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

% Judgment reserved on: 10.04.2024
Judgment delivered on: 06.05.2024

\+ CRL.A. 79/2024 & CRL.M.A. 2650/2024

AMMAR ABDUL RAHIMAN ..... Appellant

VERSUS

NATIONAL INVESTIGATION AGENCY ..... Respondent

Memo of Appearance

For the Appellants: Ms. Nitya Ramakrishnan, Sr. Advocate with Mr. Archit Krishna, Ms. Tamanna Pankaj and Ms. Stuti Rai, Advocates.

For the Respondent: Ms. Aishwarya Bhati, ASG with Ms. Zeenat Malick, PP, Mr. Akshai Malik, SPP, Mr. Rustam, Mr. Akshay Sehgal Mr. Khawar Saleem, Mr. Arun Kumar and Ms. Poornima, Advocates for NIA with Insp. Ajay Singh.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T

MANOJ JAIN, J

1. Present appeal has been filed by appellant Amar Abdul Rehman (A-10) challenging impugned order[1] whereby his bail application has been dismissed.

[1] Order dated 22.12.2023, passed by ld. Special Judge, Patiala House Courts

2. It has been prayed that said order be set aside and as a necessary corollary, he may be released on regular bail.

3. Let us first take note of background facts, germane for disposal of the appeal in hand.

4. There was credible information with Central Government that one Mohammed Ameen Kathodi@ Abu Yahya (A-1), having allegiance with proscribed terrorist organization i.e. Islamic State of Iraq and Syria (ISIS), had been running various ISIS propaganda channels on several secured social media applications. Through these channels, he had been dispersing violent Jihadi ideology of ISIS and radicalizing and recruiting impressionable and gullible Muslim youths.

5. As per the investigating agency, he (A-1) and his associates had planned to undertake 'Hijrah' (religious migration) to Jammu and Kashmir (J&K) and ISIS controlled territories for engaging in terrorist acts. They had procured fake SIM cards, virtual numbers for creating several IDs on various secured social media chat platforms and used to interact with the like-minded persons for raising funds for supporting ISIS activities and for carrying out anti-national activities in India.

6. Three such persons i.e. accused Mohammed Ameen Kathodi @ Abu Yahya (A-1), Mus'Hab Anwar (A-2) and Rahees Rasheed (A-3) were arrested on 15.03.2021. The material collected during the

investigation revealed their complicity as they were found to be the members of banned terrorist organization ISIS. The first chargesheet qua them was filed by National Investigating Agency (NIA) on 08.09.2021 for committing various offences punishable under IPC and Unlawful Activities (Prevention) Act, 1967 (in short 'UAPA').

7. It was also, however, mentioned in the chargesheet that there were eight other accused persons who had also been arrested in the present matter and investigation was going on against them as well as qua few others.

8. The appellant (A-10) herein had been arrested on 04.08.2021 and supplementary chargesheet qua him and other accused persons was filed on 28.01.2022.

9. The allegations qua the appellant have been elaborated from paragraph number 17.98 onwards in such supplementary chargesheet.

10. According to NIA, these are, broadly speaking, as under: -

> *i. Appellant Ammar Abdul Rahiman (A-10) was highly radicalized towards ISIS. He entered into criminal conspiracy with known & unknown ISIS members for undertaking 'Hijrah' to J&K and other ISIS controlled territory to join (ISIS) for establishment*

of Caliphate[2] *and to carry out the activities of ISIS in India.*

ii. *In terms of criminal conspiracy, fake SIMs, virtual numbers were procured for creating several IDs to circulate ISIS propaganda material to radicalize susceptible Muslim youth for joining ISIS.*

iii. *Appellant's mobile phone was seized and its scrutiny (D-140) revealed that he had downloaded videos related to ISIS and brutal killings from Instagram using screen recorder option.*

iv. *The photographs of global terrorist Osama-Bin-Laden, Jihad promotion, ISIS flags etc. were also found in his digital devices which established his radical mindset and association with ISIS. From the web history, links of lectures of Muslim hard-line preacher Anwar AlAwlaki were also found.*

v. *He had also been following Pro-ISIS Instagram entities*[3] *Further, screenshot of Instagram account "strangersonhaqq" had also been found in his device which was also retrieved from the digital devices of his co-accused persons which confirm and corroborate that they all were part of same conspiracy.*

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[2] Creating Islamic form of government

[3] *One_banner_of_tawheed', 'Sheikh Ahmad Moosa Jibrail', 'Al.ansaaree (jihad)', 'Muwaheed_888', 'Abu.sayfullah.shishan', 'Milat-e-ibrahim' 'Muvahhideen_99', 'Doamuslims' etc.*

vi. *Appellant had also installed applications Telegram, MobileSafari etc. to avoid preying eyes of law enforcement agencies.*

vii. *Mizha Siddeeque (A-6) and Deepthi Marla (A-4) planned for Hijra to ISIS territory along with Ammar Abdul Rahiman (A-10) as they wanted a man to accompany them, which stands corroborated through disclosure statement (D-105) of Mizha Siddeeque (A-6) in which she admitted that she and Deepthi Marla@ Maryam along with A-10 (brother-in-law of Deepthi Marla) had decided to go to Afghanistan for Hijrah and to join ISIS. He had gone to Dubai and met A-4 and A-6 for said purpose. He wanted to go to Khorasan via Tehran but could not go for want of passport's renewal.*

viii. *Deepthi Marla @ Maryam(A-4) is his close relative and she had radicalized him towards ideology of ISIS.*

ix. *The Scrutiny of downloaded social media data of accused Ammar Abdul Rahiman (A-10) confirms that he was following news related to Middle East and Israel Palestine conflict.*

11. We may also note that even in the present appeal, the sum and substance of the allegations made against the appellant, have been outlined as aforesaid. Broadly speaking (i) *he used to watch lectures of hard-line Muslim preacher Zakir Naik; (ii) A-4 used to share relevant developments with the Appellant to radicalize and motivate him; (iii)* he *downloaded Telegram application on his iPhone and A-4 assisted him in*

creating his Telegram ID and continued radicalizing him for taking "Hijrah" with her and her associates to Khorasan for joining ISIS; (iv) in March 2018, he visited Dubai with his family and stayed in the rented accommodation of A-4 for 4/5 days where he met A-6; (v) *by March 2019, he was radicalized and wanted to go to Khorasan via Tehran but could not do so as his passport was not renewed; and (vi) his mobile contained various incriminating material.*

12. Thus, according to the Investigating Agency, accused Ammar Abdul Rahiman (A-10) was radicalized by co-accused Deepthi Marla @ Maryam (A-4) and was using secured social media platforms viz. Telegram to communicate with co-accused persons Deepthi Marla @ Maryam (A-4), Mizha Siddeeque (A-6) and other associates and discussed plans to undertake Hijra to ISIS controlled territory for joining ISIS. He associated himself with proscribed terrorist organisation ISIS. According to NIA, recovery of incriminating contents viz. videos, images etc. related to ISIS from his digital devices and from his social media account reflect his inclination towards violent Jihad and all these facts collectively establish that he was a member of proscribed terrorist organization ISIS and hatched conspiracy to support the activities of ISIS.

13. We may, highlight, right here that the learned Trial Court ascertained the charges on 31.10.2022 and the matter is already at the

stage of recording of prosecution evidence. We are conscious of the fact that the case is already at the stage of trial. When the matter was reserved for judgment, we were apprised that 21 witnesses, out of 154 cited, had already been examined.

14. As far as A-10 is concerned, he has been charged under Sections 120B of IPC r/w S. 2(o) r/w S.13 and Sections 38 & 39 of the UAPA.

15. Learned Trial Court, in its such order dated 31.10.2022, observed that there was overwhelming material to establish a strong nexus amongst the accused persons viz., A-2, A-3, A-4, A-5, A-6, A-7, A-9 and A-10 with known/unknown operatives of the ISIS on the web world indulging into various violent activities and crimes and they were not mere sympathizers of the ISIS ideology or its violent philosophy against non-believers but also pursuant to a well-planned conspiracy, actively followed a well-orchestrated and painstaking efforts to support the terrorist activities of the banned organization. It also observed that they were disseminating the provocative messages and sharing highly inflammatory, anti-national and secessionist propaganda on social media platforms to spit venom against the country and promote the cause of the terrorist organization.

16. It will also be worthwhile to extract the charges against the appellant Amar Abdul Rehman (A-10) which reads as under: -

"(i) Firstly, you entered into a criminal conspiracy since the year 2015 with other co-accused persons on social media platforms for using the various social accounts on Telegram or Instagram ID abdul_rahmain_05 and used to search incriminating content related to ISIS for joining the ISIS or under taking Hizra and that you used the social media platform soliciting joining the ideology of Jihad and further the cause of ISIS and glorifying the activities if ISIS; and you used the social media platform to pollute the mind for the section of Muslim youth to spread the propaganda for the ideology of ISIS in the year 2015; and that you incited and facilitated the dissemination ideology of ISIS on social media platforms by using various social accounts on Telegram or Instagram ID abdul_rahmain_05 which intend to cause the disaffection against India and thereby you have committed the offence of the unlawful activity punishable under section 2(0) read with section 13 of the UAPA read with section 120-B of the IPC and I hereby direct you to be tried for the aforesaid offences by this Court and within my cognizance.

(ii) And secondly you associated and/ or professed to be associated as a member of Terrorist organization ISIS to involved in terrorist act(s) in criminal conspiracy with other co-accused persons and you continued to be associated as a member of ISIS since the year 2015 with intention to further its activities and you joined to take part in the activities of the ISIS by using social media platforms for using the social media accounts on Telegram or lnstagram ID abdul_rahmain_05 under which radicalizing the Muslims youth to follow the ideology and activities of ISIS. Thereby you have committed the offence relating to membership of a terrorist organization punishable under section 38 of the UAPA read with section 120 B of the IPC and within my cognizance. I hereby direct you to be tried for the aforesaid offence by this Court and within my cognizance

> *(iii) Thirdly and lastly, you lend support given to the terrorist organization ISIS to involved in terrorist act(s) pursuant to criminal conspiracy with other co-accused persons and you continued to give support since the year 2015 with intention to further its activities by exchanging and promoting the religious ideology of ISIS by using the social media platforms for using the various social accounts on Telegram or Instagram ID abdul_rahiman_05 to facilitating the Muslim Youth to joining the ISIS to support their terrorist activities and thereby you committed the offence related to support given to a terrorist organization punishable under section 39 of the UA(P) Act read with Section B of the IPC and within my cognizance. I hereby direct you to be tried for the aforesaid offence by this Court and within my cognizance."*

17. It was amidst the trial only that application seeking bail was moved by A-10 before the learned Trial Court.

18. In such application dated 03.10.2023, bail was sought on the premise that there was no material on record indicating the accusation against him to be *prima facie* true. It was submitted that there was nothing to show that he was part of any terrorist organization or that he had committed any overt act in furtherance of activities of any such terrorist organization. It was also submitted that mere association with other co-accused was not sufficient to attract UAPA and mere possession of some incriminating and extremist material, as allegedly retrieved from the electronic devices of the appellant, would not, in itself, demonstrate that he had committed any offence. It was also contended that since the

investigation qua the appellant was already over and he was no longer required for investigational purpose**,** his further incarceration amounted to infringement of his fundamental right to life and liberty and since the trial was not likely to be over in near future, he was entitled to be released on bail.

19. None of these grounds found favour with the learned Trial Court and, resultantly, his said application was dismissed on 22.12.2023.

20. Such order is under challenge before us.

21. The contentions raised before us are, more or less, same and similar.

22. It is contended by Ms. Nitya Ramakrishnan, learned senior counsel for the appellant that the appellant, aged approximately 30 years, is a law-abiding citizen and has deep roots in the society, with no criminal antecedents. It is reiterated that, in essence, the broad allegations against the accused are that he was radicalized by his sister-in-law (A4) towards ISIS and that his mobile phone revealed various images which showed that he had access to hardline speeches, video(s) related to ISIS and some pro-ISIS Instagram entities. Merely because he was accessing material which was found downloaded in his electronic devices would not mean anything substantial as there is nothing to indicate that he had ever

disseminated such material or acted upon the same or did anything pursuant to such material.

23. Though, as per NIA, he figured in chat messages and disclosure made by his co-accused A-4 and A-6, he was never a privy to such chat messages. Mere fact that in their disclosure statements and chats, they had made reference about him and indicated that he would be taken for Hijrah to Khorasan, would neither indict him nor take the case of prosecution anywhere.

24. It is also argued that the prosecution seems to rely upon six pages of images and one page of web history (D-140) out of 1000 odd pages claim to have been retrieved from his two mobile phones by the concerned Forensic Labs. Even the retrieved images or web history do not demonstrate that he had ever participated or professed or was associated with any terrorist organization.

25. It is also supplemented that mere fact that charges had been framed would not be a bar against grant of bail, though in such a situation, the task of any such accused would be relatively arduous. It is contended that despite the fact that the charges had been ascertained, learned Trial Court should have undertaken surface analysis of probative value of the evidence and if the same had been carried out appropriately, it would have become clear to the learned Trial Court that there was no admissible evidence, suggesting *prima facie* case against him. Relying on *Vernon v.*

State of Maharashtra [4], it is argued that mere holding certain literature, would not *ipso facto* attract UAPA. There is also no evidence that he was ever in contact with any other accused except for A-4, who is his sister-in-law and had been residing with him in the same house.

26. Ms. Nitya Ramakrishnan, learned senior counsel has argued that there is no *prima facie true* case against the appellant and, therefore, the statutory bar contained under Section 43-D(5) of UAPA does not stand attracted. Learned senior counsel has further contended that the prosecution has roped him in, for totally inexplicable reasons, while merely relying on disclosure statements made by the co-accused persons and holding the same against the appellant. It is also contended that the alleged disclosure statement of the appellant did not lead to any recovery and, therefore, in view of bar contained under Section 27 of the Evidence Act, such disclosure statement has no legal value. Moreover, such disclosure statement was recorded after the phone in question had already been recovered and seized.

27. Reliance has been placed by appellant on *Chandeep Singh v. National Investigation Agency*[5], judgments of the Supreme Court in *NIA vs Zahoor Ahmad Shah Watali*[6]; *K.A. Najeeb v. Union of India*[7]; *Vernon*

[4] 2023 SCC OnLine SC 885
[5] 2023 SCC OnLine P&H 6332
[6] (2019)5 SCC 1
[7] (2021) 3 SCC 713

v. State of Maharashtra & Anr.[8], and *Thwaha Fasal v. Union of India*[9]; *State v. Navjot Sandhu*[10]; *Jaffar Hussain Dastagir v. State of Maharashtra*[11]; *Kehar Singh v. State (Delhi Administration)*[12]; *P. Chidambaram v. CBI*[13]; *Dataram Singh v. State of U.P.*[14]; *Sanjay Chandra v. CBI*[15]; *Ashok Sagar v. State of NCT of Delhi*[16]; *Prabhakar Tewari v State of U.P.*[17].

28. Ms. Aishwarya Bhati, learned Additional Solicitor General has countered all the aforesaid contentions.

29. It is contended that the chargesheet was laid before the competent Court qua the appellant herein on 28.01.2022 and the learned Trial Court has already ascertained charges on 31.10.2022 with a specific observation that there was a *prima facie* case against him for commission of offences under Section 120B read with Sections 38 and 39 of UAPA read with Section 2(o) and Section 13 of UAPA. It is contended that Sections 38 and 39 of UAPA falls under Chapter VI of UAPA and, therefore, the statutory bar, as contained under Section 43-D(5) of UAPA, comes into play. Since there is a *prima facie* case against him, he, now, cannot be

[8] 2023 SCC OnLine SC 885
[9] 2021 SCC OnLine SC 1000
[10] (2005) 11 SCC 600
[11] (1969) 2 SCC 872
[12] (1988) 3 SCC 609
[13] 2019 SCC Online SC 1549
[14] (2018) 3 SCC 22
[15] (2012) 1 SCC 40
[16] 2018 VIAD (Delhi) 21
[17] 2020 SCC Online 75

permitted to seek bail in view of the aforesaid bar. It is also contended that for the reasons best known to the appellant, he has not challenged the order on charges.

30. As regards the allegations against the appellant and his co-accused, it is informed that as far as A-1 Mohammed Ameen Kathodi@ Abu Yahya is concerned, he has already expired. A-2 Mus'Hab Anwar and A-3 Rahees Rasheed have been released on default bail and as far as A-8 Obaid Hamid is concerned, he has been bailed out as he has not been charged for any offence falling under Chapter IV or Chapter VI of UAPA.

31. It is argued that the comprehensive investigation clearly suggests that there was criminal conspiracy amongst all the accused and such conspiracy stands decoded by the Investigating Agency with the help of various crucial circumstances.

32. It is reasoned that since conspiracy is hatched in secrecy, there would rarely be any direct evidence and, therefore, the conspiracy has to be inferred from various circumstances and the conduct of the accused persons.

33. It is claimed that the residential premises of the appellant were searched on 04.08.2021 and as per Search and Seizure Memo (D-76), four mobile devices of appellant were seized. These were sent to CERT-

In[18] for extraction of digital data. The report and extracted data of such digital devices was scrutinized and was found containing several incriminating contents viz. ISIS videos, photos of various Muslim hard-line preachers.

34. Ms. Aishwarya Bhati, learned ASG submitted that ISIS is a banned terrorist organization under the First Schedule of UAPA and finds its place at serial No.38 and was banned in the year 2015 and despite the fact that the ISIS had been declared a terrorist organization, there is ample material on record to suggest that the appellant continued to remain associated with said organization and was acting in furtherance of its cause. It is also argued that social media data of the account of A-10 and his co-accused/sister-in-law Deepthi Marla (A-4) were downloaded and it stood confirmed that A-4 and A-6 had discussed about their plans of Hijrah and A-10 was also part of such conspiracy. On the basis of scrutiny of social media data of A-4, it came to fore that A-4 had booked a hotel room for three people in one hotel in Tehran/Iran on 17.02.2019 and if the dots are connected, it would go on to establish that such booking was meant for all three of them, i.e. A-4, A-6 and A-10. It is, however, admitted that only A-4 and A-6 had gone to Tehran in April 2019 with intention to undertake Hijra to ISIS controlled territory and A-10 could not join them as he was not able to get his passport renewed.

[18] Indian Computer Emergency Response Team

Thus, as per the messages exchanged between A-4 and A-6, it is very obvious that A-4 and A-6 wanted A-10 to undertake Hijra.

35. According to learned ASG, when the digital data of devices of A-10 was analyzed, it was found containing photographs related to Instagram entity "strangersonhaqq" and the content related to said "strangersonhaqq" pro-ISIS Instagram entity was also found in the digital devices of A-1, A-3, A-5 and A-7 which clearly demonstrate that they all had conspired together and were part of same conspiracy. It is argued that since learned Trial Court has already returned a finding and has observed that there was a *prima facie* case against the appellant herein as well, and when the trial is already midway, it will not be appropriate for this Court to hold a mini-trial and to minutely analyze each and every circumstance and to come to any conclusion, either way. Her contention is that even if the bail application is considered in the present peculiar factual matrix, the yardstick would be that of consideration of the case on broad probabilities and that detailed examination and evaluation of documents and statements need to be avoided.

36. Reliance has been placed upon *Gurvinder Singh vs. State of Punjab and Anr.*[19]; *Arup Bhuyan vs. State of Assam & Anr.*[20]; *National Investigation Agency vs. Zahoor Ahmad Shah Watali*[21]; *State vs. Nalini*[22].

[19] 2024 SCC Online SC 109
[20] (2023) 8 SCC 745
[21] (2019) 5 SCC 1
[22] (1999) 5 SCC 253 (Rajiv Gandhi Assassination Case)

37. We have given our thoughtful consideration to the aforesaid contentions and have gone through the precedents cited at the bar.

38. As already noticed above, the charges have already been framed and the case is pending trial.

39. We are also conscious of Section 43-D(5) of UAPA which creates a sort of restriction and limitation on grant of bail if, the Court, finds that the accused has committed offences falling under Chapter IV and/or Chapter VI of UAPA and the case against such accused is *prima facie* true.

40. In *Jamsheed Zahoor Paul vs. State of NCT of Delhi*[23], this Court was faced with similar issue when the aspect of consideration of bail in a UAPA matter came before us in a case where the charges had already been ascertained. We think it appropriate to extract following observations made therein: -

> ***"LIMITATION ON CONSIDERATION OF BAIL UNDER UAPA***
>
> ……..
>
> *31. Though in adversarial system, there is presumption of innocence in favour of accused and, therefore, bail is generally a rule, UAPA contains modified application of certain provisions of Criminal Code of Procedure and thus commands that no person accused of an offence punishable under Chapter IV and/or Chapter VI shall, if in custody, be released on bail if*

[23] 2024:DHC:3227-DB

there are reasonable grounds of believing that the accusation against such person is prima facie true.

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

> *"43D. Modified application of certain provisions of the Code*
> *……..*
> *……..*
>
> *(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:*
>
> *Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.*
>
> *(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.*
>
> *(7) Notwithstanding anything contained in Sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorizedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."*
>
> *(emphasis supplied)*

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

34. Firstly, whether in view of the fact that charges have already been framed and such charges have not been challenged by the appellant, whether bail plea can be considered and whether the court can go on to opine that there are no reasonable grounds for believing the accusation to

be prima facie true. Secondly, what should be the level of scrutiny for believing the same. Thirdly, whether the appellant has been able to show that there is no prima facie case against him. Lastly, whether despite such statutory bar being in place and when prima facie is found to be made out, bail can still be granted in order to safeguard his fundamental rights.

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

> ***"Test for Rejection of Bail : Guidelines as laid down by Supreme Court in Watali's Case***
>
> ***34.*** *In the previous section, based on a textual reading, we have discussed the broad inquiry which Courts seized of bail applications under Section 43D(5) UAP Act r/w Section 439 CrPC must indulge in. Setting out the framework of the law seems rather easy, yet the application of it, presents its own complexities. For greater clarity in*

the application of the test set out above, it would be helpful to seek guidance from binding precedents. In this regard, we need to look no further than Watali's case which has laid down elaborate guidelines on the approach that Courts must partake in, in their application of the bail limitations under the UAP Act. On a perusal of paragraphs 23 to 29 and 32, the following 8-point propositions emerge and they are summarised as follows:

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

• ***Degree of Satisfaction at Pre-Chargesheet, Post Chargesheet and Post-Charges - Compared*** *[para 23] : Once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 CrPC), do not make out reasonable grounds for believing that the accusation against him is prima facie true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.*

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

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

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

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

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

• ***Admissibility of documents relied upon by Prosecution cannot be questioned*** *[para 27] : The materials/evidence collected by the investigation agency in support of the accusation against the accused in the first information report must prevail until contradicted and overcome or disproved by other evidence……. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible."*

(emphasis supplied)

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

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

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

39. Moreover, in view of specific observations made in National Investigation Agency v. Zahoor Ahmad Shah Watali (supra) as elaborated in Gurwinder Singh (supra), Court can always consider such bail application,

even after framing of charges, the rider being the onus on accused would be much more rigorous in such a situation."

41. Thus, despite the fact that the charges have been ascertained and such order has not been assailed, this Court can, still, very well consider bail application within the above parameters. We may also refer to *Chandeep Singh* (supra) wherein also, it has been observed that it is the bounden duty of the trial court to examine the role of the accused by meticulously perusing the challan and keeping in mind the restrictions imposed under Section 43-D(5) of UAPA, supplementing that merely because the charges have been framed, benefit of bail cannot be denied.

42. Thus, it is quite obvious that the court can consider bail plea in a UAPA case, even after ascertainment of charges. Right to seek bail is indefeasible one and can be exercised at any stage. It never stands extinguished.

43. We now switch to the allegations and the relevant provisions.

44. In the supplementary chargesheet, it has been alleged that the appellant has committed offences punishable under Section 120B of Indian Penal Code and Sections 18, 20, 38 and 39 of UAPA.

45. Fact remains that the learned Trial Court directed him to face trial for offences under Section 120B IPC read with Section 2(o) read with sections 13, 38 and 39 of UAPA.

46. Meaning thereby, no case for offences under Section 18 and 20 of UAPA was found existing against him.

47. The statutory provisions of UAPA, germane for our present purpose, read as under:-

> **2. Definitions.—(1)** In this Act, unless the context otherwise requires,—
>
> (a)…….
>
> ……..
>
> *(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),—*
>
> ***10. Penalty for being member of an unlawful association, etc**.—Where an association is declared unlawful by a notification issued under section 3 which has become effective under sub-section (3) of that section,—*
>
> *(a) a person, who—*
>
> *(i) is and continues to be a member of such association; or*
>
> *(ii) takes part in meetings of such association; or*
>
> *(iii) contributes to, or receives or solicits any contribution for the purpose of, such association; or*
>
> *(iv) in any way assists the operations of such association, shall be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine; and*
>
> *(b) a person, who is or continues to be a member of such association, or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms,*

ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property,—

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

(ii) in any other case, 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.

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.

15. Terrorist act.—*[(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security 5 [, 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 6 [an international or inter-governmental organisation 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 authorised 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.]

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.

16A. [Punishment for making demands of radioactive substances, nuclear devices, etc.] Omitted by the Unlawful Activities (Prevention) Amendment (Repealing and Amending) Act 2013 (3 of 2013), s. 5 (w.e.f. 1-2-2013).

*[**17. Punishment for raising funds for terrorist act**.—Whoever, in India or in a foreign country, directly or indirectly, raises or provides funds or collects funds, whether from a legitimate or illegitimate source, from any person or persons or attempts to provide to, or raises or collects funds for any person or persons, knowing that such funds are likely to be used, in full or in part by such person or persons or by a terrorist organisation or by a terrorist gang or by an individual terrorist to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such 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.*

Explanation.—For the purpose of this section,—

(a) participating, organising or directing in any of the acts stated therein shall constitute an offence;

(b) raising funds shall include raising or collecting or providing funds through production or smuggling or circulation of high quality counterfeit Indian currency; and

(c) raising or collecting or providing funds, in any manner for the benefit of, or, to an individual terrorist, terrorist gang or terrorist organisation for the purpose not specifically covered under section 15 shall also be construed as an offence.]

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.

***[18A. Punishment for organising of terrorist camps.**—Whoever organises or causes to be organised any camp or camps for imparting training in terrorism 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.*

***18B. Punishment for recruiting of any person or persons for terrorist act.**—Whoever recruits or causes to be recruited any person or persons for 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.]*

***38. Offence relating to membership of a terrorist organisation.**—(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:*

Provided that this sub-section shall not apply where the person charged is able to prove—

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

***39. Offence relating to support given to a terrorist organisation.**—(1) A person commits the offence relating to support given to a terrorist organisation,—*

(a) who, with intention to further the activity of a terrorist organisation,—

(i) invites support for the terrorist organization; and

(ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is—

(i) to support the terrorist organization; or

(ii) to further the activity of the terrorist organization; or

(iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

48. Section 10 of UAPA provides penalty for being member of unlawful association. Section 13 provides punishment for taking part or advocating, abetting, inciting commission of any unlawful activity and invites punishment for a period upto 7 years. Terrorist act has been defined under Section 15 and the punishment for terrorist act is provided under Section 16. Section 18 UAPA provides for punishment for conspiring or attempting to commit, or advocating, abetting etc. the commission of a terrorist act or any preparatory act to such commission.

49. We have already noticed that the accused has not been charged for commission of offence under Section 18 which falls under Chapter IV of UAPA.

50. It would be appropriate to take note of the observations made by the learned Trial Court in this regard.

51. Learned Trial Court held that though there was material suggesting that the accused had committed offence under Section 2(o) read with Section 13 of UAPA, there was nothing to hold that he had committed any 'terrorist act'. It was also observed that no 'overt act' had been attributed to him either. Relevant part of para 49 and 50 of order on charge reads as under: -

> *"49. Thus, the satisfaction to be recorded at the stage of charge is more onerous as compared to satisfaction to be recorded at the stage of consideration for grant of bail. Reverting to the instant matter, without further ado, although the accused persons prima facie have committed offence under section 2(o) read with section l 3 of the UA(P) Act, there is no material to hold that any of the accused persons committed any "terrorist act" within the scope and meaning of subsections (a),(b) and (c) to section 15 of the UA(P) Act. No physical act has been attributed to them leading to commission of a terrorist act or any act or omission shown to be preparatory to doing of a "terrorist act", and it is imperative to point out that we have already referred to decision of the Supreme Court in the case of* ***Zameer Ahmed Laitful Rehman Sheikh v. State of Maharastra, (supra)*** *wherein it was held that commission of a physical act is core condition of applicability of section 15 of the Act. Similarly, there is no material worth its salt that would show that the accused persons were conspiring together to commit any terrorist act within the scope and ambit of Section 18. Indeed, some of the accused persons were in contact with one another but there is no evidence extracted from the*

digital devices or otherwise except their confessional statements/disclosure statements, so as to decipher that the accused persons were hatching a criminal conspiracy to commit a terrorist act or an act preparatory to commission of a terrorist act. There is no iota of material collected that the any of the accused procured arms or ammunition or explosive substances or attempted to acquire the same, or for that planned to commit any terrorist act so as to cause large scale disturbances or fear in the mind of the general public. If the prosecution story is believed, some of the accused persons were highly motivated to undertake Hijra i.e., mass exodus· to ISIS controlled territories or for that matter to the State of Jammu & Kashmir, which desire could never materialize, and that by itself is no offence under section 18 of the UA(P) Act. There is no material that any of the accused individually or for that matter with in association with one or the other planned to carry out any terrorist act or act preparatory to any terrorist act. The material gathered by the investigation agency at the best demonstrate that almost all the accused except A-11 were ISIS sympathizers and accessing highly radicalized Jihadi material from the web world but there is no iota of material to suggest any of the accused individually or in association with one or the other committed or planning any terrorist act. Further, in so far as section 18-B of the U A (P) Act is concerned , there is no evidence that any of the accused individually or in association with any of the other accused persons was entrusted with the task of soliciting details of like-minded ·persons, conducting interviews, taking money or even facilitating their onward journey to ISIS controller territories. Section 18-B of the UA(P) Act contains the word 'recruitment' which implies certain kind of organized activity, process or pattern for finding out suitable candidates to join the terrorist organization and there is nothing in the messages that would demonstrate that any such kind of recruitment process was ever conducted by any of the accused persons.

50. To sum up; the accused persons before this Court are more or less young persons and their religious & ideological bent of mind is certainly disdainful, despicable and contrary to the ideals of the constitution of India. However, since none of the accused is said to have indulged into any acts of violence or of being a party to any conspiracy for committing any particular terrorist act, they cannot be held prima facie to have committed the offences in question .• Though it appears that the accused

> *persons except for A-1 I were highly radicalised and were by all means in connection with some known and unknown operatives of the ISIS, and deliberately, purposely and actively disseminating information about the philosophy and ideology of the said organization, they cannot be prima facie held as perpetrators of committing some or the other terrorist act or actions."*

52. Thus, the learned Trial Court, while ascertaining the charges, observed in absolutely unambiguous manner that the appellant had neither indulged into any terrorist act nor was party to any conspiracy for committing any such terrorist act. It observed that though the appellant herein was highly radicalized but it cannot be *prima facie* held that he was either perpetrator of any terrorist act or was conspiring to commit the same.

53. In the aforesaid background, principally, it is now to be found out whether there is any admissible incriminating material on record to hold that the appellant has committed offence under section 38 and 39 of UAPA, which fall under Chapter VI of UAPA.

54. Needless to reiterate, in the present context, bar provided under Section 43-D(5) would stand attracted if any offence under Chapter VI stands disclosed.

55. We have already extracted Sections 2(o), 13, 15, 16, 17, 18, 38 and 39 of UAPA.

56. Section 38 of UAPA would come into play when it is shown that accused has associated himself or professes to be associated with a terrorist organization with intention to further its activities. Section 39 of UAPA prohibits giving support to any such terrorist organization, if done with such intention.

57. Thus, with respect to both the aforesaid penal provisions, i.e. Section 38 and Section 39 of UAPA, the prosecution is required to, first, establish that any such person has associated himself or professed to be associated himself with the terrorist organization or that he was supporting such terrorist organization. However, the crucial ingredient is the second one. Such association or support should be with intention to further its activities. This is *sine qua non* for attracting said penal provisions.

58. We have already taken note of the allegations appearing on record against the appellant herein. Even if the allegations are assumed to be gospel truth, the prosecution's case would reflect that (i) Appellant was highly radicalized towards ISIS. (ii) He was in touch with his co-accused A-4 (Deepthi Marla), who is his close relative as she is married to his elder brother. (iii) A-4 was a staunch follower of ISIS and was desperate to undertake Hijrah and was acting in furtherance of activities of ISIS in India. (iv) A-4 and her associate A-6 wanted appellant also to undertake Hijrah and wanted him to go to Khorasan via Tehran. (v) In order to

achieve above, A-4 booked hotel room for three persons in Tehran, Iran on 17.02.2019 and such booking was for all three of them, i.e., A-4, A-6 and A-10. (vi) The objective of such visit and meeting was to undertake Hijrah to ISIS controlled territory. (vii) Admittedly, A-10 did not go to Tehran, *albeit*, for want of renewal of his passport. (viii) The electronic device/mobile phone of A-10 contained, *inter alia*, material which suggested his radical mindset. (ix) Several applications were found to be downloaded in his mobile device as well as in the mobile devices of his co-accused which was suggestive of conspiracy.

59. According to learned ASG, there would rarely be a direct and clear-cut evidence for decoding conspiracy and on most of the occasions it has to be inferred from various facts and circumstances. It is contended that in the present factual matrix, the incriminating material found in his digital devices clearly reveals his association with ISIS and therefore, at this stage, he cannot run away from the penal provisions of Section 38 and 39 of UAPA. It is argued that he and his co-accused had downloaded similar kind of applications and were accessing Instagram account of "strangersonhaqq" which clearly points out that they all are part of same conspiracy and were not only the members of terrorist organization ISIS but were acting in furtherance of its cause.

60. There is no doubt that ISIS is a terrorist organization. Its name is found mentioned in the First Schedule of UAPA.

61. The question posed to us is, however, very simple and precise.

62. Whether mere fact, that the electronic device of appellant is containing material showing his radical mindset, would, in itself, be sufficient to hold that he was not only associated with ISIS but also acting in furtherance of its activities?

63. Though, learned ASG contends that in the present peculiar position, when the charges have already been framed and the case is pending trial, the aforesaid bare allegations are sufficient to attract Section 38 & 39 of UAPA and if the appellant is of the view that he had not taken part in the activities of said organization, he can always prove the same during the trial in terms of proviso contained under Section 38 as the onus is rather onto him. We are, however, unable to subscribe to such contention.

64. Without entering into any kind of mini-trial and elaborate dissection, we are simply testing the extent and legal impact of bare allegations levelled against the appellant. This is, what actually is meant by 'surface analysis'.

65. Merely because the mobile device of the appellant was found carrying incriminating material including photographs of terrorist Osama bin Laden, Jihad Promotion, ISIS flags etc. and he was also accessing lectures of hard-liner/Muslim preachers would not be enough to brand

him as a member of such terrorist organization, much less his being acting in furtherance of its cause.

66. Such type of incriminating material, in today's electronic era, is freely available on World Wide Web (www) and mere accessing the same and even downloading the same would not be sufficient to hold that he had associated himself with ISIS.

67. Any curious mind can access and even download such content.

68. That act by itself, to us, appears to be no crime.

69. Though such act may give us some insight about his mindset but when we talk about a penal provision which, in essence, takes away the liberty of anyone and where even grant of bail becomes a sort of exception, the prosecution needs to have some extra ammunition in the shape of decipherable and tangible material.

70. During the course of arguments, we had put a very specific query to learned ASG as to whether there was anything indicating that after the alleged downloading of the incriminating material, had he, in any manner whatsoever, disseminated such information to anyone or had put any such information on his social media account or in public domain. In all fairness, learned ASG was quick to admit that there was nothing to indicate the same. In such a situation, it would be very difficult, at this stage, to come to a conclusion that the appellant had associated himself

with a terrorist organization or that was professing to be associated with such terrorist organization. We are also unable to find any material which may indicate that he was giving support to such terrorist organization.

71. Even for the purpose of finding out a *prima facie* case, the Court is required to consider the material which *per se* has some evidentiary value and can be admitted in evidence. We need not emphasize that the disclosure statement, in itself, has no evidentiary value and only that part which leads to discovery of some fact is relevant in terms of Section 27 of Indian Evidence Act. Thus, the disclosure statement cannot be, *ipso facto*, read as incriminating material, particularly, when it does not lead to any recovery or discovery. The disclosure statement of co-accused also cannot be borrowed for said purpose either. Admittedly, the mobile phones of the appellant had been taken into possession by the Investigating Agency even prior to his arrest and, therefore, the disclosure statement does not come to the rescue of the prosecution, even otherwise.

72. Undoubtedly, learned ASG is absolutely justified in contending that conspiracy is generally hatched in secrecy and at times, there is no direct evidence and, therefore, it has to be inferred by connecting several dots and by deducing some inference.

73. However, the Court may, though, connect the dots but cannot presume the dots.

74. Here, there is no other fact and circumstance which may indicate the element of conspiracy. Merely because the appellant had downloaded certain software like MobileSafari or Telegram, would not mean anything substantial as these are available in public domain and no adverse inference can be drawn merely because of the fact that these were found downloaded in his mobile. At best, the appellant was highly radicalized and had downloaded pro-ISIS material and was accessing the sermons of Muslim hard-liner but that would not be enough to attract Section 38 and Section 39 of UAPA.

75. A careful perusal of the order on charge would indicate that as far as A-8 was concerned, the prosecution had come up with similar kind of allegations qua him that he was radicalized by A-4 and that he had been accessing and reading Islamic Literature of extreme nature. However, the learned Trial Court observed that the act of A-8 in accessing and reading hardliner Islamic Literature would not *per se* amount to commission of any offence, except for offences under Section 2(o) read with Section 13 of UAPA and, therefore, A-8 was not charged under Section 38 and 39 of UAPA. We feel that the same yardstick should have been applied to A-10 also and merely because he was relative of A-4, he could not have been treated differently and charged for said offence falling under Chapter VI of UAPA.

76. A-4 wanted appellant to accompany them to Tehran for undertaking Hijrah but that, even as per prosecution, did not happen for want of renewal of his passport. Therefore, he could not undertake any such journey. In such a situation mere booking of hotel would not take the case of prosecution anywhere.

77. Even if, for a moment, we assume that the appellant is associated with ISIS or that he was supporting such organization, it is *sine qua non* for the prosecution to have further established the most crucial ingredient of *mens rea* i.e. acting with intention to further the activities of such terrorist organization**.**

78. This crucial in-built ingredient of Section 38 and Section 39 cannot be left for imagination.

79. This prerequisite of *mens rea* is in direct contrast to Section 10 of UAPA which stipulates that if an association is declared unlawful, a person who is and continues to be a member of such association would be liable for punishment. Thus, in context of Section 10 of UAPA, the mere requirement on the part of the prosecution is to simply demonstrate that the person is member of such association. The element of *mens rea* or acting with intention in furtherance of activities of such unlawful association are missing and, therefore, no overt act is required to be proved by the prosecution, as far as Section 10 of UAPA is concerned.

80. We may refer to *Thwaha Fasal* (supra) wherein it is specifically observed that plain reading of Section 38 of UAPA would show that it would stand attracted only if the accused had associated himself or professed to associate himself with a terrorist organization with intention to further its activities. Such person may or may not be a member of terrorist organization but the above penal provision would stand attracted only if such association was with intention to further its activities. It was also observed that such activity has to be in connection with terrorist act, as defined in Section 15 of UAPA. It also observed that for Section 39 UAPA also, the alleged activities should have some connection with the 'terrorist act'.

81. Para 19 of *Thwaha Fasal* (supra) reads as under:-

> ***"19.*** *Thus, the offence under sub-section (1) of Section 38 of associating or professing to be associated with the terrorist organisation and the offence relating to supporting a terrorist organisation under Section 39 will not be attracted unless the acts specified in both the Sections are done with intention to further the activities of a terrorist organisation. To that extent, the requirement of mens rea is involved. Thus, mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. Even if an accused allegedly supports a terrorist organisation by committing acts referred to in clauses (a) to (c) of sub-section (1) of Section 39, he cannot be held guilty of the offence punishable under Section 39 if it is not established that the acts of support are done with intention to further the activities of a terrorist organisation. Thus, intention to further activities of a terrorist organisation is an essential ingredient of the offences punishable under Sections 38 and 39 of the 1967 Act."*

82. It also observed that insistence for any overt act or intention was not required when it comes to Section 10 of UAPA. In said case, as per the allegations, the concerned accused had allegedly knowingly and intentionally, associated themselves and acted as a member of a terrorist organization (Communist Party of India) (Maoist) whose name was already included in the First Schedule of UAPA. The accused were found in possession of documents supporting and published by such terrorist organization and according to prosecution, such possession was with the intention of supporting the above proscribed terrorist organization and for propagating its violent extremist ideology. In that case, the incriminating material, in the form of books and other printed material, was found from the possession of the accused and it was also found on the digital devices seized from one such accused. Hon'ble Supreme Court in *Thwaha Fasal* (supra) further observed as under:-

> ***"39.*** *Now the question is whether on the basis of the materials forming part of the charge-sheet, there are reasonable grounds for believing that accusation of commission of offences under Sections 38 and 39 against Accused 1 and 2 is true. As held earlier, mere association with a terrorist organisation is not sufficient to attract Section 38 and mere support given to a terrorist organisation is not sufficient to attract Section 39. The association and the support have to be with intention of furthering the activities of a terrorist organisation. In a given case, such intention can be inferred from the overt acts or acts of active participation of the accused in the activities of a terrorist organisation which are borne out from the materials forming a part of charge-sheet. At formative young age, Accused 1 and 2 might have been fascinated by what is propagated by CPI (Maoist). Therefore, they may be in possession of various documents/books concerning CPI (Maoist) in soft or hard form.*

> ***40.*** *Apart from the allegation that certain photographs showing that the accused participated in a protest/gathering organised by an organisation allegedly linked with CPI (Maoist), prima facie there is no material in the charge-sheet to project active participation of Accused 1 and 2 in the activities of CPI (Maoist) from which even an inference can be drawn that there was an intention on their part of furthering the activities or terrorist acts of the terrorist organisation. An allegation is made that they were found in the company of Accused 3 on 30-11-2019. That itself may not be sufficient to infer the presence of intention. But that is not sufficient at this stage to draw an inference of presence of intention on their part which is an ingredient of Sections 38 and 39 of the 1967 Act. Apart from the fact that overt acts on their part for showing the presence of the required intention or state of mind are not borne out from the charge-sheet, prima facie, their constant association or support of the organisation for a long period of time is not borne out from the charge-sheet."*

83. Thus, mere being found in possession of incriminating material, in hard form or soft form, would not be sufficient to hold that such possession was with the intention to further its activities. There has to be something more than that.

84. As already noticed above, while Section 10 penalizes mere membership or association with any unlawful association, Section 38 and Section 39 make such association penal only when the association or support, as the case may be, is done in furtherance of the activities of such terrorist organization.

85. We may also refer to *Arup Bhuyan* (supra). Said matter came to be placed before the Hon'ble Supreme Court of India by way of Reference, as according to the prevalent judgments, mere membership of a banned

organisation would not incriminate a person unless there was allegation that he had resorted to violence or incited people to violence or had done an act intended to create disorder or disturbances of public peace. In that case also, the reliance had been placed upon *Thwaha Fasal* (supra) but such contention was opposed by learned Solicitor General claiming that said decision (*Thwaha Fasal)* would not stand attracted while considering an offence under section 10 of UAPA as the judgment given in *Thwaha Fasal* pertained to a matter dealing with an offence under Section 38 of UAPA. It was also argued by learned Solicitor General that Section 38 and 39 of UAPA were worded differently as compared to the provision concerning criminalization of membership of a banned organization and, therefore, any observation made therein, while considering a different penal provision, may not be *stricto sensu* applicable in context of Section 10(a)(i) of UAPA.

86. Reference was answered observing that in context of Section 10(a)(i) of UAPA, mere membership of a banned organization was enough and it was not required to show or establish any overt act and/or in furtherance of criminal activities. Hon'ble Supreme Court observed that before any organization was declared unlawful association, a detailed procedure was required to be followed, including the wide publicity and even the right of any member of such association to represent before the Tribunal. Therefore, once any such particular association was declared unlawful, the person, who is a member of such unlawful association,

cannot be permitted to raise any grievance and if he continues as its member, despite the fact that it has been declared unlawful, it can be said that such person is acting in furtherance of its activities.

87. However, in view of specific language of section 38 and section 39 of UAPA, the aspect related to intention is required to be established, even for making out a *prima facie* case. There is no room for guess work.

88. In *Vernon* (supra) also, Hon'ble Supreme Court has observed that mere possession of the literature, even if the content thereof inspires or propagates violence, by itself cannot constitute any of the offences within Chapters IV and VI of the 1967 Act.

89. Thus, in view of our foregoing discussion, at best, the appellant can be said to be a highly radicalised person who believed in ideology of ISIS, a banned terrorist organisation. However, his such fascination with ISIS cannot be dubbed as if he was associated with ISIS and was furthering its cause.

90. We have seen the extracted data which was retrieved from the electronic device/mobile of the appellant. Even these do not advance the case of prosecution.

91. The mobiles were seized vide Memo D-76, even before the arrest of accused, and the Scrutiny Memo (D-140) contains the details of the files retrieved from his mobile. The description of such videos/images

has been given therein in comprehensive manner. Fact remains that he had merely downloaded all such images and videos. Some of such files were prepared from Instagram, by using screen recorder. Admittedly, there are certain videos and files of incriminating nature, which are bound to raise eyebrows but as already noticed above, he was merely downloading and storing its contents on his mobile and there is nothing on record which may indicate that he made any endeavour to disseminate or broadcast or transmit these to anyone. These images/videos/photographs can, though, give us some glimpse of what was travelling through his mind but fail to establish that he was acting in furtherance of activities of ISIS.

92. His co-accused A-4, who happens to be his close relative, had been radicalising him and was insisting that he may also undertake Hijrah to ISIS territory along with her and A-6. A hotel room was also booked but as admitted by the prosecution also, A-10 never went to Tehran. There is no chat or messaging between him and any of his co-accused which may depict that he himself, ever, wanted to undertake Hijrah or that he was acting in furtherance of ideology of ISIS.

93. The messages, which were exchanged between his co-accused, cannot be fastened upon him because he was never privy to such messages. Merely because he was following some news items related to Middle-East and Israel Palestine conflict or had been accessing hate

speeches of hard-line Muslim preachers, would not be enough to hold that he was acting in furtherance of a banned terrorist organisation. Therefore, invocation of Section 38 and 39 of UAPA seems erroneous and misplaced.

94. As we have already noticed above, the statutory bar contained under Section 43-D (5) would come into play only when the offence attributable to any such accused falls under Chapter IV and Chapter VI of UAPA. The appellant has not been charged with any offence punishable under Chapter IV and in view of our foregoing discussion, we feel that the material on record do not suggest commission of offence under Section 38 or 39 of UAPA, which fall under Chapter VI.

95. Admittedly, the accused had also been charged for commission of offence under Section 13 of UAPA. However, said offence falls under Chapter III of UAPA.

96. Consequently, we, hereby, allow the present appeal and direct that the appellant be released on bail on such terms and conditions, as the concerned learned Special Court may consider fit and proper. In case there is any violation of any condition imposed by the learned Trial Court or appellant attempts to threaten or influence any witness, directly or indirectly, or attempts to delay the trial, it would be open to prosecution to seek cancellation of bail, without any reference to this Court.

97. We also wish to clarify that the observations made hereinabove are tentative in nature and are purely for the purpose of deciding the bail. Learned Trial Court shall not feel persuaded by any of the observations made hereinabove which are, obviously, not a final expression about the merits of the case. We have, at the moment, confined ourselves to the bare allegations and, therefore, the learned Trial Court would be at liberty to come to any conclusion, after comprehensive analysis of evidence.

98. Appeal stands disposed of accordingly.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

MAY 06, 2024
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