

GAHC010140272020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./192/2020

(THE STATE) THE NATIONAL INVESTIGATION AGENCY
MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, REP. BY THE
SUPERINTENDENT OF POLICE, NIA, BRANCH OFFICE, GUWAHATI,
ASSAM.

VERSUS

AKHIL GOGOI
S/O- LATE BOLURAM @ BOLU GOGOI, R/O- LUKRAKHANGAON
SEINGHAT, P.S. TEOK, DIST.- JORHAT, ASSAM.

Advocate for the Petitioner : SC, NIA

Advocate for the Respondent : MS. P BORAH

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MIR ALFAZ ALI

JUDGMENT AND ORDER (CAV)

Date : 09-04-2021

(Suman Shyam, J)

Heard Mr. D. Saikia, learned senior counsel assisted by Mr. N. Satyanarayan, Addl. P.P., NIA, appearing for the appellant. We have also heard Mr. K. N. Choudhury, learned senior counsel assisted by Mr. S. Borthakur, learned counsel representing the sole respondent.

2. This appeal, filed by the National Investigation Agency (NIA) under Section 21 (4) of the National Investigation Agency Act, 2008, is directed against the judgment and order dated 01.10.2020 passed by the Judge, Special Court, NIA, Assam, Guwahati, in Misc. Case(NIA) No.22/2020 arising out of Special NIA Case No.03/2020, allowing the respondent to go on bail after submission of charge-sheet by the Investigating Agency.

3. The facts of the case, in a nutshell, are as under :-

On 10.12.2019, Sri Tulumoni Duwarah, Sub-Inspector of Police, Chabua Police Station, in the district of Dibrugarh, had lodged an ejahar *inter-alia* stating that on 09.12.2019, while he was on law and order duty in Chabua Town, a 6000 persons strong crowd, led by the respondent, had caused economic blockade and had pelted stones, one of which had hit him on his face causing grievous injury. In the FIR, it has also been alleged that the mob led by the respondent had tried to murder police personnel on duty. Based on the ejahar dated 10.12.2019, Chabua P.S. Case No.289/2019 was registered under Sections 120(B)/147/148/149/336/ 307/383/326 of the I.P.C. and the matter was taken up for investigation. Subsequently, Sections 15(1) (a)/16 of the Unlawful Assemblies (Prevention) Act, 1967 [herein after referred to as "the Act of 1967"] was added.

4. While the matter was under investigation by the State Police, by the order dated 14.12.2019 passed by the Ministry of Home Affairs, Government of India, investigation in the aforesaid police case was entrusted to the appellant (NIA) whereafter, the case was re-registered as RC-01/2020/NIA-GUW. Upon completion of

investigation, charge-sheet was laid on 26.06.2020 against the four accused persons including the respondent herein, viz., Sri Akhil Gogoi as accused No.1 (A-1), Sri Jogjit Mohan as accused No.2 (A-2), Sri Bhaskar Phukan as accused No.3 (A-3) and Sri Bhupen Gogoi as accused No.4 (A-4). The respondent (A-1) was already in police custody in connection with another case bearing No.RC-03/19/NIA-GUW and therefore, he was shown arrested in connection with the present case on 01.04.2020.

5. The respondent (A-1) had filed Misc. Case No.NIA/22/2020 seeking his release on bail. By the impugned judgement and order dated 01.10.2020, the learned Judge, Special Court, NIA had allowed the respondent to go on bail on furnishing a bond of Rs.30,000/- with one surety of like amount to the satisfaction of the Court. The order dated 01.10.2020 is under challenge in this appeal.

6. It appears that the Accused No.2 Jogjit Mohon was granted bail in connection with Chabua P.S. Case No 289/2019 during the stage of investigation conducted by the police. However, the bail application jointly filed by the accused Nos.3 and 4 (A-3 and A-4) was rejected by the learned Special Court, NIA by the judgment and order dated 08.07.2020 passed in Misc. Case No.10/2020. The judgment and order dated 08.07.2020 was assailed by the A-3 and A-4 by filing Criminal Appeal No.171/2020 before this Court. However, the said appeal was dismissed by a Division Bench of this Court by the judgment and order dated 05.02.2021, thereby upholding the order of the learned Court below.

7. By inviting the attention of this Court to the materials available on record, Mr. Saikia, learned senior counsel, appearing for the appellant submits that the

respondent (A-1) had led the entire movement which had turned into a violent protest, whereby, a Railway Station and a police vehicle was burnt down besides spreading sporadic incidents of violence and stone pelting upon the police personnel. It has also been submitted that at the instance of the respondent, a conspiracy was hatched by the accused persons to attack a particular community of that locality so as to disturb the unity and integrity of the country. The accused Nos.3 and 4 (A-3 and A-4) had carried out the instructions of the respondent (A-1) to such effect.

8. Mr. Saikia has further submitted that the learned court below had recorded categorical finding, based on the materials placed before it, that the respondent was responsible for making provocative speeches whereafter, the crowd had turned violent and pelted stones leading to the injury of the Officer-in-Charge of Chabua Police Station and had also vandalised public property. Notwithstanding the same, the respondent was allowed to go on bail while rejecting the bail prayers made by the two similarly situated co-accused (A-3 and A-4) on the same set of facts.

9. By placing reliance on the judgment and order dated 05.02.2021 passed in Criminal Appeal No.171/2020 Mr. Saikia has further argued that the materials available against the A-1 i.e. the respondent herein was found to be equally incriminating as in the case of A-3 and A-4. By taking note of such incriminating materials available on record another Division Bench of this court has found that such materials *prima facie* disclosed culpability of the appellants. The aforesaid observation, having been based on the same set of facts and materials available on

record, the observations made in the order dated 05.02.2021 would be applicable in the present case as well. According to Mr. Saikia, the learned trial court had erroneously ignored the incriminating materials available on record demonstrating the strong likelihood of conviction of the respondent (A-1) and had employed a completely different standard while considering the bail application moved by the respondent. As such, submits Mr. Saikia, the impugned judgement and order is hit by perversity and therefore, the same is liable to be set aside by this Court on such count alone.

10. By referring to the decision of this Court in the case of **Jayanta Kumar Ghosh and Ors. Vs. State of Assam** reported in **2010(4) GLT 1**, Mr. Saikia has argued that since all the accused persons in this case were a part of a larger conspiracy to incite violence and destroy public property besides disrupting essential supplies and also to threaten the unity, integrity and security of this country, such activities would come within the fold of section 15(1)(a)(i)(ii) & (iii) of the Act of 1967. Therefore, in view of the restriction created by section 43D(5) of the Act of 1967, the learned court below had committed an error in the eye of law in directing the release of the respondent on bail.

11. Mr. K. N. Choudhury, learned senior counsel appearing on behalf of the respondent, on the other hand, has argued that the materials annexed to the charge-sheet does not disclose any ingredient to *prima facie* presume that the respondent was guilty of any offence committed under section 15(1) of the Act of 1967. Therefore, the learned Special Judge has rightly exercised his discretionary

jurisdiction and granted bail to the respondent.

12. By referring to the various observations made by the learned trial court in the impugned judgment and order dated 01.10.2020, Mr. Choudhury has argued that such findings and observations have been arrived at after a proper consideration of the materials available on record and the conclusion recorded by the learned court below is also consistent with the law governing the subject. As such, the impugned judgement does not call for any interference by this Court.

13. Mr. Choudhury has also argued that the Citizenship Amendment Bill(CAB) [now 'CAA'] is a very sensitive issue for the people of Assam and therefore, the decision of the Government to introduce such an enactment had triggered wide-spread protest within the State of Assam. He submits that such protests were resorted to by several organization in the State and one such organization was led by the respondent. The learned senior counsel has argued that the issue is sensitive and the agitation was spontaneous. There was anger amongst the protesters which had turned violent leading to arson and stone pelting. However, according to Mr. Choudhury, there is nothing on record to show that the respondent had ever asked the mob to resort to violence or to attack any community, as has been made out in the charge-sheet. The learned senior counsel has argued that only one stone, which had hit the police official, was seized by the Investigating Agency. Having regard to the words such as bombs, dynamites or other explosive substances or firearms or inflammable substances or lethal weapons or poisonous or noxious gases or other chemicals, used in Section 15(1)(a), a 'stone' cannot be treated as one of the

weapons so as to bring the alleged act within the fold of section 15(1)(a) of the Act of 1967. Contending that while interpreting the expressions "or by any other means of whatever nature" used in Section 15(1)(a) the rule of *ejusdem generis* would have to be applied, in which event, a "stone" cannot be treated at par with other lethal means described in that section. In support of his arguments, Mr. Choudhury has placed heavy reliance on the observations made by the Supreme Court in the case of **Kabalappaara Kottarathil Kochuni @ Moopil Nayar vs. The State of Madras and Kerala** reported in **AIR 1960 SC 1080**.

14. By referring to another decision of the Supreme Court rendered in the case of **State through Superintendent of Police, CBI/SIT Vs. Nalini and others** reported in **(1999) 5 SCC 253** Mr. Choudhury has argued that having regard to the consequences that would ensue in case of conviction for an offence committed under Section 15(1) of the Act of 1967, the Court would employ strict interpretation of the statute. Therefore, submits Mr. Choudhury, unless the act alleged strictly comes within the definition of Section 15(1) of the Act of 1967, no presumption of guilt can be drawn against the accused based on materials placed with the charge-sheet.

15. We have considered the submissions advanced by the learned counsel for both the parties and have also gone through the materials available on record.

16. From a perusal of the charge-sheet submitted by the Appellant (NIA), it is evident that the basic allegation brought against the respondent (A-1), is to the effect that the respondent being the leader of an organization, had delivered provocative speeches instigating the public to resort to violence, which had led to

pelting of stones, burning down of Railway Station and Police vehicles and attack on duty Police personnel. It has also been alleged that the respondent had conspired to target the Bengali community residing in the locality so as to disturb the peace, integrity and harmony in the society. The appellant has assailed the impugned order of the learned trial court by relying upon section 43D of the Act of 1967 to contend that the materials available on record was sufficient to draw *prima facie* satisfaction as regards the guilt of the respondent and to such extent, the impugned order, granting him bail, was un-sustainable in the eye of law. As per the charge-sheet submitted in this case, the respondent was guilty of offence committed, inter-alia, under section 15(1)(a) of the Act of 1967 which is punishable under section 16 of the Act. In view of the above stand of the appellant, we deem it appropriate, at the very outset, to briefly refer to the relevant provisions of the Act of 1967 .

17. By the Constitution (Sixteenth Amendment) Act, 1963, the Parliament was empowered to enact laws, so as to impose reasonable restrictions, in the interests of sovereignty and integrity of India, on (i) freedom of speech and expression; (ii) right to assemble peacefully and without arms; and (iii) right to form association or unions. Accordingly, the Unlawful Activities (Prevention) Act, 1967 was enacted with the object to provide for effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith. From the object clause of the Act of 1967, it is apparent that the primary objective of the statute is to make powers available for dealing with activities directed against the integrity and sovereignty of India. Therefore, the Act of 1967 is a special statute to deal with certain specified types of offences including terrorist acts.

18. Terrorist act has been defined in section 2(k) of the Act of 1967 which is quoted herein below for ready reference :-

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

19. The expression “unlawful activity” has been defined in section 2(1)(o) of the Act, which is reproduced herein below :-

“(o) “unlawful activity”, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),--

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India.”

20. Section 15 of the Act of 1967 deals with offence committed as “terrorist acts”, which reads as follows:-

“15. Terrorist act.-- (1) *Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, [economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,--*

(a) by using bombs, dynamite or other explosive substances or

inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause--

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

[(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or ⁵[an international or inter-governmental organization or any other person to do or abstain from doing any act; or]

commits a terrorist act.

[Explanation.--For the purpose of this sub-section,

(a) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;

(b) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorized or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.]

[(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.]”

21. Section 16 of the Act of 1967 prescribes punishment for "terrorist act" which is as follows :-

“16. Punishment for terrorist act--(1) *Whoever commits a terrorist act shall,--*

(a) if such act has resulted in the death of any person, be punishable with death or imprisonment for life, and shall also be liable to fine;

(b) in any other case, 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.”

22. The appellant's counsel has argued that the respondent has committed an offence under section 15(1)(a)(i)(ii) & (iii). From the scheme of section 15, it is apparent that in order to invoke said provision, the act complained of must be a "terrorist act" done by adopting any of the means provided in clause (a) of section 15(1) with the intent to cause –

- (i) death of, or injuries to any person or persons, or
- (ii) loss of or damage to or destruction of any property, or
- (iii) disruption of any supplies or services essential to the life of the community in India or any foreign country.

23. Section 2(m) defines "terrorist organization" which reads as follows :-

"(m) "terrorist organization" means an organization listed in the [First Schedule] or an organization operating under the same name as an organization so listed:"

24. From a plain reading of the relevant provisions of the statute it is evident that sub-sections (1)(a) of section 15 of the Act of 1967 would be attracted only if the alleged act is in the nature of "terrorist act" committed with the intention to threaten or likely to threaten the unity, integrity, security[economic] and sovereignty of India or with intent to strike terror or likely to strike terror in people or any section of the people by resorting to any one or more means included in the sub-clauses of clause (a) of section 15(1) such as use of bombs, explosive substances and other lethal weapons mentioned therein . However, in case of unlawful activity in relation to any individual or association , any action taken by such individual or association including spoken words would also come within the purview of section 2(1)(o).

25. Taking note of the commonality of offence of a terrorist act under section 15 and section 2(1)(o) of the Act of 1967, the apex court has observed in the case of **Zameer Ahmed Laitfur Rehman Sheikh vs State of Maharashtra** reported in **(2010) 5 SCC 246** that the essential element in both is the challenge or threat or likely threat to

the sovereignty, security, integrity and unity of India. While section 15 requires some physical act such as use of bombs and other weapons etc, section 2(1)(o) takes in its compass even written or spoken words or any other visible representation intended or which supports a challenge to the unity sovereignty, integrity and security of India.

26. In the case of **Hitendra Vishnu Thakur And Others Vs State of Maharashtra And Others** reported in **(1994) 4 SCC 602**, the Hon'ble Supreme Court had the occasion to deal with the issue of applicability of section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (herein after, in short, TADA) which contained a similar provision. While interpreting section 3(1) of TADA, the Apex Court has observed that even though the crime committed by a 'terrorist' and a ordinary criminal would be over-lapping to an extent but it was not the intention of the Legislature that every criminal should be tried under TADA. Every 'terrorist' may be a criminal but every criminal cannot be given the label of a terrorist only to set in motion the more stringent provisions of TADA. The criminal activity, in order to invoke TADA, must be committed with the requisite intention as contemplated by section 3(1) of the Act.

27. In the case of **State Vs. Nalini** (*supra*) relied upon by Mr. Choudhury, the Hon'ble Supreme Court has expressed similar views in paragraphs 43, 44 and 45 which are reproduced herein below for ready reference :-

*“43. “Terrorist act” is defined in **Section 2(1)(h) of TADA** by giving “the meaning assigned to it in **sub-section (1) of Section 3**” and the expression “terrorist” is mandated to be construed accordingly. It is therefore necessary to look at Section 3(1) more closely. We may extract the first three sub-sections of Section 3:*

“3. (1) Whoever with intent to overawe the Government as by law established or to strike terror in people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall,—

(i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(ii) in any other case, 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.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to 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.”

44. A reading of the first sub-section shows that the person who does any act by using any of the substances enumerated in the sub-section in any such

manner as are specified in the sub-section, cannot be said to commit a terrorist act unless the act is done "with intent" to do any of the four things:

(1) to overawe the Government as by law established; or

(2) to strike terror in people or any section of the people; or

(3) to alienate any section of the people; or

(4) to adversely affect the harmony amongst different sections of the people.

45. When the law requires that the act should have been done "with intent" to cause any of the above four effects such requirement would be satisfied only if the dominant intention of the doer is to cause the aforesaid effect. It is not enough that the act resulted in any of the four consequences."

28. Upon analyzing the ratio laid down in the aforesaid decision of the apex court, it becomes evident that an unlawful activity under section 2(1)(o) of the Act of 1967 could even be spoken words including a provocative speeches but in order to constitute an offence under the Act of 1967 the same must be done with the intention to cause death of , or injuries to any person or persons, or to cause loss of or damage to or destruction of any property aimed at disturbing the unity, integrity, security and sovereignty of the country. The dominant intention of the wrong doer must be to commit a 'terrorist act' coming within the ambit of section 15(1) of the Act. In other words, unless the act complained of strictly comes within the letter and spirit of section 2(1)(o) read with section 15(1) of the Act, the provisions of the Act of 1967 would not be applicable. What ,therefore, follows is that unlawful act of any other nature, including acts arson and violence aimed at creating civil disturbance and

law and order problems, which may be punishable under the ordinary law , would not come within the purview of section 15(1) of the Act of 1976 unless it is committed with the requisite intention.

29. Section 437 (1) of the Cr.P.C confers power upon a Court, other than High Court or Court of Sessions, to release on bail, any person either accused or suspected of commissioning a non-bailable offence, arrested or detained without warrant by any Officer-in-Charge of a Police Station. However, as per sub-section (3) of section 437, the Court is required to impose certain conditions mentioned there-in if the offence is punishable with imprisonment of seven years or more or is an offence under Chapters VI, XVI or XVII of the Indian Penal Code or abetment of or conspiracy or attempt to commit any such offence.

30. Section 439(1) of the Cr.P.C confers jurisdiction upon the High Court and the Court of Sessions to direct any person accused of any offence and in custody, to be released on bail and if the offence is of the nature specified in sub-section(3) of section 437, by imposing any condition which it considers necessary for the purpose mentioned in that sub-section. Power of the Court under section 439 Cr.P.C is discretionary and of wide amplitude.

31. Section 43D(5) of the Act of 1967, however, imposes fetters on the discretionary power of the Court to release an accused on bail if the court is of the opinion that the accusation is *prima facie* true. Therefore, the burden upon the accused to show that the materials produced along with the charge-sheet, even if taken on their face value, would not establish the guilt of the accused, is much

heavier than in case of an accused charged with any offence under the IPC. However, the materials produced by the investigating agency must be of such nature so as to enable the court to believe that the accused is guilty.

32. In the case of **NIA Vs Zaroor Ahmed Shah** reported in **(2019) 5 SCC 1**, the Supreme Court has expounded the legal position with reference to section 43D(5) and observed that the charge-sheet need not contain detailed analysis of the evidence. It was for the Court considering the application for bail to assess the materials produced by the Investigating Agency along with report under section 173 Cr.P.C, in its entirety to form its opinion as to whether, there are reasonable grounds for believing that the accusation brought against the named accused *prima facie* true or otherwise. In the said decision, it has further been held that at the stage of considering the prayer for bail, it is not necessary to weigh the materials placed before the Court on broad probabilities and form an opinion as to whether the accusation is *prima facie* true. The court is not required to examine the merits, demerits and credibility of the evidence but is to examine generally the totality of the materials on record including the FIR, case diary, charge-sheet and report under section 173 of the Cr.P.C. so as to ascertain as to whether the accusation is *prima facie* true or not.

33. In the light of the law as expounded above, we now propose to examine the legality and validity of the impugned order 01.10.2020 passed by the learned Judge, Special Court, NIA. In the present appeal we are to consider only the correctness of the approach of the Learned Special Court, NIA in passing the impugned judgement

and order and not to consider any prayer for cancellation of bail.

34. As noticed above, the impugned order has been passed after submission of charge-sheet by the NIA. We are informed that no formal charge has yet been framed against the respondent/ accused. The materials submitted along with the charge-sheet are basically statements of the witnesses recorded under section 161 of the Cr.P.C. which obviously do not have any evidential value. That apart, the Investigating Agency has also produced certain documents and other material in support of the charge-sheet. Since the observations and conclusions of the learned Court below is based on the charge-sheet and the materials appended thereto, we deem it appropriate to extract the relevant portion of the Charge-sheet pertaining to Accused No.1 i.e. the respondent herein. As per paragraph 16.14. A) of the Charge-sheet, the Investigation revealed the following role of the respondent (A-1) :-

“16.14.A) Investigation with respect to the Role of Akhil Gogoi (A-1):

- i) *A-1 delivered provocative speeches at the spot in Chabua which has caused disruption of public peace and damage/destruction of public and private properties and disruption of services essential for life of community in India, and created fear in a section of people in India, which is a terrorist act as per section 15(1)(a)(ii)(iii), (b).*
- ii) *A-1 led a mob in violation of section 144 of Cr.P.C. imposed at Chabua on 09.12.2019. A-1 led the mob to cause damage to public/private properties with intent to strike fear in a section of people in India.*
- iii) *A-1 led the mob armed with deadly weapons and attempted*

to cause death of public functionary by show of criminal force and thus, caused grievous injury to the Government servant on duty.

- iv) *The mob led by A-1 was planning to set fire on the house of Bengali dominated area 'Ámrawti Colony'. This establishes the fact that A-1 led a mob with intent to strike terror in a section of people of India. The statement of witness reveals that the terrorist act of A-1 in pursuance of the conspiracy has led to fear in a section of people in the area.*
- v) *The oral evidence, documents, material objects and technical evidence collected during the course of investigation, are establishing the prima-facie case against the accused for prosecution of the offences."*

35. The learned Court below had analyzed the statements of the witnesses and made the following observations :- -

"30) Upon perusing the statements of the witnesses, recorded during the investigation, I find as follows with regard to A-1:

- i. *P.W. A in his statement before NIA stated that on 09.12.2019, A-1 called him and asked him to do something fiery. That, at around 6:00 P.M. on the same day he along with A-1 reached Chabua where there was a large gathering in a noisy atmosphere. That, A-1 addressing the meeting, provoked the people and asked them to oppose the government using any means. That, due to the provocation of A-1 some people from the crowd started pelting stones on the security officials and one stone hit the mouth of Chabua O/C Sri Tulumoni Duarah grievously wounding him with profuse bleeding. That, even then the crowd did not stop and overturned and damaged a Bolero vehicle on*

government duty. That, even after the crowd turn violence A-1 did not denounce the same or did anything to stop them.

- ii. Witness no. 2 Sri Tulumoni Duarah in his statement before NIA stated that at the relevant time he was working as O/C Chabua P.S and that on 09.12.2019 he was performing law and order duty at Chabua Town along with his staff and Addl. Superintendent of Police. That, there was a gathering of 6000 people headed and addressed by A-1 and that they had blocked the railway track as part of economic blockade and that the crowd had also damaged the gypsy vehicle belonging to security personnel. That, during the meeting he got information from one Devarikhi Chetia that protesters were planning to burn down houses of Bengali dominated Amravati Colony whereupon he immediately informed Circle Inspector and request him to deploy security forces in the area. It is further stated by this witness that he along with security staff tried to remove the blockade unsuccessfully as they were provoked by A-1 and that A-1 the leader of the crowd and his associates criminally conspired against police and government officials and threw stones, one of which hit the mouth of the witness Sri Duarah causing grievous injuries by way of broken teeth and injury of lips. That, another stone hit his head but he was wearing helmet. That, he was immediately removed to Aditya Nursing Home in Dibrugarh where he was given treatment involving stitches and removal of affected teeth. It is further stated that at the time of the incident the associates of A-1 also damaged the Bolero vehicle on CRPF duty and that A-1 and his associates obstructed police and government officials from performing their duties as well. It is further stated that at the time of the incident when the witness got injured and was being shifted away from the site, A-1 was still addressing the gathering of people.

- iii. Witness no. 3 Sri Khagen Laskar, S.I. of Police of Chabua P.S. also stated that on 09.12.2019 a protest meeting held near Chabua Railway

Station and addressed by A-1 turned violent and pelted stones as a result of which O/C Chabua P.S. sustained grievous injuries leading to lodging of FIR and registration of Chabua P.S. Case No. 289/19, which was endorsed to this witness for investigation, during which he seized one stone, duty register and pan drive.

- iv. Witness no. 4 Sri Kulapradip Bhattacharjee in his statement stated that while working as Dy. Superintendent of Police at Namrup, he took over the investigation of Chabua P.S. Case No. 289/19 from the earlier I/O Sri Khagen Laskar.
- v. Witness no. 5 Siranjib Chetia, witness no. 6 Sourav Jyoti Baruah and witness no. 7 Pallab Baruah are constables working in the Chabua police station and they have stated on similar lines that on 09.12.2019, there was a large protest meeting in Chabua during which people tried to block the roads and rail and the police party from Chabua police station were trying to clear the blockage and in the presence of Akhil Gogoi, the crowd started pelting stones on the police party also, leading to injuries on the OC. These witnesses have also stated that they do not know the attacking persons but will be able to recognise them, if they see them. Witness no. 5 has also stated that the crowd led by A-1 started pelting stones but the version of witness no. 6 and 7 is slightly different. Witness no. 8 Nabajyoti Chetia, a driver in the Chabua police station has also stated on similar lines and that while they were trying to clear the blockage, some people in the crowd under the leadership of Akhil Gogoi started pelting stones on the police party. This witness has also stated that though he does not know the attacking persons but will be able to recognise them, if he sees them.
- vi. Witness No.9, Rafiq Shah; witness no.10, Birendra Sarmah and witness no.11, Biju Choudhury are associated with the V.D.P. under Chabua P.S. and all 3 (three) of them have stated that on 09.12.2019,

there was protest meeting in Chabua area, whereby, the protestors were trying to block the highway and the police party of Chabua P.S. were trying to obstruct the same, whereupon, some of the protestors started pelting stones on the police party. All these three witnesses have, however, stated that they do not know the said protestors.

- vii. Witness no.12, Subhas Kachari, witness no.13, Lakhinath Basumatary and witness no.14, Dipen Gogoi are associated with the office of Circle Inspector of Chabua and they have also stated about the protest meeting and attempts at blockade. They have mentioned about the aggressive speech given by Akhil Gogoi against the Government and subsequent pelting of stones by some of the protesters, due to which, the O/C of Chabua P.S. sustained injuries. Witness no.14 has stated that due to the crowd and darkness, he could not recognize the attacking persons.
- viii. Witness no.15, Nabin Gogoi is the driver of the Circle Office of Chabua Revenue Circle and witness no.16, Sri Anuj Bharati is a driver of Chabua P.S. and both the two witnesses have stated about the aggressive speech of Akhil Gogoi and the stone pelting by protestors leading to injuries on the O/C of Chabua P.S. Witness no.16 has stated that he could not recognize the persons attacking the police at that time.
- ix. Witness no. 17 Sri Dhruba Bora, Addl SP, in his statement recorded during investigation stated that on 09.12.19 he along with O/C Chabua P.S. and staff were going on law and order duty at Chabua where a protest programme of railway blockade was being carried out under the leadership of A-1, who in his speech instigated the people, leading to pelting of stones, one of which hit the face of O/C Chabua P.S. leading to grievous injuries by way of broken teeth and cut lips. That, after the instigational speech of A-1 miscreants also vandalized vehicle and public

properties. That, A-1 as leader of KMSS was responsible for the miscreants activities that took place in Chabua during the bandh called given by them. That, it was revealed that it was a plan of miscreants as well as Maoist / terrorist design activity in the name of protest against CAA in Chabua.

- x. Witness no. 18 Sri Biswajit Phukan a local correspondent of Pratidin Time stated in his statement that he was in Chabua and on 9th December, 2019 during bandh call given by KMSS and other organizations there was a huge gathering at Chabua Town in the evening comprising about 6000 people. That, A-1 and his associates arrived at the meeting at 6:00 P.M. where after A-1 asked the people to sit on the railway track to block the trains. That, A-1 gave a provoking lecture as chief guest whereupon the people got furious and started pelting stones on the security people and subsequently he saw O/C Chabua P.S. Sri Tulumoni Duarah with sustaining injuries on his face and bleeding. That, Sri Duwara told the witness that he was hit because of pelting of stones by the supporters of A-1, whereupon witness took video footage of the injured O/C and the meeting environment. That, one Bolero vehicle was also damaged there due to the instigational speech of A1; that organizer had made the public gathered there and that after the vandalism, A-1 and others remained there for an hour; that the witness did not see A-1 requesting the crowd not to vandalize; that as leader of KMSS A-1 is fully responsible for the miscreants activities that took place in Chabua during the bandh call given by KMSS and that it was also revealed that it was a planned miscreants as well as Maoist/ terrorist design activities in the name of protest against CAA in Chabua.

- xi. Witness no. 19 Dr. C.R. Joshi- Dental Surgeon of Dibrugarh who had treated Sri T. Duarah for the injuries in the incident has stated in his statement about the treatment given by him involving dental surgery procedure under anaesthesia.

- xii. Witness no. 20 Ms Manashi Bora of the cyber cell of Dibrugarh police in her statement stated that on 29.05.2020 under requisition of NIA team she extracted 8 nos. of video footages of violent activities by KMSS/SMSS and their associates from 9th December, 2019 onwards under Chabua P.S. The said witness has also stated about another video of such violent activities extracted from the cyber cell computer system of S.P. Dibrugarh and from two pen drives produced by Inspector NIA.
- xiii. Witness no. 21 Sri Ridip Sonowal is the seizure witness pertaining to aforesaid extraction. Witness no. 22 Sri Nilu Kumar Kohar is also a similar seizure witness pertaining to the 8 videos mentioned by witness Manashi Bora.
- xiv. Witness no. 23 Sri Bikey Kondapan in his statement before NIA has stated that he was the driver of Mahendra Bolero vehicle No. AS06 V2392 given by his owner on hire to CRPF and that on 09.12.2019 he was around Chabua area; that, on that day at around 6:45 P.M. he was on the high way going towards Tinsukia and then he saw one gypsy vehicle being attacked by protectors whereupon he tried to move out but crowd came out from both sides of the road and blocked his vehicle and started pelting stones and attacking him as well, whereupon he somehow came out of the vehicle and hid himself; that after sometime he came out and saw that the vehicle had been damaged by protesters; that, on calling O/C Chabua P.S. he came to know that O/C himself had suffered from serious face injury caused by violent protesters; that due to darkness and huge crowd he could not identify any of the protesters clearly.
- xv. Witness no. 24 Sri Trilochan Behera - an Assistant Commandant of CRPF in his statement before NIA stated that on 09.12.19 he was on security duty in Chabua where a protest were going on and that around 6:00 P.M. A-1 and his associates came to Chabua near the railway

station and started addressing the crowd during which he delivered a provocative speech and told the people to oppose CAA using any means; that, on his provocation some people from the crowd started pelting stones, one of which hit the mouth of O/C Chabua P.S. leading to injuries; that even then the crowd did not stop and damaged his vehicle. Witness no. 25 Sri D.K. Medhi of Government Railway Police stated about the rail block programme conducted near Chabua railway station on 09.12.2019. He also stated about some complaints lodged by railway officers regarding damage of railway properties. Similarly witness no. 26 Sri T. Shanti Kr. Singha of RPF also stated about such rail block protest on 09.12.2019. Witness no. 28 Sri Parimal Mali – railway officer in his statement before NIA stated that during the CAB protest from 09.12.2019 to 12.12.2019 different violent activities were reported in Chabua and other railway stations committed by violent protesters, causing loss and damage of railway properties; that, after the situation improved a little, he along with his senior officers visited the affected stations including Chabua and prepared loss assessment report.

xvi. Witness no. 29 Sri Satish Baruah has also stated about witnessing such protest on 09.12.2019 near Chabua railway station being a railway officer on duty at that time and that also saw leaders of different organization deliver speeches, but could not personally identify any of them; that on 13.12.2019 when he saw the station he found that it was partially burnt down and there was also other destruction of railway properties there.

xvii. Witness no. 32 is Constable Sri S. Dangaria who in his statement before NIA stated about being a seizure witness to the seizures made by NIA team on 28.05.2020 from Chabua P.S., which included documents, one piece of stone, medical report of T. Duarah etc. Witness no. 33 is Constable Sri Reshob Das who also stated about being witness to such seizure.

- xviii. Witness no. 34 Sri Kaushik Haldar also stated about protest at near Chabua Railway Station on 09.12.2019 and that, on 11.11.2019 when he went there, he found station to be partially burnt and also saw other losses of railway properties. Witness no. 35 Sri B.P. Rao - a railway employee has stated about being witness to seizure of some materials such as mobile phone, photographs etc. by NIA team from Chabua Railway Station on 21.06.2020. Witness no. 36 - Sri Tanu Gogoi another railway employee also stated about such seizure on 21.06.2020.
- xix. Witness no. 37 - Sri Matin Choudhury @ Matin Ali in his statement has stated that he personally knows A-1 and his mobile no. 9435054524 and had talked with A-1 many times on this number. Witness no. 38 - member of KMSS has stated about personally knowing A-1 and having talked with him many times on his mobile nos. 9435054524 and 6001416124. Witness no. 39 Sri Dipjyoti Handique and witness no. 40 Sri Abhijit Gohain has stated about talking with accused Bhupen Gogoi, Jagjit Gohain and Bhaskarjit Phukan on their mobile nos. 7099492813, 84863719449 and 9101117593 respectively.
- xx. Witness no. 30 Sri Devarikhi Chetia in his statement before NIA stated that he is the P.W.D. contractor and office bearer of Motok Juba Chatra Sammelon and that under umbrella of several organizations, his organization had also taken part in the anti CAA movement in Assam in 2019. That, on 9.12.2019 people started gathering for protest near Chabua Railway Station and around 5:40 to 6:00 P.M. leaders of different organizations started delivering speeches; that, KMSS leader Sri Akhil Gogoi (A-1) also delivered an aggressive and provocative speech. That, during this time one administrative officer informed him about some protesters were trying to create violence by disruptive law and order situation and that at 6:45 P.M. he heard about damage of one CRPF vehicle. That, at that time Sri Tulumoni Duarah, O/C of Chabua P.S. along with his staff were doing duty near him and subsequently O/C Chabua

along with his staff went forward and these witnesses also followed him; that, when they reached the place where CRPF vehicle was damaged O/C Duarah was attacked by protesters causing serious injury on his face due to stone pelting. That, A-1 along with A-2, A-3 and A-4 were leading the mobs. That, though other leaders were also there, he saw presence of A-1 and other KMSS leaders from beginning of the programme. This witness further stated that during this time, he also got information that some protesters were planning to set fire on the houses of Amaravati colony - Bengali dominated area, whereupon he immediately informed the O/C who in turn deployed security there.

xxi. Witness no. 31 Sri Dhruba Gohain in his statement before NIA stated that he is a businessman and also associated with CPI (M) and under an umbrella organizations, also took part in anti CAA protest; that, on 09.12.2019 people gathered for protest near Chabua Railway Station and around 5:30 to 6:00 P.M., A-1 delivered an aggressive and provocative speech. That, during the programme he also heard about damaging of one CRPF vehicle and that O/C Chabua P.S. was attacked by some miscreants causing serious injury. However, the witness stated that he has not seen this incident personally."

36. From a perusal of the impugned order dated 01.10.2020 it also transpires that the learned Special Court, NIA had taken note of the relevant documents filed along with the charge-sheet which are *inter-alia* as follows :-

- i) D-2 i.e. original ejahar dated 10.12.2019 lodged by the O/C of Chabua Police Station.
- ii) D-6/1 i.e. F.I.R. dated 09.04.2020 prepared by NIA pursuant to order dated 04.04.2020.
- iii) D-12 i.e. the seizure list dated 11.12.2019 pertaining to seizure of one stone from the place of occurrence in the presence of witnesses.

- iv) D-15 i.e. transcripts of intercepted telephonic conversation of A-1 with various other persons during the relevant period of time wherein the A-1 tells other persons about his plan to go to Chabua on 9th at night as public programme etc.
- v) D-29 i.e. the scrutiny report of videos seized vide seizure memo dated 29.05.2020.
- vi) D-33 i.e. seizure memo dated 11.06.2020 pertaining to Mahendra Bolero vehicle No.AS-06 V2392 found in capsized condition.
- vii) D-40/5 i.e. assessment of loss of Railway property during the CAB protest.
- viii) D-48 i.e. photographs including those connected with A-3 and A-4.
- ix) D-49 i.e. CDR analysis report of Mobile Nos. Of the accused persons and others in connection with the alleged incident.

37. After a threadbare analysis of the materials on record, the learned Special Court, NIA, had recorded the following findings and observations :-

“35) From the materials on record available at this stage in the case diary and the charge sheet, it is revealed prima-facie that on 09.12.2019, A-1 participated in a protest programme at Chabua in the evening hours, during which he delivered an aggressive or provocative speech whereafter the crowd turn violent and pelted stones leading to serious facial injuries to the informant-cum-victim Sri Tulumoni Duarah, who as O-C Chabua P.S. was doing law and order duties at that time in the place of occurrence. “

36) It is further revealed prima-facie from the materials that though A-1 apart from giving aggressive or provocative speech, might not have directly incited violence, but he did not do anything to dissuade the crowd from vandalizing, after they started doing so. It also appears prima-facie that A-1 remained at the place of occurrence for about an hour after the vandalism started and also revealed from the statement of the informant-cum-victim that while he

was being shifted after sustaining the injuries from stone pelting, A-1 was still addressing the crowd.

37) Thus, from these materials it is clear *prima-facie* that on 09.12.2019 A-1 was present in the evening at the place of occurrence in Chabua; that he addressed the protesting crowd giving a progressive / provocative speech where after the crowd turn violent and pelted stones seriously injuring the informant and that A-1 did not do anything to prevent the violence or stopping it after it started.

38) Now in the aforesaid facts and circumstances, it has to be determined *prima-facie* as to whether the omissions and commissions of the accused A-1 on the aforesaid lines would make him liable for an act of terrorism within the meaning of Section 15 of the UA (P) Act."

38. Having observed as above, the learned Court below had held that the alleged omissions and commissions on the part of the respondent (A-1) revealed by the materials cannot be *prima-facie* said to be a "terrorist act" done with the intention of threatening the unity, integrity and sovereignty of India or a terrorist act done with the intention to strike terror in the people. As such, it was held that there was no reasonable ground for holding that the accused respondent (A-1) was *prima facie* guilty of committing a terrorist act within the meaning of Section 15 of the Act of 1967 which is punishable under Section 16 of the said Act and accordingly, allowed the respondent to go on bail.

39. It is to be noted here-in that under the proviso to section 43D(5) Bail to an accused is to be denied only if the court is of the opinion that the accusation against the person is *prima facie* true .

40. From a perusal of the relevant portion of the charge-sheet and the materials

appended thereto, it is apparent that the basic allegation against the respondent(A-1) is that of making provocative speeches inciting the public to resort to violence and also to draw- up plan to set the houses of the people from the Bengali community living in the Amrawati Colony on fire. It may be true that taking advantage of the public sentiment associated with enactment of CAA, the respondent had delivered fiery speeches whipping up strong passion amongst the masses, which in turn, had led to violent activities which are punishable under the law. It may also be correct to say that the violence resorted by the members of the mob was the direct fall out of the speech delivered by the respondent. However, what would be of utmost significance in this case is to consider as to whether the materials placed of record by the investigating agency was sufficient for the Court to *prima facie* believe that the accused/ respondent had delivered such provocative speeches with the intent to commit a "terrorist act" within the meaning of section 15(1)(a) of the Act of 1967,thereby challenging the unity, integrity, security and sovereignty of India.

41. Upon going through the impugned judgement and order dated 01.10.2020 in the light of materials placed before us, we are of the considered opinion that the views expressed by the learned Special Court, NIA leading to granting of bail to the respondent is a possible view in the facts and circumstances of the case. Therefore, we do not find any error in the approach of the learned Court below while exercising discretionary jurisdiction and granting bail to the respondent.

42. It is settled principle in law that the power of the Court to grant bail is discretionary in nature. While examining the correctness of the decision rendered in

exercise of such discretionary power, if two views are possible, the appellate court would be loath in interfering with the view of the Court below.

43. This Court is conscious of the fact that trial is yet to commence in this case. Therefore, although the learned counsel for both sides have addressed elaborate arguments on various other aspects touching upon the merit of the case, we are not inclined to go into those issues at this stage. Having examined the impugned decision of the learned trial court, in the light of the materials placed by the appellant, we are of the opinion that the impugned order dated 01.10.2020 does not suffer from any infirmity warranting interference by this court.

44. As regards the observations and findings recorded by a co-ordinate Bench of this Court in the order dated 05.02.2021 passed in CrI. Appeal No.171/2020 preferred by the Accused Nos.3 and 4, we find that there are photographs to show that A-3 and A-4 were brandishing swords before the public while taking part in the protest rally. Taking note of such materials available in the case diary, the learned court below had observed that there was incriminating materials available against those appellant and accordingly, rejected their bail prayer. By the order dated 05.02.2021 a Division Bench of this court had agreed with such view expressed by the learned Judge and dismissed the appeal filed by those accused. Therefore, it is apparent that the judgement and order dated 05.02.2021 was passed after taking into consideration of the peculiar facts and circumstances of that case and hence, the said judgement, in our opinion, would not have any bearing in the present appeal.

45. In the case of **Jayanta Kumar Ghosh (supra)** relied upon by Mr. Saikia, the

three appellants had approached this court being aggrieved by the order passed by the learned Special Judge rejecting their prayer for grant of bail. While dismissing the appeal, the Division Bench was of the view that the prima facie satisfaction recorded by the learned court below was borne out from the materials available on record. Therefore, the aforesaid decision was evidently rendered in the facts and circumstances of that case.

46. For the reasons stated herein above, we do not find any good ground to interfere with the impugned judgment and order dated 01.10.2020 passed by the learned Judge, Special Court, NIA. This appeal is, therefore, held to be devoid of any merit and is accordingly dismissed.

The records be returned back.

Before parting with the records, we deem it appropriate to clarify that our views expressed in this order are tentative and have been recorded in the context of the impugned judgement and order, for the limited purpose of disposal of this appeal.

JUDGE

JUDGE

T U Choudhury

Comparing Assistant