

10. The material on record further indicates that the Appellant has also shared photographs and one audio clip of slain terrorist Mehran Yaseen Shalla, wherein a shayari has been quoted which reads as under:

"Ab jag uthe hai diwane duniya ko jaga kar dum lenge, yeh byan hai duniya per hum phool bhi hai, talwaar bhi hai, apas mein jahan mahakaeynge ya khoon mein naha ke dum lenge, socha hai kafeel ab kuch bhi ho, har haal mein apna haq lenge, ". Finally he spoke that mujhe dhudne ki koshish na kare, Mein mujhahid ke safon mein shamil ho gaya hoon. Meri is tanzeem se achi tarah wikif honge jiska naaam hai The Resistance Front" (TRF)."

11. After considering the material on record, the Ld. Trial Court *vide* Order dated 10.09.2024 (*hereinafter referred to as "Impugned Order"*) came to a conclusion that there are reasonable grounds for believing that accusations against the Appellant are *prima facie* true and rejected the bail application of the Appellant under Section 43D(5) of UAPA.

12. It is this Impugned Order which is under challenge in the present appeal.

13. Learned Counsel for the Appellant contends that the Ld. Trial Court failed to appreciate that there is no material on record indicating that the Appellant is part of the TRF. It is stated that the TRF was not included as a terrorist organization in Schedule – I of the UAPA on the day of the Appellant's arrest and therefore, a case under the provisions of UAPA is not made out against him.

14. It is further contended that the TRF was not designated as a terrorist organization in terms of Section 35 of the UAPA either at the time of registration of FIR, or at the time of arrest of the Appellant, or even when the chargesheet was filed against the Appellant. He, therefore, states that the Appellant did not commit any offence under Sections 38 and 39 of the UAPA as no vicarious liability can be inflicted upon him.

15. It is further contended by the learned Counsel for the Appellant that the crux of the allegations against the Appellant is that he was associated with slain Mehran Yaseen Shalla, however, no material is placed on record to show that the said Mehran Yaseen Shalla was designated as a terrorist or he was associated with TRF and, therefore, a case under UAPA cannot be made out against the Appellant. It is also stated that no material either documentary or oral has been placed on record to show that slain Mehran Yaseen Shalla was a member of TRF or that the Appellant was aware of his membership status with TRF. He states that mere factum of sharing images of slain Mehran Yaseen Shalla by the Appellant on social media will not constitute an offence punishable under the UAPA. He states that even assuming that slain Mehran Yaseen Shalla indulged in terrorism or was a member of TRF, there is no material to show that the Appellant assisted slain Mehran Yaseen Shalla in any manner either overtly or covertly, and in any event, the Appellant cannot be made vicariously liable for the actions of slain Mehran Yaseen Shalla. He states that none of the allegations made against the Appellant would constitute a terrorist act within Section 15 of the UAPA and, therefore, the Appellant cannot be brought into the ambit of Section 18 of UAPA.

16. *Per contra*, learned Counsel appearing for the Respondent/NIA vehemently opposes the instant appeal, thereby supporting the Impugned Order passed by the Ld. Trial Court rejecting the bail application of the Appellant. It is stated that the material on record shows the active involvement of the Appellant in propagating radical information on social media, with the intent of compromising the safety and security of the nation and therefore, the case of the Appellant is affected by the rigours of Section 43D(5) of UAPA.

17. Heard learned Counsel appearing for the Parties and perused the material on record.

18. The parameters for granting bail for offences punishable under UAPA have been laid down under Section 43D(5) of UAPA. Section 43D(5) of UAPA reads as under:

> ***"43D(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."*

19. At this juncture, it is apposite to refer to the case of Gurwinder Singh v. State of Punjab, **(2024) 5 SCC 403,** wherein the Apex Court explained the scope of Section 43D(5) of UAPA in detail. The relevant portion is as under:

"24. *The source of the power to grant bail in respect of non-bailable offences punishable with death or life imprisonment emanates from Section 439CrPC. It can be noticed that Section 43-D(5) of the UAP Act modifies the application of the general bail provisions in respect of offences punishable under Chapter IV and Chapter VI of the UAP Act.*

25. *A bare reading of sub-section (5) of Section 43-D shows that apart from the fact that sub-section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to sub-section (5) of Section 43-D puts a complete embargo on the powers of the Special Court to release an accused on bail. It lays down that if the Court, "on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure", is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UAP Act is prima facie true, such accused person shall not be released on bail or on his own bond. It is interesting to note that there is no analogous provision traceable in any other statute to the one found in Section 43-D(5) of the UAP Act. In that sense, the language of bail limitation adopted therein remains unique to the UAP Act.*

26. *The conventional idea in bail jurisprudence vis-à-vis ordinary penal offences that the discretion of courts must tilt in favour of the oft-quoted phrase — "bail is the rule, jail is the exception" — unless circumstances justify otherwise — does not find any place while dealing with bail applications under the UAP Act. The "exercise" of the general power to grant bail under the UAP Act is severely restrictive in scope.*

The form of the words used in the proviso to Section 43-D(5)— "shall not be released" in contrast with the form of the words as found in Section 437(1)CrPC — "may be released" — suggests the intention of the legislature to make bail, the exception and jail, the rule.

27. *The courts are, therefore, burdened with a sensitive task on hand. In dealing with bail applications under the UAP Act, the courts are merely examining if there is justification to reject bail. The "justifications" must be searched from the case diary and the final report submitted before the Special Court. The legislature has prescribed a low, "prima facie" standard, as a measure of the degree of satisfaction, to be recorded by the Court when scrutinising the justifications [materials on record]. This standard can be contrasted with the standard of "strong suspicion", which is used by courts while hearing applications for "discharge". In fact, the Supreme Court in Zahoor Ahmad Watali [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] has noticed this difference, where it said : (SCC p. 24, para 23)*

"23. ... In any case, the degree of satisfaction to be recorded by the court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act."

(emphasis supplied)

28. *In this background, the test for rejection of bail is quite plain. Bail must be rejected as a "rule", if after hearing the Public Prosecutor and after perusing the final report or case diary, the court arrives at a*

conclusion that there are reasonable grounds for believing that the accusations are prima facie true. It is only if the test for rejection of bail is not satisfied — that the courts would proceed to decide the bail application in accordance with the "tripod test" (flight risk, influencing witnesses, tampering with evidence). This position is made clear by sub-section (6) of Section 43-D, which lays down that the restrictions, on granting of bail specified in sub-section (5), are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on grant of bail.

29. *On a textual reading of Section 43-D(5) of the UAP Act, the inquiry that a bail court must undertake while deciding bail applications under the UAP Act can be summarised in the form of a twin-prong test:*

(1) Whether the test for rejection of the bail is satisfied?

1.1. Examine if, prima facie, the alleged "accusations" make out an offence under Chapter IV or VI of the UAP Act;

1.2. Such examination should be limited to case diary and final report submitted under Section 173CrPC;

(2) Whether the accused deserves to be enlarged on bail in light of the general principles relating to grant of bail under Section 439CrPC ("tripod test")?

On a consideration of various factors such as nature of offence, length of punishment (if convicted), age, character, status of accused, etc. the court must ask itself:

2.1. Whether the accused is a flight risk?

2.2. Whether there is apprehension of the accused tampering with the evidence?

2.3. Whether there is apprehension of accused influencing witnesses?

30. *The question of entering the "second test" of the inquiry will not arise if the "first test" is satisfied. And merely because the first test is satisfied, that does not mean however that the accused is automatically entitled to bail. The accused will have to show that he successfully passes the "tripod test".*

Test for rejection of bail : Guidelines as laid down by Supreme Court in Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383]

31. *In the previous section, based on a textual reading, we have discussed the broad inquiry which courts seized of bail applications under Section 43-D(5) of the UAP Act read with Section 439CrPC 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.*

32. *In this regard, we need to look no further than Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] 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 paras 23 to 24 and 26 to 27, the following 8-point propositions emerge and they are summarised as follows:*

32.1.*Meaning of "prima facie true" : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 24, 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.

32.2. *Degree of satisfaction at pre charge-sheet, post charge-sheet and post-charges — compared : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 28, para 26)*

"26. ... 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 173CrPC), 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."

32.3. *Reasoning, necessary but no detailed evaluation of evidence : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 27, para 24)*

"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."

32.4. *Record a finding on broad probabilities, not based on proof beyond doubt : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 27, 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."

32.5. *Duration of the limitation under Section 43-D(5) : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 27, para 26)*

"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."

32.6. *Material on record must be analysed as a "whole"; no piecemeal analysis : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 28, para 27)*

"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."

32.7. *Contents of documents to be presumed as true : (Watali case [NIA v. Zahoor Ahmad Shah*

Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC p. 28, para 27)

"27. ... The Court must look at the contents of the document and take such document into account as it is."

32.8. *Admissibility of documents relied upon by prosecution cannot be questioned : (Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , SCC pp. 24 & 28, paras 23 & 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.

33. *It will also be apposite at this juncture to refer to the directions issued in Devendar Gupta v. NIA [Devendar Gupta v. NIA, 2014 SCC OnLine AP 192 : (2014) 2 ALD (Cri) 251] wherein a Division Bench of the High Court of Andhra Pradesh strove to strike a balance between the mandate under Section 43-D on one hand and the rights of the accused on the other. It was held as follows : (SCC OnLine AP)*

"The following instances or circumstances, in our view, would provide adequate guidance for the Court to form an opinion, as to whether the accusation in such cases is "prima facie true":

(1) Whether the accused is/are associated with any organisation, which is prohibited through an order passed under the provisions of the Act;

(2) Whether the accused was convicted of the offences involving such crimes, or terrorist activities, or though acquitted on technical grounds; was held to be associated with terrorist activities;

(3) Whether any explosive material, of the category used in the commission of the crime, which gave rise to the prosecution; was recovered from, or at the instance of the accused;

(4) Whether any eyewitness or a mechanical device, such as CC camera, had indicated the involvement, or presence of the accused, at or around the scene of occurrence; and

(5) Whether the accused was/were arrested, soon after the occurrence, on the basis of the information, or clues available with the enforcement or investigating agencies."

(emphasis supplied)

34. *In Kekhriesatuo Tep v. NIA [Kekhriesatuo Tep v. NIA, (2023) 6 SCC 58 : (2023) 2 SCC (Cri) 676] the two-Judge Bench (B.R. Gavai and Sanjay Karol, JJ.) while dealing with the bail application for the offence of supporting and raising funds for terrorist organisation under Sections 39 and 40 of the UAP Act relied upon NIA v. Zahoor Ahmad Shah Watali [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] and observed that : (Kekhriesatuo Tep case [Kekhriesatuo Tep v. NIA, (2023) 6 SCC 58 : (2023) 2 SCC (Cri) 676] , SCC p. 63, para 13)*

While dealing with the bail petition filed by the accused against whom offences under Chapters IV and VI of UAPA have been made, the court has to consider as to whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. The Bench also observed that

distinction between the words "not guilty" as used in TADA, MCOCA and the NDPS Act as against the words "prima facie" in the UAPA as held in Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] to state that a degree of satisfaction required in the case of "not guilty" is much stronger than the satisfaction required in a case where the words used are "prima facie"....

35. *In Sudesh Kedia v. Union of India [Sudesh Kedia v. Union of India, (2021) 4 SCC 704 : (2021) 2 SCC (Cri) 496] the Bench of Nageswara Rao and S. Ravindra Bhat, JJ. while dealing with a bail application for the offence under Sections 17, 18 and 21 of the UAP Act relied upon the principle propounded in Watali case [NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] (at SCC p. 24, para 23) and observed that : (Sudesh Kedia case [Sudesh Kedia v. Union of India, (2021) 4 SCC 704 : (2021) 2 SCC (Cri) 496] , SCC p. 708, para 12)*

the expression "prima facie" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows that complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted.

36. *In the light of these guiding principles, we shall now proceed to decide whether the additional limitations found in Section 43-D(5) of the UAP Act are attracted in the facts of the present case. In other words, we shall inquire if the first test (as set out*

above) i.e. test for rejection of bail, is satisfied. For this purpose, it will, firstly, have to be examined whether the allegations/accusations against the appellants contained in charge-sheet documents and case diary, prima facie, disclose the commission of an offence under Sections 17, 18 and 19 of the UAP Act.

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38. *Section 18 of the UAP Act states:*

"18. Punishment for conspiracy, etc.—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."

20. As mentioned in the foregoing extracts, the instant case must be subjected to the twin-prong test i.e., the test for rejection of bail and the tripod test to determine whether the allegations against the Appellant are *prima facie* true.

21. Accordingly, when the aforesaid parameters are applied to the facts of the present case, it can be seen that the material produced against the Appellant in the chargesheet show that the Appellant was closely associated with the slain Mehran Yaseen Shalla and other terrorists, who were active in TRF, which is a banned organization under the UAPA. Although it was contended by the Appellant that the TRF was not banned at the time of the arrest of the Appellant or at the time of the chargesheet, it holds no

significance at this stage. This Court is of the opinion that the material on record indicates that the Appellant has abetted and incited the commission of terrorist act in the country which is punishable under Section 18 of the UAPA. The question as to whether the Appellant is guilty of an offence under Sections 38 and 39 of UAPA need not be gone into by this Court at this juncture. Material on record *prima facie* indicates the capability of the Appellant to commit an offence under Section 18 of the UAPA.

22. Accordingly, this Court will not go into the applicability of Section 38 and 39 of the UAPA.

23. The material on record also indicates that the messages that have been shared by the Appellant have the tendency to incite people to join terrorist activities. The Appellant has also used images, videos etc. of slain Mehran Yaseen Shalla for glorifying the terrorist activities and the Appellant has also been propagating radical ideology of TRF to create unrest within the country.

24. The Apex Court in Gurwinder Singh (supra) has held that though "*bail is the rule and jail is an exception*", while deciding an application under Section 43D(5) of UAPA, the Court must examine if the accusations make out an offence under Chapter IV or VI of UAPA or not.

25. The contention of the Ld. Counsel for the Appellant that unless there are allegations against the Appellant that he has committed a terrorist activity in terms of Section 15 of the UAPA, he cannot be roped in under Section 18 of the UAPA, cannot be accepted. Section 15 of the UAPA defines terrorist act and Section 18 of the UAPA sets out the punishment for conspiracy. Section 18 of UAPA reads as under:

> ***"18. Punishment for conspiracy, etc.—****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."*

26. In the case of Union of India v. Barakathullah, **2024 SCC OnLine SC 1019**, the Apex Court specifically dealt with the applicability of Section 15 and 18 of the UAPA and the same is as follows -

> *"18. In our opinion, the High Court has committed gross error in not considering the material/evidence in its right and proper perspective and in recording a perverse finding to the effect that there was no material to suggest the commission of any offence, which falls under Section 15 of UAPA, and that the prosecution had not produced any material about the involvement of any of the respondents-accused in any terrorist act or as a member of a terrorist gang or organization or training terrorism. Such perverse findings of the High Court deserve to be strongly deprecated more particularly when the appellant has not alleged the offence under Section 15 of UAPA either in the FIR or in the chargesheet against the respondents. The alleged offences are under Section 18, 18A, 18B etc. For the purpose of considering the offence under Section 18, the commission of terrorist act as contemplated in Section 15 of UAPA is not required to be made out. What Section 18 contemplates is 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 would be punishable under the said provision. Hence, if there is any*

> *material or evidence to show that the accused had conspired or attempted to commit a terrorist act, or committed any act preparatory to the commission of a terrorist act, such material evidence would be sufficient to invoke Section 18. For attracting Section 18, the involvement of the accused in the actual commission of terrorist act as defined in Section 15 need not be shown. The High Court having miserably failed to comprehend the correct import of Section 18 read with the definition of terrorist act as contemplated in Section 15 of UAPA, in our opinion the High Court has fallen into a patent and manifest error."*
>
> (emphasis supplied)

27. Section 18 of the UAPA prescribes that any person who directly or knowingly incites commission of a terrorist act or any act preparatory to the commission of a terrorist act is liable to be punished under this Section. The said provision is framed in such a broader way that even the usage of social media or any digital activity for the purpose of disseminating radical information and ideology falls within its ambit and it is not necessary that the same is to be a physical activity.

28. There is sufficient material against the Appellant that he has posted photographs of terrorists and has incited people to commit terrorist act. It cannot be said that there is no evidence against the Appellant that he was closely associated with slain terrorist Mehran Yaseen Shalla or that he has actively participated in the terrorist activities himself. Material does indicate that the Appellant was disseminating information for inciting local youths to indulge in activities which will lead to commit a terrorist act which is sufficient to bring the Appellant in the ambit of Section 18 of UAPA, thereby satisfying the test of rejection of bail under UAPA.

29. Undoubtedly, the Appellant has been in custody for an approximate period of four years. However, the fact that the punishment for the offence under Section 18 of UAPA is life imprisonment and the fact that there are witnesses whose identities have not been disclosed and would be at risk, if the Appellant is enlarged on bail, cannot be ignored. Moreover, given that the Appellant is in a position of influence, there is a high possibility of him tampering with the evidence and may pose a flight-risk. Therefore, the Appellant also fails to satisfy the tripod test. It is well settled that the statutory restriction under Section 43D(5) of UAPA is more stringent than its counterpart provision under the CrPC/BNSS. Considering the facts of the present case, this Court is not inclined to grant bail to the Appellant at this juncture.

30. However, keeping in mind that right to speedy trial has been held to be concomitant under Article 21 of the Constitution of India, it is always open for the Appellant to approach the Competent Court for the grant of bail if the trial does not commence in the near future or that there is an undue delay in completion of trial.

31. With these observations, the appeal stands dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

HARISH VAIDYANATHANSHANKAR, J

JULY 07, 2025
S. Zakir/SM