IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-226-2021
Reserved on : 22.12.2021
Pronounced on: 14.01.2022

Amarjeet Singh @ Amar Singh

... Appellant

Versus

National Investigation Agency

... Respondent

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MR.JUSTICE VIKAS SURI

Present: Mr. Pratham Sethi, Advocate for the appellant.

Mr. S.S. Sandhu, Advocate for the respondent.

G.S. Sandhawalia, J.

The present appeal filed under Section 21 (4) of the National Investigation Agency Act, 2008 (for short '2008 Act') is directed against the order dated 04.02.2021 passed by the Special Judge, NIA, SAS Nagar, Mohali, whereby the bail application of the appellant was dismissed in FIR No.RC-20/2019/NIA/DLI dated 23.09.2019 {arising out of FIR No.280 dated 05.09.2019 under Section 304 IPC and Sections 4 & 5 of the Explosive Substances Act, 1908 (for short '1908 Act') lodged at Police Station Sadar, Tarn Taran}.

The reason as such for the Special Judge to dismiss the bail application, though the name of the applicant was not found in the FIR, but during the course of investigation, as per the case of the prosecution it has come on record that the appellant Amarjeet Singh @ Amar Singh was associated with the pro-Khalistan terrorist gang to support Khalistan movement. On account of his close association with co-accused persons, he had advocated/abetted/advised/incited the commission of terrorist offences

and was also associated with the co-accused persons in testing bombs. The prosecution had collected incriminating material during the screening of the digital data of his mobile phone and status of Whatsapp account showing the accused's ideology towards Khalistan state. His association with the other arrested persons, thus established his nefarious intention and pro-Khalistan activities and, therefore, in the absence of any ground for believing that accusation of the appellant is *prima facie* false, the bail application was dismissed.

Mr. Pratham Sethi, Advocate for the appellant has taken us thoroughly through the paper-book and the relevant provisions of the concerned Acts, to argue that it was a case of bail and his client was in custody since 15.09.2019. It was his argument that the appellant had been arrested on 15.09.2019 by the Punjab Police alongwith other co-accused on the basis of secret information received. Thereafter, a disclosure statement dated 21.10.2019 (Annexure A-7) was taken from him that he alongwith co-accused Malkit Singh @ Sher Singh (A-5) had tested a Improvised Explosive Device (IED) in the year 2016 in the month of October/November, near the Fatehgarh Churian Canal, when the said Malkit Singh had come to his house and taken him there. The co-accused Malkit Singh who has admittedly expired on 04.10.2021 during the trial had alleged to have gone 50 feet away from the motorcycle and taken out

an IED from his pocket and blasted it and, thereafter, had left while entrusting the bike to the appellant. Apart from that another disclosure statement of the said co-accused Malkit Singh is stated to be there, in the form of extra-judicial confession recorded on 23.12.2019, wherein he had mentioned that he had exploded a bomb as a trial near the village canal and his friend Amarjeet Singh, the present appellant was with him. The bomb had been given by one Bikkar Baba for checking of the explosion.

It has, thus, the contention of the counsel for the appellant that as per the investigation itself he has been named in the said FIR only on account of the fact that he had met with Chandeep Singh @ Gabbar (A-4) and Bikramjit Singh @ Bikkar Panjwar @ Bikkar Baba (A-9) in the year 2015-2016 and the allegation that he had become highly radicalized. Accordingly, it has been contended that the sanction under the Unlawful Activities (Prevention) Act, 1967 (for short '1967 Act') has been granted under Section 13 & 20 of the 1967 Act by the Central Government, though it had also been asked under Section 120-B IPC. It is, accordingly, contended that there is nothing on record to show that the appellant is a member of any terrorist gang or terrorist organization and was involved in any unlawful activity and, therefore, is entitled for concession of bail during the pendency of the trial. It is submitted that he has been in custody almost for 2 years and 4 months and out of the 117 witnesses, only 5 have been examined and, therefore, the provisions

of Section 43-D (5) of the 1967 Act as such would not stand in the way.

Mr. Sandhu, on the other hand has vehemently opposed the bail application on the ground that the master mind as such behind the said incidents was one Bikramjit Singh @ Bikkar Panjwar @ Bikkar Baba (A-9), who is stated to be absconding. The appellant was in touch with him and had participated in the training organized by him to make bombs and tested the bombs in the presence of the deceased Malkit Singh (A-5). It is his case that he was under the fold of the main accused as such who was raising sleeper cells for the causes of separate State of Khalistan, thus, he had raised a terrorist gang. It is submitted that charge has been framed against the appellant under the provisions of Sections 13, 18, 20 and 23 of the 1967 Act, under Section 120-B, 153A of the IPC and Sections 3 & 4 of the 1908 Act on 03.12.2020. He referred to the sketch plan of the site, where the IED had been exploded by Malkit Singh in the presence of the appellant and, thus, submitted that it was not a case for grant of bail, on account of the gravity of the offences, in which the appellant is involved.

A perusal of the paper-book would go on to show that the FIR was lodged on 05.09.2019 on account of the secret information received by Harsa Singh, SI/SHO of Police Station Sadar, Tarn Taran. He was informed that on the night of

04/05.09.2019 at 8:00 PM on the link road leading from Tarn Taran to Patti near Pandori Gola towards Bath side, a powerful blast had occurred in a vacant plot in which lot of reeds grown and trash had been thrown. In the blast two youngster's had died and one was seriously injured namely Gurjant Singh. Thus, FIR under Section 304 IPC read with Section 4 & 5 of the 1908 Act was lodged. On the information being sent to the Central Government, the FIR was lodged by the NIA on 23.09.2019, in view of the orders dated 20.09.2019, on account of gravity of the offence, national and international linkages which were required to be investigated by the NIA.

It is pertinent to notice that the appellant had already been rounded up by the Punjab Police by the same complainant SI Harsa Singh, again on secret information that Harjit Singh, Manpreet Singh, Amritpal Singh, who had links with Gurjant Singh, the injured of the blast, being involved in terrorist activities. Gurjant Singh's friend Bikramjit Singh was stated to be on visiting terms and had gone abroad and the said youths had gone into hiding and it was possible that they were in the vicinity of the canal. They had been spotted between the road on the bank of the canal and were apprehended alongwith Chandeep Singh, Malkit Singh and the present appellant Amarjeet Singh. The disclosure statement of the appellant had taken by the NIA on 21.10.2019 (Annexure A-7)

which reads as under:-

> "I alongwith Malkit Singh @ Sher Singh r/o Village Kotla Gujjar Majitha Amritsar Rural tested an IED in the year 2016 in the month of Oct/Nov. Malkit Singh @ Sher Singh came to my house and told me to accompany him on his motorcycle. Thereafter he took me near the Fatehgarh Churian Canal. Thereafter he parked the motorcycle on the bank of the canal. He asked me to stand near the motorcycle and thereafter Malkit Singh went 50 feet away from the motorcycle and took out an IED from his pocket and blasted it, after that a sound occurred alongwith smoke. Thereafter Malkit Singh had told me that he is going for "sewa" at Golden Temple. Malkit Singh told me to take bike and go home and I did the same.
>
> This disclosure statement was read over to all concerned and explained to the accused Amarjeet Singh in best understood language by him and was admitted to be correctly recorded, by the accused under custody. The Proceedings of this disclosure statement were started at 1300 hrs and concluded at 1430 hrs on 21.10.2019. All present, including the accused in custody, singed the disclosure statement after fully understanding its contents."

Similarly, the statement of Malkit Singh, the earlier co-accused and now deceased, wherein the appellant has been implicated regarding his role as such reads as under:-

> "**<u>Testing of the bomb at lonely place: -</u>**
>
> He further disclosed that Bikkar Baba gave me again a bomb made of steel to check its explosion. I may also mention that we had exploded bomb as a trial near my village canal at that time my friend namely Amarjit Singh, s/o Sh. Lakhwinder Singh r/o Fatehgarh Churian

Road, dist-Amritsar was also with me."

The challan/charge-sheet under Section 173 (2) Cr.P.C was filed on 11.03.2020 (Annexure A-3), on the basis of which the appellant was arrested reads as under, qua the role of the appellant arrayed as A-8:-

> "**17.1.2. Arrest of accused persons for their involvement in the crime and conspiracy:**
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> During the course of investigation incriminating role of A-1 emerged in the instant crime and he was arrested by Punjab Police on 15.09.2019. It was found that a Pro-Khalistan terrorist gang was formed with association of A-2, A-3, A-4, A-5, A-6, A-7, ***A-8***, A-9, D-1, D-2 and other unknown associates. Further A-2, A-4, A-5, A-6, A-7 and ***A-8*** were also arrested on 15.09.2019 by Punjab Police due to their incriminating role in the instant crime. Sections 10, 11, 13 of the UA (P) Act 1967 and sections 153-A, 120-B of IPC were added subsequently on 15.09.2019 in the instant case. During investigation it emerged that aforesaid accused persons came in contact with each other in 2015 during protest organized by them against sacrilege incident of Sri Guru Granth Sahib and formed a terrorist gang due to similar religious thoughts and started meeting at Amritsar and Tarn Taran. Further they planned to carry out violent acts against the members of a particular community and followers of different religious ideology. They procured explosive material and training was given by A-9 to the members of the terrorist gang for making of Bombs/Improvised Explosive Devices. In the middle of July 2019, A-1, A-2, A-3, A-5 and D-1 planned to target Muradpura Dera of Divya Jyoti Jagran Sansthan in

> Tarn Taran District, founded by Ashutosh Maharaj. They decided to attack the Dera by throwing bombs in night hours of 04.09.2019. On 4th Sep 2019 afternoon, A-1 received a call from A-2 telling that they would be ready with the bombs to target the Dera during night hours. Earlier A-2, A-3 and D-1 had made a reconnaissance of the above said Dera and found out that many followers of the Dera used to stay there during the night hours. A-2 asked A-1 to accompany the group for the task. However, A-1 told A-2 that he was far away from his village. Around 8:24 PM, A-1 received a phone call from A-2, asking A-1 to reach Guru Nanak Super Specialist Hospital, Tarn Taran. Around 9:00 PM, A-1 reached near the house of A-2, where he met parents of A-2 and A-1 was informed that A-3 has been seriously injured and taken to hospital by A-2. Later on, he went to the spot and found A-6 and other local boys, who were searching for the bodies of D-1 and D-2."

Thus, from the above, there is nothing incriminating qua the appellant which the investigating agency has been able to collect. Though there are also averments made in the hatching of conspiracy between other 7 accused with the present appellant, and there is recovery of social media accounts to show the appellant's intention towards Khalistan. The said analyzation of the mobile phone of the appellant reads as under:-

> "**Analysis of Mobile phone of Amarjit Singh @ Amar (A-8):**
>
> A-8 was using Instagram (Instagram-7344_behparwah) and Whatsapp application registered with Whatsapp-918070000732 @s.whatsapp.net. User

> saved one mobile number +916284446242 as Guri Khalistani. One WhatsApp account registered with mobile number 9982888542 whose status on WhatsApp as "KhaLiSTANJiNDBaad!!" This establishes nefarious intention and pro-khalistani attitude of A-8."

The investigation shows that he was in touch with one of the accused Chandeep Singh @ Gabbar (A-4) and 7 calls as such have been made *inter se* as per the inter connectivity chart amongst the accused and their associates from the period of the CDR data from 01.01.2019 to 04.09.2019. The appellant is stated to have made 3 calls *inter se* with Malkit Singh (A-5), who has now expired. Apart from this material above, the investigation as such is not come forth as to whether the appellant as such was in touch with other eight accused. Admittedly while taking sanction for prosecution qua the appellant, provisions of Section 3 & 4 of 1908 Act and Sections 13 & 20 of the 1967 Act read with Section 120-B IPC were asked for, vide letter dated 02.03.2020 under Section 45 (1) of the 1967 Act read with Section 196 Cr.P.C. The Government of India, Ministry of Home Affairs vide communication dated 09.03.2020 after making independent review of the evidence gathered in the course of the investigation with a help of a Retired Judge of the High Court and Retired Law Secretary, recommended sanction for prosecution of the appellant under Section 13 & 20 of the 1967 Act and not under Section 120-B IPC. The sanction under the 1908 Act is stated to have been granted by the District Magistrate. Section 2

(k)(l) and (m) of 1967 Act, read as under:-

" Section 2

(k) "terrorist act" has the meaning assigned to it in section 15, and the expressions "terrorism" and "terrorist" shall be construed accordingly;

(l) "terrorist gang" means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

(m) "terrorist organisation" means an organisation listed in the or an organisation operating under the same name as an organisation so listed;

Sections 13 & 20 of the 1967 Act read as under:-

"13. Punishment for unlawful activities-

(1) Whoever—

(a) takes part in or commits, or

(b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

(3) Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the Government of any other country or to any negotiations therefor carried on by any person authorised in this behalf by the Government of India.

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> **20. Punishment for being member of terrorist gang or organisation.--**Any person who is a member of a terrorist gang or a terrorist organisation, 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.

A perusal of the above would go on to show that punishment for being involved in the unlawful activity under Section 13 is for seven years, if there is abetment or incitation of the same. Under the provisions of Section 20, the prosecution would have also to show that the person is a member of the terrorist gang or the terrorist organization as listed in the Schedule of the Act and it is alleged that the main accused Bikramjit Singh @ Bikkar Panjwar @ Bikkar Baba is heading and associated with the terrorist organization as mentioned in the first Schedule of the Act, propagating the creation of the independent Sikh State.

Section 43-D (5) of the 1967 Act reads as under:-

> "(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."

The said provision was subject matter of consideration in **'National Investigation Agency Vs. Zahoor Ahmad Shah Watali', (2019) 5 SCC 1,** in co-relation to the language used by Section 37 of the NDPS Act. It was, accordingly, held that the provisions under the 1967 Act provides a degree of satisfaction lighter than the mandate of not guilty as required under the NDPS Act. Relevant portion of the said judgment reads as under:-

> "23. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is *"prima facie"* true. By its very nature, the expression "prima facie true" would mean that the

> materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the 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. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. 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."

In **'Sudesh Kedia Vs. Union of India', (2021) 4 SCC 704,** bail had been denied under the 1967 Act read with Arms Act, on account of the fact that person named in the FIR was operative of a terrorist gang and was extorting levy from coal traders, transporters and contractors in the State of Jharkhand. The bail application had been dismissed both by the Special Court and the High Court. The Apex Court allowed the bail application on the ground that no case of conspiracy had been made out *prima facie,* since the appellant had only met a member of the organization and on account of the fact that Rs.9,95,000/- received from his house, the amount could not be

stated to be received from terrorist activity. Reference was also made to provisions of Section 43-D (5) of the 1967 Act, to hold that it was the bounden duty of the Court to apply its mind to examine the entire record for the purpose of satisfying itself, whether the *prima facie* case is made out against the accused or not.

We are also of the opinion that this exercise has not been undertaken by the Special Judge in the manner which it was supposed to examine the factum of the disclosure statement made by the appellant and the co-accused and the relevance of the same. It is settled position of the law that confession made before the police is a weak kind of evidence and it is a rampant practice by the police/investigation agency to use third degree methods for extracting confession. As already been noticed above, the appellant was already rounded up by the Punjab Police on 15.09.2019 and there is nothing on record to show that any other co-accused had been arrested earlier who made a disclosure statement or led the police to the appellant by giving any statement.

Reliance can also be placed upon a three Judge Bench judgment of the Apex Court in ***Tofan Singh vs. State of Tamil Nadu, (2021) 4 SCC 1***, which was examining the confessions made to the empowered officers under Section 53 of the NDPS Act. Resultantly, majority view discussed the settled position of law qua Sections 24 to 27 of the Evidence Act, 1872 and the protection

which is granted to the accused qua the confessional statements made while in custody.

Resultantly, the conclusion arrived at was that the confessional statements made would be barred under Section 25 of the Evidence Act and cannot be taken into account in order to convict an accused under the NDPS Act. Reference has already been made above regarding the fact that the Apex Court has time and again held that the requirement under the NDPS Act is more strict than the 1967 Act and in such circumstances, the observations of the Apex Court in *Tofan Singhs' case (supra)* would be of great relevance.

It is not disputed that the appellant is a resident of Village Fatehgarh Churian, District Gurdaspur and he was arrested by Tarn Taran police in the close vicinity of the place where initially blast had taken place 10 days earlier, which *prima facie* would go on to show that no direct connection as such had been made by the police against him. Mainly because there are some Khalistani mentions spotted in his social media account which are of offending nature as reproduced above which show that there are two mobile numbers that have been saved under the title 'Guri Khalistani' and another mobile number wherein the entry reads as 'Khalistan Jindabad' would not as such be conclusive proof that the appellant is a member of a terrorist group.

Reference can also be made to the judgment of the Apex Court passed in **'Thwaha Fasal Vs. Union of India', 2021 (13) Scale 1,** wherein the bail order granted had been set aside by the High Court. The Apex Court noticed that sanction had not been granted under Section 20 of the 1967 Act and, therefore, the Special Court could not take cognizance in view of Section 45 and, therefore, a *prima facie* case could not be stated to be made out against the accused. Resultantly, it was held that the cancellation of bail was not justified. Relevant portion of the said judgment reads as under:-

> "23. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue of prima facie case as required by sub-section (5) of Section 43D is not expected to hold a mini trial. The Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material

forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is.

24. Under sub-section (1) of Section 45 of the 1967 Act, the Court is not empowered to take cognizance of any offence under Chapters IV and VI without previous sanction of the Central Government. Procedure for obtaining sanction has been laid down in sub-section (2) of Section 45, which reads thus:-

> " [(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation within such time as may be prescribed to the Central Government or, as the case may be, the State Government.]"

25. The order of sanction dated 18th April 2020 is a part of the charge sheet which is placed on record of these appeals. Paragraphs 2 and 3 of the order of sanction show that though the offence was registered under Sections 20, 38 and 39 of the 1967 Act, by a letter dated 13th April 2020, NIA did not seek sanction for prosecuting any of the three accused for the offence punishable under Section 20. Sanction was sought to prosecute the accused nos.1 and 2 for the offences punishable under Sections 38 and 39. In addition, a sanction was sought to prosecute the accused no.2 under Section 13. Paragraph 4 of the order refers to the authority appointed by the Central Government under sub-section (2) of Section 45 consisting of a retired Judge

> of a High Court and a retired Law Secretary, as well as the report submitted by the said authority. Paragraph 6 of the said order records prima facie satisfaction of the Central Government that a case is made out against the accused under the provisions of the Act of 1967, as mentioned in letter dated 13th April 2020. Thus, as of today, sanction under sub-section (1) of Section 45 has not been accorded for prosecuting the accused for the offence punishable under Section 20 of the Act of 1967 and, therefore, as of today, the Special Court under NIA Act cannot take cognizance of the offence punishable under Section 20. Therefore, for deciding the issue of prima facie case contemplated by sub-section (5) of Section 43D, the case against the both accused only under Sections 38 and 39 is required to be considered. In view of the absence of sanction and the fact that NIA did not even seek sanction for the offence punishable under Section 20, a prima facie case of the accused being involved in the said offence is not made out at this stage. As stated earlier, sub-section (5) of Section 43D will not apply to Section 13, as Section 13 has been incorporated in Chapter III of the 1967 Act."

The abovesaid observations would as such blunt the arguments raised by Mr. Sandhu that the charge has also been framed under the provisions of Section 120-B IPC and Section 23 of the 1967 Act. The death of Malkit Singh, the co-accused as such is another factor, as a disclosure statement made by him would also wane, since now he cannot be prosecuted and, therefore, his statement as such could only be considered under Section 30 of the Indian Evidence Act, 1872, if he was tried alongwith the appellant. Reliance can be placed upon the judgment of the Apex Court in

'Hardeep Singh Sohal and others Vs. State of Punjab through CBI' (2004) 11 SCC 612, wherein extra-judicial confession of Balwinder Singh was held to be not admissible in evidence as he was not tried with the co-accused and had been killed in a fake encounter. It was held that the extra-judicial confession made by him could have been taken into consideration only if he was tried alongwith the co-accused. Relevant portion of the said judgment reads as under:-

> "6. The extra-judicial confession allegedly made by Balwinder Singh can only be considered under Section 30 of the Indian Evidence Act 1872. The extra-judicial confession cannot be admitted in evidence as Balwinder Singh was not tried along with the appellants. It is interesting to note that though a charge- sheet was filed against Balwinder Singh, in the judgment he is shown as a proclaimed offender. According to the prosecution, Balwinder Singh was arrested on 18.4.1993. PW-45 Gurnam Singh, who was the Station House officer of the police station civil lines, Patiala, along with a Sub-Inspector and three Constables was on patrol duty near N.I.S. chowk, Patiala on 18.4.1993. They came to know that one taxi driver who had committed various crimes had been roaming in the city in a vehicle without registration number. In the meanwhile, one maruti car without registration number came and the same was intercepted and its driver was taken into custody. He was in possession of a point thirty two bore revolver loaded with five live cartridges. He told them that his name was Balwinder Singh. According to the prosecution he escaped from custody and was later declared as a proclaimed offender.

> The counsel for the appellants contended that Balwinder Singh was killed in a fake encounter by the police, for which a criminal case also is filed against some of the police officers. In any case, Balwinder was never tried along with the present appellants. The extra-judicial confession made by Balwinder Singh could have been taken into consideration only when he was tried along with the present appellants."

In **'Union of India Vs. K.A. Najeeb' (2021) 3 SCC 713,** it was similarly held that the statutory restriction under Section 43-D (5) of the 1967 Act in comparison of Section 37 of the NDPS Act is less stringent. Keeping in view the right under Article 21 of the Constitution of India, the prayer for cancellation of bail granted, was not interfered with. Relevant portion of the said judgment reads as under:-

> "17. It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA perse 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 43D (5)

> of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.
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> 18. 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.
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> 19. Yet another reason which persuades us to enlarge the Respondent on bail is that Section 43D(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 precondition under the UAPA. Instead, Section 43D (5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the wellsettled 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."

Keeping in view the cumulative discussion above and the fact that the appellant has been in custody for almost 2 years 4

months and the trial is not likely to be concluded in the near future, this Court is of the considered opinion that on account of the material which has been collected against him in the investigation, it can be safely recorded that the accusation is not *prima facie* true and he is entitled for the benefit of regular bail during the pendency of the trial.

The appellant be produced before the Special Court within a week from today, to enable him to seek bail by furnishing bail bonds/surety bonds. The Special Court shall also put a condition that the appellant shall report in the local police station after every 15 days on 1st and 15th of the month at 10:00 AM before the concerned SHO, to ensure that his whereabouts as such are always ascertainable.

The present appeal stands allowed, accordingly. Needless to say, the observations made herein are not binding upon the merits of the case.

(G.S. SANDHAWALIA)
JUDGE

(VIKAS SURI)
JUDGE

January 14, 2022
Naveen/shivani

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No