

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

Reserved on : 14.01.2021

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Pronounced on : 28.01.2021

+ **CRL.M.C. 2560/2020**

NAJMUS SAKIB

..... Petitioner

Through: Mr. Trideep Pais and Ms. Megha
Bahl, Advocates.

versus

NATIONAL INVESTIGATION AGENCY Respondent

Through: Mr. Amit Sharma, SPP

+ **CRL.M.C. 2561/2020**

AL MAMUN KAMAL

..... Petitioner

Through: Mr. Trideep Pais and Ms. Megha
Bahl, Advocates.

versus

NATIONAL INVESTIGATION AGENCY Respondent

Through: Mr. Amit Sharma, SPP

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. The present petition has been filed under section 482 of the Code of Criminal Procedure, 1973 seeking to set aside the impugned orders dated 16.12.2020 passed by the Ld. Additional Sessions Judge-03, Special Judge,

NIA, Patiala House Court, New Delhi, whereby period of investigation and custody of above petitioners was extended for a further period of 45 days with the directions to the investigating agency to expedite the investigation.

2. The brief facts of the case are that petitioner Najmus Sakib is a twenty-two year old student of B.Sc (Honours) Computer Science at Dumkal College, Murshidabad affiliated to Kalyani University, West Bengal and he recently gave his 4th Semester examinations from Jail No. 8, Tihar Jail Complex where he is currently lodged. And petitioner Al Mamun Kamal is around 36 years old wage labourer, who last worked as a mason and driver during lockdown and his family holds the Priority Household ration card under the National Food Security Act, 2013. He is currently lodged in Jail No. 4, Tihar Jail Complex.

3. Briefly stated, it is stated in the present petitions that as per the FIR registered on 11.09.2020, the “suspected offence” was that a group of “jihadi terrorists” inspired by the globally proscribed terrorist organization Al Qaeda, consisting of more than 10 members mostly of Bengali origin were planning “anti-national/terrorist” activities at several locations in India. The present petitioners are not named in the said FIR.

4. Both the petitioners were arrested on 19.09.2020 in the early hours from their permanent residence at Murshidabad district, West Bengal. As per the seizure memo, a laptop, a phone, a personal diary, a bunch of 17 loose papers, xerox of a passbook and xerox of voter card were seized from the house of petitioner Najmus Sakib and his arrest was shown from BSF Camp, BOP, Jalangi, Murshidabad the same morning. From the house of

petitioner Al Mamun Kamal, as per the seizure memo, a money receipt book in the name of a Shiksha Madarasa, three phones (including two keypad ones), and some religious literature were seized pursuant to search operation. 8 other accused persons including the named accused were arrested on 19.09.2020 the same day. 2 other persons were also subsequently arrested on 26.09.2020 and 01.11.2020. Total eleven persons have been arrested in this case so far.

5. On the same day i.e. on 19.09.2020, both the petitioners were produced before the Special Judge, NIA, City Sessions Court, Kolkata, West Bengal, where the Transit remand was granted for the accused/petitioners to be produced before NIA Court, Patiala House Courts, New Delhi on or before 24.09.2020. On 22.09.2020, both the petitioners were produced before the Ld. Special Court, NIA Patiala House Courts, New Delhi where the applications seeking four days of police custody of both the petitioners were allowed.

6. On 26.09.2020, applications seeking thirty days judicial custody of both the petitioners were allowed and they were remanded to JC till 23.10.2020. On 22.10.2020 applications for extension of judicial custody of both the petitioners was allowed till 21.11.2020. On 21.11.2020, applications for extension of judicial custody of both the petitioners were allowed till 16.12.2020. Further on 10.12.2020 applications for extension of time for investigation and period of detention of both the petitioners were moved by the investigating officer and arguments were heard on the applications.

7. On 16.12.2020, the impugned orders were passed by the Ld. Trial Court, whereby the Ld. Trial Court extended the period of investigation and the period of detention of the petitioners herein by 45 days under S.43D(2)(b) of the UAPA. Both the petitioners were remanded to judicial custody on the same date vide a separate order. Aggrieved by these impugned orders, the present petitions have been filed.

8. I have heard the Ld. counsel for the petitioners, Ld. SPP for the respondent and perused the records of the case.

9. Ld. counsel appearing for the petitioners submitted that the impugned orders remanding the petitioners to judicial custody and extending their detention by 45 days are arbitrary and without any basis. The application was moved 7 days before the 90th day of the petitioners custody were to expire were moved with the sole purposes of thwarting the petitioners right to move statutory bail U/s 167(2) of Cr.P.C.

10. It is further submitted that all the documentary and electronic evidence in the form of phone, laptop were already in the custody of the investigating officer since 19.09.2020, the day on which the petitioners were arrested, so there is no threat of destruction of the same by the petitioners. It is further submitted that when police custody of the petitioners was sought on 22.09.2020, it was submitted in the application by the respondent that data retrieved from electronic devices of the petitioners were under analysis and the same was needed to be confronted with them, so, their further police custody remand was not sought. It is further submitted that after 4 days of

the police custody and after being confronted with the retrieved data, the presence of the petitioners was not required.

11. It is further submitted that one of the ground taken by the investigating officer for non filing of the charge sheet is the delay in the analysis of the data retrieved from digital exhibits. It is further submitted that the application of the investigating officer reveals that the electronic exhibits were sent to CFSL Chandigarh on 05.10.2020 after two weeks of their seizure and a reminder was sent to CFSL only on 25.11.2020 and to the Indian Computer Emergency Response Team on 26.11.2020 after a delay of two months.

12. It is further submitted that a clone or “IOs copy” of the data submitted for analysis should have been taken from the CFSL in September itself for confrontation but the same was not done. It is further submitted that the investigating officer cites “pandemic situation” for delay in getting response from the CFSL but the same cannot be cited as a reason to deprive liberty to a citizen. Ld. counsel for the petitioner has relied upon “*S. Kasi Vs. State*” [2020 SCC OnLine SC 529, whereby the Supreme Court observed that the pretext of lockdown cannot be used to deny the rights of the accused U/s 167(2).

13. It is further submitted that another ground of delay cited is that the translations have not been done yet of the data retrieved or yet to be retrieved which pertains to taped conversations of the accused persons and the chats are in Bangla. It is further submitted that if the alleged conversations between the accused persons were not known till now, being

in Bangla, then how it was concluded that the same were incriminating and on what basis the petitioners were arrested.

14. It is further submitted that one of the main reason for granting of extension of time for investigation by the Ld. Trial Court is the voluminous nature of data retrieved from the digital exhibits being 243 GB but neither the application by the IO nor the order of the Court lays down the voluminous data retrieved. It is further submitted that no specific role of the petitioners has emerged during the investigation so far and even in the application filed on 10.12.2020, extension of period of investigation does not lay down any specific reason for detention of the petitioners. It is further submitted that the impugned order does not reflect independent scrutiny of progress of investigation by the public prosecutor or by the Court and do not reflect any independent application of mind by the public prosecutor. It is further submitted that the report of the public prosecutor is to be submitted before the Court and not to the investigating officer which reveals lack of independent exercise by the prosecutor in preparing his report. It is further submitted that petitioner Al Mamun Kamal is a daily wages earner and has a family to support and petitioner Najmus Sakib is a student of B.Sc (Honours) Computer Science.

15. On the other hand, it is submitted by the Ld. SPP for the respondent that during the investigation involvement of the petitioners alongwith 10 other persons had emerged and searches were conducted at their respective addresses on 19.09.2020 and many incriminating material and documents were seized. He further urged that during the investigation it has emerged

that the petitioners conspired with other accused persons to recruit members to the group which was inspired by the ideology and affiliated to terrorist organization Al-Qaeda. He further submitted that one Lap Top and one mobile phone alongwith some incriminating documents were seized from the residential premises of petitioner Najmus Sakib and 3 mobile phones alongwith incriminating documents were seized from the residential premises of petitioner Al Mamun Kamal on 19.09.2020 and the seized exhibits have been sent to CFSL for forensic analysis on 5.10.2020, report of which is awaited.

16. It is further submitted that priorities letters dated 25.11.2020 and 15.12.2020 were sent to CFSL to expedite the forensic analysis and submit the report. It is further submitted that after due follow up of the matter on regular basis, IO copy containing mirror image of mobile phones of the petitioners was received from CFSL on 25.12.2020 which is being scrutinized. It is further submitted that during scrutiny of the above data with the help of Bangali knowing persons, many incriminating chats between the group members as well as with Pakistan and Bangladesh based Al Qaeda handlers was found. All the chats were short listed and sent to various translation agency to provide translation of the chats from Bengali to English on 07.12.2020 and the report is awaited and the reminder was sent to translation agency on 29.12.2020. It is further submitted that the reply was received from the various translating agency on 29.12.2020, whereby it was intimated that 10 translators have been deployed for this work and only

40% of the work could be completed as the volume of data is more than 20000 pages.

17. It is further submitted that Public Prosecutor had given proper justification in his PP report submitted before the Special Court and after perusing the PP report, the Special Court granted extension of investigation period beyond 90 days for 45 more days under the provisions of Section 43D(2)(b) of UA(P) Act 1967 and the petitioners have not been able to show any exceptional circumstances to warrant interference with the order of the Ld. Special Judge NIA.

18. It is further submitted that on 14.12.2020, statement U/s 164 Cr.P.C of a crucial witness has been recorded which clearly highlights the role of the accused person. It is further submitted that the police custody remand of petitioners was taken for 4 days during the initial stage of investigation. They were examined to unearth the conspiracy and to know the name of his accomplices and at that time forensic analysis report of seized electronic exhibits were not available and as such they could not be confronted with the data but now IO copy of mirror image of seized electronic exhibits have been received from CFSL on 25.12.2020 which is being analyzed so that subsequently he could be taken into police custody for confrontation.

19. It is further submitted that digital exhibits seized in Kerala on 19.09.2020, was brought to Delhi on 21.09.2020 and the same were sent to CFSL on 22.09.2020. Further exhibits seized in Murshidabad on 19.09.2020 were received by the CIO at Delhi on 22.09.2020. It is submitted that as 9 accused persons were in police custody, they were being examined

regarding their roles, associates and other facts relevant to the investigation and since the digital exhibits were very large in number, they were sent to different CFSL's to distribute their work load so that report could be obtained at an early date and reminders were accordingly sent to the CFSL's for early report. It is further submitted that CFSL did not provide IO copy immediately and it was provided only on 25.12.2020 after three reminders and it is being scrutinized. It is further submitted that thereafter accused persons need to be confronted with the data for the purposes of further investigation and the accused persons are to be confronted with the data obtained with the digital exhibits of other accused persons also specially in the light of chats and communication which took place between group members of various encrypted and secure platforms. It is submitted that the data is voluminous and due to Covid-19 pandemic and shortage of staff, the analysis is taking time and further the pandemic situation has not affected the pace of investigation and the investigation has been carried out in remote locations at West Bengal as well as Kerala.

20. It is further submitted that large number of phone calls of the petitioners were recorded and a summary report was obtained, wherein incriminating conversations regarding procurement of weapon etc. had taken place between the group members. It is further submitted that as 70 numbers of calls have been recorded, transcript of the calls took substantial time and the same has now been received and the petitioners are to be examined in the light of the findings of the transcript. It is further submitted that all the issues have been specifically dealt by the Special

Judge and the order has been passed on correct appreciation of facts and submission in the PP report.

21. In the instant case, the Ld. Special Judge (NIA) has extended the period of investigation and custody of petitioners for a further period of 45 days with the directions to the investigating agency to expedite the investigation on an application U/s 43D [2(b)] UA(P) Act moved for seeking extension of investigation period / detention of the petitioners.

22. In *State Vs. Shakul Hameed, (2019) 6 SCC 350*, the Supreme Court has declared as to what are the ingredients for extension U/s 43D [2(b)] UA(P) Act, the same are :

- (1) It has not been possible to complete investigation within the period of 90 days;
- (2) A report to be submitted by the Public Prosecutor;
- (3) The said report indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 90 days.
- (4) Satisfaction of the court in respect of the Report of the Public Prosecutor.

23. The counsel for the petitioners has relied upon:

1. *Nayantara Gupta Vs. State of Maharashtra* [2020 SCC OnLine Bom 873]
2. *Shino John Vs. State of Kerala* [2018 SCC Online Ker 2392]
3. *Shaikh Moin Shaikh Mehmood Vs. State of Maharashtra* [2020 SCC OnLine Bom 968, Division Bench]

4. Unnikrishnan Vs. State of Kerala [2015 SCC OnLine Ker 31590, Division Bench].
 5. Notifications by Ministry of Home Affairs on “Unlock” or Reopening” dated 29.08.2020, 30.09.2020 and 27.10.2020.
 6. Hitendra Vishnu Thakur Vs. State of Maharashtra [(1994) 4 SCC 602].
 7. Sanjay Kumar Kedia Vs. Intelligence Officer, NCRB [(2009) 17 SCC 631]
 8. S. Kasi V. Stae [2020 SCC OnLine SC 529]
 9. S. Karan Vs. State [2015 SCC On Line Kar 5017]
24. The Ld. SPP for the respondent has relied upon:
1. The State of Maharashtra Vs. Surendra Pundik Gadling and Ors. 2019(3) SCALE 379.
 2. Syed Maqbool Vs. National Investigation Agency 2014(4) JCC 2854.
 3. Ishrat Jahan Vs. State 2020 SCC OnLine Del 862.
 4. Sharjeel Imam Vs. State (NCT of Delhi) 2020 SCC OnLine Del 734.
 5. Mohd. Maroof @ Ibrahim & Ors. Vs. State MANU/DE/1552/2015.
25. As far as the contention of the Ld. counsel for the petitioners that neither the Ld. APP nor the Ld. Special Judge has applied their mind and the application has been moved by the Ld. APP without satisfying himself as to whether there is any requirement for seeking further extension of the custody and the application for extension of investigation period has been moved under the signatures of the IO and that Special Judge has extended

the remand period in a mechanical manner and without application of mind has no force in it.

26. In the present case, the application/report clearly depicts the reasons for not completing the investigation in 90 days. The application/report also discloses the progress made in the investigation and the reasons for extending the investigation beyond the period of 90 days. The relevant paragraphs are reproduced as under:

“12. That during the investigation it emerged that all associates appear to be highly radicalized and motivated to commit terrorist acts and further their jihadi ideology and activities. Several incriminating chats, photos and videos were found in the data extracted from the mobile phone of accused Murshid Hasan @ Sofiq (A-1), as per IO copy of the data received from Cert-In, New Delhi. Accused person along with his associates was active on various social medial platforms i.e. Telegram, Facebook etc. and hatched a conspiracy for mobilizing and raising funds for procuring weapons and committing disruptive acts. Scrutiny of the above mentioned data of Telegram, Facebook and WhatsApp of the Murshid Hasan @ Sofiq (A-1) was done and the same has been sent to Anubhav Multilingual Services [Registred Translation Firm) for the translation from Bengali to English. The scrutiny of the data extracted from the mobile device of Iyakub Biswas (A-6) is being done which would then be sent to Anubhav Multilingual Services for translation from Bengali to English.

13. That electronic exhibits seized from the accused persons have been sent to Cert-In on 22.09.2020 and CFSL, Chandigarh on 05.10.2020 and request was made to complete the data extraction and submit the report at the earliest. However, the same is awaited till date and in this regard, reminder letter dated 25.11.2020 was sent to CFSL Chandigarh and letter dated 26.11.2020 was sent to Cert-In, New Delhi to expedite the

process of submitting the report. However, CFSL Chandigarh has stated as the number of digital exhibits is very large (02 Laptop, 15 mobiles, 37 sims, 06 SD card) and due to pandemic situation, there is acute shortage of staff. The CFSL authorities assured that the analysis is under process and the report would be sent at the earliest. The data from the digital exhibits of 8 (eight) accused persons is to be received from CFSL Chandigarh. They have been also requested to submit the IO Copy of the data at the earliest so that the same could be scrutinized and translated. The IO Copy of the digital exhibits of 2 (two) accused have been received from Cert-In, New Delhi and the date for 1 (one) accused is yet to be received. As such till date the extracted data of total nine (9) accused persons are yet to be received. After receiving the extracted data from CFSL, Chandigarh and Cert-In, New Delhi, the same has to be scrutinized and translated. This data would be voluminous and crucial for unearthing the conspiracy hatched by this group. Based on the new facts which are likely to be discovered after scrutiny of the data, the examination of accused persons would be required in the interest of investigation.

14. That during investigation done so far, large number of phone calls of above arrested accused persons were recorded which need to be translated from Bengali to Hindi which is voluminous in nature. The same needs to be analyzed as it may result in discovery of new facts relevant to the investigation of the said case. Further various electronic exhibits were seized and sent to CFSL and forensic report is awaited, which upon receipt needs to be translated and analyzed in order to unearth the entire conspiracy. During investigation some facts related to Orissa, Bihar and J&K have been emerged which needs filed investigation in the interest of the case. Further mirror image of mobile data of accused Murshid Hassan @ Sofiq (A-1) and Iyakub Biswas (A-6), received from Cert-in contain lots of incriminating chats/documents/images in Bengali language which need to be translated from Bengali to English and the

same has been sent to translation agency but the report is awaited.”

27. In “*State of Maharashtra Vs. Surendra Pundlik Gadling (2019) 5 SCC 178*”, there was no report by the APP but there were two applications, by the police (one by the investigating Officer and other by the State of Maharashtra through ACP. The later application only carried an endorsement by the APP. The issue before the Court was, whether the said documents could be considered to be the report of the APP. The Court acknowledged the infirmities in the two reports and held:

“A clarity in the form of a proper endorsement by the public prosecutor that he had perused the grounds in the earlier document submitted by the IO and, thus, was satisfied that a case had been made out for extension of time to complete the investigation would have obviated the controversy”

28. In *Gadling (supra)*, it was held that even without such a report by the APP, endorsement on the IOs application would suffice. In the present case, the application for extension has been endorsed by the APP and as held in Judgment “*supra*” that it “is more of substance than form” which is the question in each case. Therefore, in my opinion, the report satisfies the requirement of Section 43 of UA(P) Act.

29. As far as the question of non application of mind by the Ld. ASJ in passing the impugned order mechanically is concerned, the relevant portion of the impugned order is reproduced hereinbelow:

“I have considered the rival submissions and gone through the CD and PP report.

The main contention of Ms. Megha Bahal, counsel for accused No. 5 and 12 is that the entire documentary evidence is already in the custody of NIA and investigating agency cannot cite pandemic for keeping the accused in custody. In this regard, she has relied upon the judgment of Hon'ble Supreme Court in S. Kasi Vs. State (2020 SCC OnLine SC 529). While so arguing, it is contended that electronic exhibits were sent to CFSL only on 05.10.2020 i.e. two weeks after their seizure and reminder was sent to CFSL only on 25.11.2020 and to CERT-In on 26.11.2020 i.e. after a delay of almost two months. A clone of the data should have been taken from CFSL in September itself but it was not done. IO has not given any specific averment about the A-5 and A-12.

Considering the submission, it is correct that long time has been taken for this report. However, in order to ensure fair investigation, FSLs have not been kept under the control of investigating agency and therefore, investigating agency cannot be held responsible for the delay caused by FSL in sending the digital data after its retrieval. It is correct that pandemic cannot be allowed to be used by the investigating agency for not completing the investigation. However, it is not a ground taken by investigating agency for not completing the investigation should not have taken 180 days but as the data is around 243 GB, it cannot be translated in a very short period and even after the translation, its analysis and investigation is required, which would certainly take more time.

It is further contended that the application reveals that there is not a single averment against A-5 and A-12 and therefore, ld. PP has not assessed how detention of A-5 and A12 will help the investigation. Ld. Counsel has relied upon the judgment of Hon'ble Supreme Court in Hitendra Vishnu Thakur V. State of Maharashtra, (1994) 4 SCC 602 and Sanjay Kumar Kedia V. Intelligence Officer, NCRB (2009) 17 SCC 631 wherein Hon'ble Supreme Court had

laid down conditions to be specified for seeking extension of investigation period and that compelling reasons need to be shown for allowing application seeking extension of period of investigation and it should not be merely granted because the investigating agency has asked for it.

There is no contest to the legal propositions cited by Id. Counsel. However, given the fact that the present investigation involves a large number of accused, its geographical extent is from West Bengal to Kerala, it involves a huge digital data for retrieval of which, the agency is dependent upon an independent agencies such as FSL and CERT-In, the data already recovered which is required to be analyzed is 243 GB, I find that it cannot be rather it is the reason given by FSL Chandigarh for not retrieving the data due to shortage of staff on the issue of COVID-19 pandemic. Thus, its something which was beyond the control of the investigating agency.

As regards the objection that the investigating agency has not stated whether they have received data from the digital exhibits of A-5 and A-12, it has been submitted by the Ld. Spl. PP that they have not received any such data and therefore, as data from digital exhibits from a large number of accused is yet to be received, investigation is going to take time. Therefore, I find that it is not on the ground of pandemic that NIA is seeking extension of period of investigation but for the reasons that it has not received digital evidence from FSL.

On inquiries, it is submitted by CIO that the data which has been sent by CFSL is around 243 GB. Thus, I find that it would certainly require a detailed analysis and would take long time to analyze such a huge data and therefore, it cannot be said that investigation could not be completed because of the laxity on the part of investigating agency.

30. The most relevant para of the impugned order which clearly shows the due application of mind by the Ld. ASJ is as follows:

“In these circumstances, the application at hand is allowed. However, I find that accused have already been in custody for a long time and therefore, a blanket extension of 90 days as sought by the investigating agency cannot be granted. Therefore, U/s 43D(2) (b), period of investigation and custody of accused is extended for a further period of 45 days with the directions to the investigating agency to expedite the investigation. Copy of order be sent to NIA as well as to the counsels.”

31. The investigating agency in the instant case has sought extension for a period of 90 days but the Ld. ASJ granted extension only for a period of 45 days, which clearly shows that after considering the progress of investigation in the case, custody period was extended not to 90 days as prayed for by the respondent but only to 45 days.

32. One of the contentions of the Ld. counsel for the petitioners is that there were no compelling reason for extension of custody as all the material for investigation was available with the respondent and the respondent has been slow in proceeding with the investigation. He further argued that the non receiving of the report from the CFSL Chandigarh cannot be a ground to claim delay in investigation and he relied upon “*S. Kasi Vs. State [2020 SCC OnLine SC 529]*”. I have already reproduced hereinabove in the judgment the nature of investigation carried out by the respondent till the filing of the application/report. The grounds as enumerated in the application/report are sufficient enough to extend the period for carrying out the investigation and the same cannot be faulted. The said judgment is not

applicable to the facts of the present case. In the said case the Supreme Court was examining a situation where the fact of non filing of charge sheet qua the infeasible right of the accused U/s 167 (2) Cr.P.C was interpreted and the scope of provision similar to Section 43D (2) proviso UA(P) Act was not before the Court. In fact S Kasi's case is governed by the provisions of CrP.C. and not UA(P) Act. The judgment would be relevant if the prosecution does not file charge sheet within 180 days.

33. One of the contention of the counsel for the petitioner is that the filing of the application / report 7 days prior to the expiry of 90th day clearly shows the malafide and has been done only with the sole purpose to deny the statutory bail to the petitioner. I find no force in the contention of the counsel for the petitioner because UA (P) Act provides for extension of period of investigation for a further period of 90 days i.e. totaling to 180 days. It is only when the prescribed period of completing the investigation is expiring and the investigation is not complete in that event the application for extension of period of investigation lie. In case the application is moved much prior to the period prescribed for completing the investigation, it would clearly be premature as there would be much time left for completing the investigation within the prescribed period of investigation. In any case there is no time period provided for moving such application, in case the investigation is not complete within the prescribed period despite efforts.

34. As far as the contention that there was no compelling reasons, seeking extension of time for completing the investigation, hereinabove in the judgment I have already held that there was justifiable grounds made out by

the respondent in the application / report for seeking the extension. Moreover, the Ld. ASJ after due application of mind extended the period to only 45 days as against the 90 days as claimed by the respondent.

35. Therefore, in view of the discussions, mentioned hereinabove, I find no merit in both the petitions, the same are, therefore, dismissed.

36. Trial court record be sent back forthwith alongwith a certified copy of this judgment.

RAJNISH BHATNAGAR, J

JANUARY 28, 2021

Sumant

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