

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2023

DATE OF DECISION : 31.08.2023

CORAM :

The Hon'ble Mr.JUSTICE M.SUNDAR  
and  
The Hon'ble Mr.Justice R.SAKTHIVEL

Criminal Appeal Nos.1317 and 1319 of 2022

1.Mohamed Hasan Kuthous  
@ Kuthous @ Thuyavan (A1)

2.Mohamed Bilal Maraikayar (A2)

3.Badrudeen (A3)

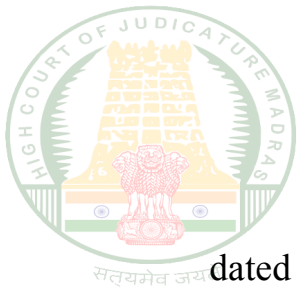
.. Appellants in  
both appeals

Vs.

State rep by  
Inspector of Police,  
Town Police Station,  
Karaikal  
(In Crime No.221 of 2022)

.. Respondent in  
both appeals

**Criminal Appeal No.1317 of 2022** has been filed under Section 21 of the National Investigation Agency Act, 2008 to call for the entire records in connection with impugned further remand extension order passed by learned Sessions Judge at Karaikal Court in Cr.M.P.No.408 of 2022,



Crl.A.Nos.1317 and 1319 of 2022

dated 22.12.2022 and set aside the same and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstance of the case and thus render justice.

**Criminal Appeal No.1319 of 2022** has been filed under Section 21 of the National Investigation Agency Act, 2008 to call for the entire records in connection with the impugned order passed by learned Sessions Judge at Karaikal Court in Cr.M.P.No.409 of 2022 dated 22.12.2022 and set aside the same and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstance of the case and thus render justice.

For Appellants  
in both criminal appeals : Mr.S.Shunmugavelayutham,  
Senior Advocate for  
Mr.S.K.Syed Eliyas

For Respondent  
in both criminal appeals : Mr.K.S.Mohandass  
Public Prosecutor (Puducherry)  
assisted by  
Ms.N.Danalatchoumy

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### COMMON JUDGEMENT

**M.SUNDAR, J.**

This common judgment will now govern the captioned two statutory Criminal Appeals which have been filed in this Court under

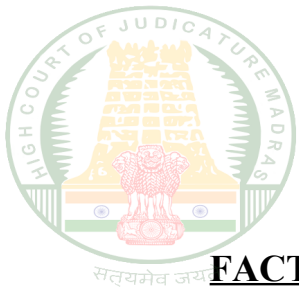


Crl.A.Nos.1317 and 1319 of 2022

Section 21 of the National Investigation Agency Act, 2008 (Act 34 of 2008).

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2 As we are conscious of the time line prescribed for disposal of statutory appeals under Section 21(2) of NIA Act (as far as possible within a period of three months from the date of admission of the appeal), at the out set, we deem it appropriate to make it clear that the date on which Hon'ble Predecessor Division Bench issued notice (i.e., 28.12.2022) is taken as date of admission and further record that when the captioned criminal appeals were taken up for hearing, owing to factual matrix on hand, it came to light that this Court had to await verdict qua reference to a Larger Bench in Hon'ble Supreme Court vide Kapil Wadhawan case being ***Enforcement Directorate, Government of India Vs. Kapil Wadhawan*** [Criminal Appeal Nos.701-702 of 2020, dated 27.03.2023]. To be noted, the question of whether the date of remand should be included for computing the 90 days time line for filing final report under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974) is a question which gains immense significance (it is in the nature of a clincher owing to the factual matrix of this case and more particularly the chronology in which events unfurled).



**FACTUAL MATRIX AND PROCEEDINGS MADE IN EARLIER**

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**LISTINGS:**

3 This common judgment has to be read in conjunction with and in continuation of proceedings made by this Court in listings on 09.02.2023, 14.02.2023 and 23.02.2023 which read as follows:

**Proceedings dated 09.02.2023 :**

Captioned two criminal appeals are statutory appeals under Section 21 of 'National Investigation Agency Act, 2008 [Act 35 of 2008]' [hereinafter 'NIA Act' for the sake of brevity and convenience].

2.In this proceedings, from here on captioned Crl.A.No.1317 of 2022 and Crl.A.No.1319 of 2022 shall be referred to as 'I Appeal' and 'II Appeal' respectively and collectively as 'captioned criminal appeals' for the sake of convenience and clarity.

3.Mr.S.Shunmugavelayutham, learned Senior Counsel instructed by Mr.S.K.Syed Eliyas, learned counsel on record for the appellants in both the captioned criminal appeals and Mr.K.S.Mohandoss, learned Public Prosecutor for Union Territory of Puducherry for respondent in both captioned criminal appeals are before us. There are three appellants in both the appeals and the three appellants, i.e. Appellant Nos.1, 2 and 3 are Accused Nos.1, 2 and 3 respectively in Crime No.221 of 2022 on the file of the Town Police Station, Karaikal for alleged offences under Sections 153-A, 120-B, 505(1)(c), 505(2) of 'The Indian Penal



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Code [45 of 1860]' [hereinafter 'IPC' for the sake of brevity and convenience] and Section 13(1)(b) of 'The Unlawful Activities [Prevention] Act, 1967 [Amendment 2012]' [hereinafter 'UAPA' for the sake of brevity and convenience].

4.The three appellants were remanded to judicial custody on 23.09.2022 and ninety days therefrom elapsed on 21.12.2022 is learned senior counsel's say. One day before ninety days elapsed i.e., on 20.12.2022 the prosecution filed a petition in Cr.M.P.No.408 of 2022 under Section 43- D(2)(b) of UAPA with a prayer for extension of period of detention beyond ninety days. To be noted, vide Section 43-D(2)(e) of UAPA a proviso has been added to Section 167(2) of 'The Code of Criminal Procedure, 1973 [2 of 1974]' [hereinafter 'Cr.P.C' for the sake of brevity and convenience].

5.Before we proceed further, we have noticed one aspect of the matter regarding Section 43-D(2)(b) of UAPA and we deem it appropriate to record the same for convenience in the days to come. Section 43-D(2)(b) of UAPA talks about proviso in singular as regards Section 167(2) of Cr.P.C. As of today Section 167(2) of Cr.P.C. has more than one proviso. We find that Sections 43-A to 43-F of UAPA was inserted in UAPA with effect from 31.12.2008. It appears that as of 31.12.2008 there was only one proviso to Section 167(2) of Cr.P.C. as the second proviso to Section 167(2) of Cr.P.C. has been inserted in Cr.P.C. only with effect from 31.12.2009. This appears to be the reason as to why Section 43-D of UAPA talks about proviso in singular and not 'provisos' though Section 167(2) of Cr.P.C. has more than one



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proviso as of today.

6.We now revert to the cases on hand i.e., captioned criminal appeals.

7.As regards the aforementioned Cr.M.P.No.408 of 2022 filed by the prosecution for extension of remand beyond ninety days, the same was taken up along with Cr.M.P. filed by the appellants being Cr.M.P.No.409 of 2022 under Section 167(2) of Cr.P.C. seeking what can be loosely referred to as 'default bail', for the sake of convenience as charge sheet had not been filed within ninety days.

8.Cr.M.P.No.408 of 2022 filed by the prosecution was taken up by the Sessions Court and the request was acceded to after hearing both sides in and by an order dated 22.12.2022. By an order of even date i.e., 22.12.2022 Cr.M.P.No.409 of 2022 filed by the appellants for statutory bail was rejected.

9.Assailing the aforementioned two orders, captioned two appeals i.e. I Appeal and II Appeal have been filed. The narrative thus far will make it clear that the decision in I Appeal will decide the fate of II Appeal. There is no disputation or contestation on this aspect of the matter before us.

10.In his campaign against the impugned order of extension of remand in I Appeal, learned senior counsel for the appellants made two main submissions and they are as follows:

(a) The reasons given in the report of the learned Public Prosecutor [Puducherry] regarding progress of investigation and specific reasons for detention of the accused beyond ninety days are not good enough for



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CrI.A.Nos.1317 and 1319 of 2022

acceding to the remand extension prayer.

(b)For extension of remand none of the three accused [three appellants before us] were produced before the Sessions Judge either in person or on a video platform. In support of this submission, learned senior counsel drew our attention to Section 167(2)(b) of Cr.P.C. which makes it clear that detention of the accused cannot be authorized without production of the accused either in person or through the medium of electronic video linkage.

11.In response to the above submissions, learned Public Prosecutor [Puducherry] submitted as follows:

(1)The reasons adduced in the report of the learned Public Prosecutor [Puducherry] qua the progress of investigation and the specific reasons for detention of accused beyond ninety days are good enough. The learned Public Prosecutor drew our attention to the petition of the prosecution under Section 43-D(2)(b) of UAPA in Cr.M.P.No.408 of 2022 and submitted that progress of investigation [five points] has been captured in the said petition.

(2)As regards production of accused before the Sessions Court, learned Public Prosecutor [Puducherry] initially sought time for getting instructions but later submitted on instructions that they were produced before the Sessions Court on 21.12.2022 in person.

12.Learned Public Prosecutor [Puducherry] sought time to



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produce the case diary to support his contention as regards production of the accused for extension of remand as the same is subjected to disputation and contestation by the appellants' counsel. To be noted, the orders that have been appealed against are silent about production of the accused before Sessions Court. Therefore with the caveat that the question whether material outside the orders can be looked into will be examined in ensuing listing and request of learned Public Prosecutor is acceded to.

13.List on 14.02.2023.

**Proceedings dated 14.02.2023 :**

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 09.02.2023.

2.Today also, Mr.S.Shunmuga Velayutham, learned senior counsel, instructed by Mr.S.K.Syed Eliyas, learned counsel on record for the appellants in both captioned criminal appeals, Mr.K.S.Mohandass, learned Public Prosecutor for Union Territory of Puducherry assisted by Ms.N.Danalatchoumy, learned counsel for respondent in both captioned criminal appeals are before us.

3.Certified copies of proceedings before trial Court i.e., Sessions Court was placed before us by both sides.

4.The undisputed position that emerges is as follows:

(i) The three accused were produced before the Sessions Court on 15.12.2022 for extension of remand and remand was extended till 29.12.2022 and the three were not produced before the Sessions Court in the interregnum;





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CrI.A.Nos.1317 and 1319 of 2022

(ii) The corollary of the above is, on 22.12.2022, when extension of remand application by the prosecution (CrI.M.P. No.408 of 2022) and default bail application of the accused (CrI.M.P.No.409 of 2022) were taken by the Sessions Court, the accused were not produced before the Sessions Court either in person or through the medium of electronic video linkage;

(iii) Considering the obtaining legal position, ninety days custody has to be computed by excluding either the date of remand or the date of filing of charge sheet for the purposes of Section 167(2) Cr.P.C. default bail;

(iv) In the cases on hand, CrI. M.P.No.408 of 2022 for extension of remand beyond ninety days by resorting Section 43-D(2)(b) of 'The Unlawful Activities [Prevention] Act, 1967 [Amendment 2012]' [hereinafter 'UAPA' for the sake of brevity and convenience] was filed by prosecution on 20.12.2022;

(v) As regards the dates i.e., undisputed dates, in the cases on hand, remand was on 23.09.2022, extension of remand beyond ninety days petition (CrI.M.P.No.408 of 2022) was filed by prosecution on 20.12.2022 and the petition for default bail under Section 167(2) of Cr.P.C. (CrI.M.P.No.409 of 2022) was filed by the three accused on 22.12.2022.

5. Learned Public Prosecutor (Puducherry) made



Crl.A.Nos.1317 and 1319 of 2022

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submissions. For continuation, list on Monday. List on 20.02.2023.'

**Proceedings dated 23.02.2023 :**

Read this in conjunction with and in continuation of earlier proceedings made in the captioned matters more particularly proceedings made on 09.02.2023 and 14.02.2023 which read as follows:

**Proceedings dated 09.02.2023:**

'Captioned two criminal appeals are statutory appeals under Section 21 of 'National Investigation Agency Act, 2008 [Act 35 of 2008]' [hereinafter 'NIA Act' for the sake of brevity and convenience].

2.In this proceedings, from here on captioned Crl.A.No.1317 of 2022 and Crl.A.No.1319 of 2022 shall be referred to as 'I Appeal' and 'II Appeal' respectively and collectively as 'captioned criminal appeals' for the sake of convenience and clarity.

3.Mr.S.Shunmugavelayutham, learned Senior Counsel instructed by Mr.S.K.Syed Eliyas, learned counsel on record for the appellants in both the captioned criminal appeals and Mr.K.S.Mohandoss, learned Public Prosecutor for Union Territory of Puducherry for respondent in both captioned criminal appeals are before us. There are three appellants in both the appeals and the three appellants, i.e. Appellant Nos.1, 2 and 3 are Accused Nos.1, 2 and 3 respectively in Crime No.221 of 2022 on the file of the



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CrI.A.Nos.1317 and 1319 of 2022

Town Police Station, Karaikal for alleged offences under Sections 153-A, 120-B, 505(1)(c), 505(2) of 'The Indian Penal Code [45 of 1860]' [hereinafter 'IPC' for the sake of brevity and convenience] and Section 13(1)(b) of 'The Unlawful Activities [Prevention] Act, 1967 [Amendment 2012]' [hereinafter 'UAPA' for the sake of brevity and convenience].

4.The three appellants were remanded to judicial custody on 23.09.2022 and ninety days therefrom elapsed on 21.12.2022 is learned senior counsel's say. One day before ninety days elapsed i.e., on 20.12.2022 the prosecution filed a petition in Cr.M.P.No.408 of 2022 under Section 43-D(2)(b) of UAPA with a prayer for extension of period of detention beyond ninety days. To be noted, vide Section 43-D(2)(e) of UAPA a proviso has been added to Section 167(2) of 'The Code of Criminal Procedure, 1973 [2 of 1974]' [hereinafter 'Cr.P.C' for the sake of brevity and convenience].

5.Before we proceed further, we have noticed one aspect of the matter regarding Section 43-D(2)(b) of UAPA and we deem it appropriate to record the same for convenience in the days to come. Section 43-D(2)(b) of UAPA talks about proviso in singular as regards Section 167(2) of Cr.P.C. As of today Section 167(2) of Cr.P.C. has more than one proviso. We find that Sections 43-A to 43-F of UAPA was inserted in UAPA with effect from 31.12.2008. It appears that as of 31.12.2008 there was only



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CrI.A.Nos.1317 and 1319 of 2022

one proviso to Section 167(2) of Cr.P.C. as the second proviso to Section 167(2) of Cr.P.C. has been inserted in Cr.P.C. only with effect from 31.12.2009. This appears to be the reason as to why Section 43-D of UAPA talks about proviso in singular and not 'provisos' though Section 167(2) of Cr.P.C. has more than one proviso as of today.

6.We now revert to the cases on hand i.e., captioned criminal appeals.

7.As regards the aforementioned Cr.M.P.No.408 of 2022 filed by the prosecution for extension of remand beyond ninety days, the same was taken up along with Cr.M.P. filed by the appellants being Cr.M.P.No.409 of 2022 under Section 167(2) of Cr.P.C. seeking what can be loosely referred to as 'default bail', for the sake of convenience as charge sheet had not been filed ninety days.

8.Cr.M.P.No.408 of 2022 filed by the prosecution was taken up by the Sessions Court and the request was acceded to after hearing both sides in and by an order dated 22.12.2022. By an order of even date i.e., 22.12.2022 Cr.M.P.No.409 of 2022 filed by the appellants for statutory bail was rejected.

9.Assailing the aforementioned two orders, captioned two appeals i.e. I Appeal and II Appeal have been filed. The narrative thus far will make it clear that the decision in I Appeal will decide the fate of II Appeal. There is no disputation or contestation on this aspect of the matter before us.



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Crl.A.Nos.1317 and 1319 of 2022

10. In his campaign against the impugned order of extension of remand in I Appeal, learned senior counsel for the appellants made two main submissions and they are as follows:

(a) The reasons given in the report of the learned Public Prosecutor [Puducherry] regarding progress of investigation and specific reasons for detention of the accused beyond ninety days are not good enough for acceding to the remand extension prayer.

(b) For extension of remand none of the three accused [three appellants before us] were produced before the Sessions Judge either in person or on a video platform. In support of this submission, learned senior counsel drew our attention to Section 167(2)(b) of Cr.P.C. which makes it clear that detention of the accused cannot be authorized without production of the accused either in person or through the medium of electronic video linkage.

11. In response to the above submissions, learned Public Prosecutor [Puducherry] submitted as follows:

(1) The reasons adduced in the report of the learned Public Prosecutor [Puducherry] qua the progress of investigation and the specific reasons for detention of accused beyond ninety days are good enough. The learned Public Prosecutor drew



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Crl.A.Nos.1317 and 1319 of 2022

our attention to the petition of the prosecution under Section 43-D(2)(b) of UAPA in Cr.M.P.No.408 of 2022 and submitted that progress of investigation [five points] has been captured in the said petition.

(2)As regards production of accused before the Sessions Court, learned Public Prosecutor [Puducherry] initially sought time for getting instructions but later submitted on instructions that they were produced before the Sessions Court on 21.12.2022 in person.

12.Learned Public Prosecutor [Puducherry] sought time to produce the case diary to support his contention as regards production of the accused for extension of remand as the same is subjected to disputation and contestation by the appellants' counsel. To be noted, the orders that have been appealed against are silent about production of the accused before Sessions Court. Therefore with the caveat that the question whether material outside the orders can be looked into will be examined in ensuing listing and request of learned Public Prosecutor is acceded to.

13.List on 14.02.2023.'

**Proceedings dated 14.02.2023:**

'Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 09.02.2023.

2.Today also, Mr.S.Shunmuga Velayutham, learned



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CrI.A.Nos.1317 and 1319 of 2022

senior counsel, instructed by Mr.S.K.Syed Eliyas, learned counsel on record for the appellants in both captioned criminal appeals, Mr.K.S.Mohandass, learned Public Prosecutor for Union Territory of Puducherry assisted by Ms.N.Danalatchoumy, learned counsel for respondent in both captioned criminal appeals are before us.

3.Certified copies of proceedings before trial Court i.e., Sessions Court was placed before us by both sides.

4.The undisputed position that emerges is as follows:

(i)The three accused were produced before the Sessions Court on 15.12.2022 for extension of remand and remand was extended till 29.12.2022 and the three were not produced before the Sessions Court in the interregnum;

(ii)The corollary of the above is, on 22.12.2022, when extension of remand application by the prosecution (CrI.M.P. No.408 of 2022) and default bail application of the accused (CrI.M.P.No.409 of 2022) were taken by the Sessions Court, the accused were not produced before the Sessions Court either in person or through the medium of electronic video linkage;

(iii)Considering the obtaining legal position, ninety days custody has to be computed by excluding either the date of remand or the date of filing of charge sheet for the purposes of Section 167(2) Cr.P.C. default bail;

(iv)In the cases on hand, CrI. M.P.No.408 of 2022 for extension of remand beyond ninety days by resorting Section 43-D(2)(b) of 'The Unlawful Activities



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CrI.A.Nos.1317 and 1319 of 2022

[Prevention] Act, 1967 [Amendment 2012]' [hereinafter 'UAPA' for the sake of brevity and convenience] was filed by prosecution on 20.12.2022;

(v)As regards the dates i.e., undisputed dates, in the cases on hand, remand was on 23.09.2022, extension of remand beyond ninety days petition (CrI.M.P.No.408 of 2022) was filed by prosecution on 20.12.2022 and the petition for default bail under Section 167(2) of Cr.P.C. (CrI.M.P.No.409 of 2022) was filed by the three accused on 22.12.2022.

5.Learned Public Prosecutor (Puducherry) made submissions. For continuation, list on Monday. List on 20.02.2023.'

2.Today, we find that the neat question that falls for consideration in the captioned matters has been referred to a Hon'ble Larger Bench of Hon'ble Supreme Court in Kapil Wadhawan case [Enforcement Directorate, Government of India Vs. Kapil Wadhawan and another] reported in 2021 SCC OnLine SC 3136], a Hon'ble Larger Bench has been constituted and now Hon'ble Larger Bench after hearing both sides has concluded the hearing and reserved orders. In other words, that very issue which falls for consideration in captioned Appeals is pending consideration and verdict (CAV) qua a Hon'ble Larger Bench of Supreme Court.

3.Be that as it may, for the sake of convenience, we deem it appropriate to extract and reproduce paragraph Nos.3 and 8 to 10 of Kapil Wadhawan case which read as follows:





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CrI.A.Nos.1317 and 1319 of 2022

'3.The core issue that arises for consideration is whether while computing the period of 90 days or 60 days as contemplated in Section 167 (2)(a)(ii) of the CrPC, the day of remand is to be included or excluded, for considering a claim for default bail.

8.Since the earlier position of law was not considered and the latest decision is of a 3 judges bench , it is necessary for a bench of appropriate strength to settle the law taking note of the earlier precedents. Unless the issue is appropriately determined, the courts across the country may take decision on the issue depending upon which judgement is brought to the Court's notice or on the Courts own understanding of the law, covering default bail under Section 167 (2)(a) II of CrPC.

9.In the above circumstances, we feel it appropriate to refer the above-mentioned issue to a larger Bench of this Court for an authoritative pronouncement to quell this conflict of views as the same shall enable the Courts to apply the law uniformly.

10.Accordingly, we direct the Registry to place all the relevant documents before the Hon'ble Chief Justice for constituting a bench of at least 3 judges to resolve the conflict in law on the issue of grant of default bail.'

4.A scanned reproduction of the proceedings of Hon'ble Larger Bench dated 09.02.2023 is as follows:



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CrI.A.Nos.1317 and 1319 of 2022

1

ITEM NO.101 COURT NO.3 SECTION II-A  
SUPREME COURT OF INDIA  
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NOS.701-702/2020  
ENFORCEMENT DIRECTORATE GOVERNMENT OF INDIA APPELLANT(S)

VERSUS

KAPIL WADHAWAN & ANR. RESPONDENT(S)

[TO GO BEFORE THREE HON'BLE JUDGES]  
IA No. 158737/2022 - APPLICATION FOR PERMISSION  
IA No. 80949/2022 - GRANT OF BAIL  
IA No. 152167/2022 - PERMISSION TO FILE ADDITIONAL  
DOCUMENTS/FACTS/ANNEXURES)

Date : 09-02-2023 These matters were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE K.M. JOSEPH  
HON'BLE MR. JUSTICE HRISHIKESH ROY  
HON'BLE MRS. JUSTICE B.V. NAGARATHNA

For Appellant(s) Mr. Tushar Mehta, Solicitor General (NP)  
Mr. S. V. Raju, ASG  
Mr. Sanjay Jain, A.S.G.  
Mr. Mukesh Kumar Maroria, AOR  
Mr. Kanu Agarwal, Adv.  
Mr. Rajan Kumar Choursia, Adv.  
Mr. Annam Venkatesh, Adv.  
Ms. Sairica Raju, Adv.  
Mr. Arkaj Kumar, Adv.  
Mr. Zoheb Hussain, Adv.

For Respondent(s) Mr. Kapil Sibal, Sr. Adv.  
Mr. Mukul Rohatgi, Sr. Adv.  
Mr. Amit Desai, Sr. Adv.  
Mr. Mahesh Agarwal, Adv.  
Mr. Ankur Saigal, Adv.  
Mr. Rohan Dakshini, Adv.  
Mr. Shubham Kulshreshtha, Adv.  
Mr. Kaustubh Singh, Adv.  
Ms. Kamakshi Sehgal, Adv.  
Ms. Pooja Kothari, Adv.  
Ms. Urvi Gupte, Adv.  
Ms. Kajal Dalal, Adv.  
Ms. Akanksha Saxena, Adv.  
Mr. E. C. Agrawala, AOR



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Mr. Shrirang B. Varma, Adv.  
Mr. Siddharth Dharmadhikari, Adv.  
Mr. Aaditya Aniruddha Pande, AOR  
Mr. Bharat Bagla, Adv.  
Ms. Kirsi Dabhech, Adv.  
Mr. Sarad Kumar Singhania, AOR  
Mr. Amit K. Nain, AOR

UPON hearing the counsel the Court made the following  
O R D E R

Criminal Appeal Nos.701-702/2020

Hearing concluded.

Order reserved.

(JAGDISH KUMAR)  
COURT MASTER (SH)

(RENU KAPOOR)  
ASSISTANT REGISTRAR



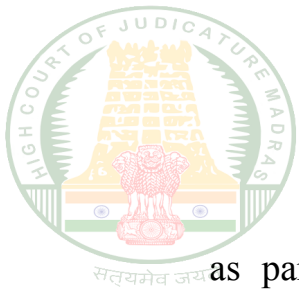
Crl.A.Nos.1317 and 1319 of 2022

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5. Therefore, we deem it appropriate to await the verdict of Hon'ble Larger Bench and this is more so owing to categorical observation made in paragraph No.9 of Kapil Wadhawan case that an authoritative pronouncement would enable the Courts to apply the law uniformly.

6. Adjourned sine die. It is open to both sides to mention before this Bench on Larger Bench of Hon'ble Supreme Court pronouncing its verdict.

4 The aforementioned proceedings / orders shall now be read as an integral part and parcel of this common judgment. This also means that short forms, short references and abbreviations used in the earlier proceedings will continue to be used in the instant judgment also for the sake of convenience and clarity. To be noted, 'The Unlawful Activities (Prevention) Act, 1967' is being referred to as 'UAPA' for the sake of brevity and convenience. This has been set out in paragraph 3 of 09.02.2023 proceedings and it has also been repeated in sub paragraph (iv) of paragraph 4 of 14.02.2023 proceedings. This is so set out twice as the two proceedings were made on two different dates. This really does not make any significant difference to the narrative but for the sake of clarity and specificity, we deem it appropriate to set out this aspect also



Crl.A.Nos.1317 and 1319 of 2022

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as part of the narrative. Besides this, in 09.02.2023 proceedings in paragraph 4, a typographical error has crept in. To be noted, this 09.02.2023 proceedings has been reproduced in 23.02.2023 proceedings. In paragraph 4 of 09.02.2023 proceedings, as we are talking about adding a proviso to Section 167(2) of Cr.P.C, the section in UAPA should read as Section 43-D(2)(b) but owing to inadvertent typographical error, it has been typed as Section 43-D(2)(e). Therefore, this shall be treated as Errata /Corrigendum and Section 43-D(2)(e) of UAPA in paragraph 4 of 09.02.2023 proceedings (which has been reproduced in 23.02.2023 proceedings also) shall be read as Section 43-D(2)(b) of UAPA. The aforementioned proceedings made in previous listings (reproduced supra) capture essential facts that are imperative for appreciating this judgment besides capturing the trajectory the captioned criminal appeals have taken before this Court. Therefore, we are not setting out the same again. However, we deem it appropriate to add to the aforementioned proceedings that FIR registered vide Crime No.221 of 2022 on the file of Town Police Station, Karaikal is for alleged offences under Sections 153-A, 120-B, 505(1)(c) and 505(2) of IPC and Section 13(1)(b) of UAPA. The prosecution case is that the appellants made certain posts in



Crl.A.Nos.1317 and 1319 of 2022

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social media which promotes enmity between different groups on the ground of religion and that they also made public utterances to the effect that one religion is subjected to wailing, helplessness, that such wailing and helplessness should also be perpetrated on persons professing other religions. This incites violence and affects religious harmony or in other words, promotes disharmony on religious grounds is the further case of the prosecution. In addition to the short forms / abbreviations used in proceedings made in earlier listings (reproduced supra and which now form an integral part and parcel of this judgment), 'The Court of Sessions Judge at Karaikal' will be referred to as 'said Trial Court' for convenience. Likewise, 'order dated 22.12.2022 in Cr.M.P.No.408/2022 in Cr.No.221/2022' shall be referred to as 'I impugned order' and 'order dated 22.12.2022 in Cr.M.P.No.409/2022 in Cr.No.221/2022' shall be referred to as 'II impugned order'. Further more, 'I and II impugned orders' together shall be collectively referred to as 'impugned orders' for the sake of convenience and clarity.

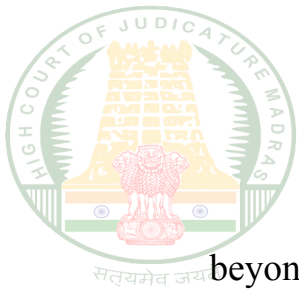
5 Be that as it may, we deem it appropriate to give critical undisputed dates in the form of a tabulation for the sake of convenience and for ease of reference in appreciating this order.



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<i>Sl.No.</i>	<i>Date</i>	<i>Event</i>
1	22.09.2022	FIR registered vide Crime No.221 of 2022 on the file of Karaikal Town Police Station against three appellants for alleged offences under Sections 153-A, 120-B, 505(1)(c), 505(2) of IPC and Section 13(1)(b) of UAPA.
2	22.09.2022	Appellants were arrested from their residences.
3	23.09.2022	Appellants remanded to judicial custody by jurisdictional Court.
4	20.12.2022	Cr.M.P.No.408 of 2022 filed by Prosecutor to extend the time period of detention beyond 90 days under Section 43D(2)(b) of UAPA
5	21.12.2022	90 days from the date of remand elapsed ( <b>applying Kapil Wadhawan principle</b> )
6	22.12.2022	Cr.M.P.No.409 of 2022 filed by appellants seeking default bail under Section 167(2) of Cr.P.C
7	22.12.2022	After filing of aforementioned default bail application by appellants, charge sheet filed at 11.00 a.m on 22.12.2022 in said Trial Court {to be noted, this is going by what has been categorically recorded in I impugned order (vide paragraph 5) by learned trial Judge}.
8	22.12.2022	Order made by trial court in Cr.M.P.No.408 of 2022, acceding to the extension prayer of Prosecution (I impugned order).
9	22.12.2022	Order made by trial court in Cr.M.P.No.409 of 2022 rejecting the default bail application of appellants (II impugned order).

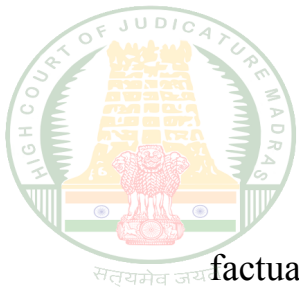
There is no disputation that the three accused (Appellants before this court) were not produced before trial court on 22.12.2022 when Crl.M.P.No.408 of 2022 for extension of the time period of detention



Crl.A.Nos.1317 and 1319 of 2022

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beyond 90 days was taken up. To be noted, not produced either in person or through the medium of electronic video linkage. To be noted, in our earlier proceedings dated 09.02.2023 vide paragraph 11(2), we had recorded the submission of learned Public Prosecutor [Puducherry] that accused were produced in person on 21.12.2022 but later the records of court below produced before us revealed that the accused were not produced before said trial court on 22.12.2022 either in person or through electronic video linkage when the petition for remand extension was taken up. The records also made it clear that accused were produced before said trial court on 15.12.2022 and thereafter only on 29.12.2022. This has been captured by us in sub paragraphs (i) and (ii) of paragraph 4 of earlier proceedings dated 14.02.2023. Learned Public Prosecutor [Puducherry] very fairly submitted that this is the correct position as is evident from the records of the court below. In this regard, advertent to what we have recorded earlier in paragraph 12 of 09.02.2023 proceedings, we make it clear that we have looked into only records of said trial court which made impugned orders and therefore, no material which is extraneous has been looked into for ascertaining this factual position. In any event, there is no dispute or contestation about the



factual position that accused were not produced before said trial court qua I impugned order.

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**RIVAL SUBMISSIONS :**

6 Before we proceed to analyze and discuss the arguments before us, we deem it pertinent to set out three points pertaining to our aforementioned earlier proceedings for the sake of clarity, specificity and they are as follows:

(i) In paragraph 5 of our 09.02.2023 proceedings, we have examined the reason behind the term 'proviso' qua Section 167(2) of Cr.P.C being mentioned in singular in Section 43D(2)(b) of UAPA. It is made clear that super adding to what has been set out in paragraph 5, it is to be noted that as on 31.12.2008 when Section 43D(2)(b) of UAPA kicked in, Section 167(2) of Cr.P.C had only one proviso and therefore, the term 'proviso' qua Section 167(2) is in singular in UAPA amendment though as of today (on and post 31.12.2008), there is more than one proviso to Section 167(2) Cr.P.C.;

(ii) In paragraph 9 of our proceedings dated





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Crl.A.Nos.1317 and 1319 of 2022

09.02.2023, we have mentioned that the decision on I appeal will decide the fate of the II appeal. In the light of the arguments that were advanced thereafter and the case laws that were pressed into service thereafter in further hearings in subsequent listings (post 09.02.2023), more particularly the argument that extension of time period of detention beyond 90 days plea of prosecution and default bail plea should have been taken up together and the argument that absent production of accused, bail plea should have been taken up first (to be noted, there shall be discussion and delineation on this infra elsewhere in this order) the scenario has changed as regards I Appeal deciding the fate of the II Appeal;

(iii) In sub paragraph (2) of paragraph 11 of 09.02.2023 proceedings, we had captured the submission of learned Public Prosecutor regarding production of accused before trial court qua I impugned order when the extension plea was acceded to. However,



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Crl.A.Nos.1317 and 1319 of 2022

as would be evident from the subsequent proceedings dated 14.02.2023 more particularly sub paragraph (ii) of paragraph 4 thereat, learned Public Prosecutor submitted on instructions that the accused were not produced before trial court qua I impugned order either in person or through the medium of electronic video linkage. To be noted, there is adequate and ample allusion to this aspect of the matter elsewhere supra in this order.

### **DISCUSSION AND DISPOSITIVE REASONING :**

7 We now proceed to set out our discussion and dispositive reasoning on the rival arguments / contentions one after the other infra. Learned Public Prosecutor [Puducherry] has filed counter affidavits in captioned criminal appeals reiterating the submissions made by him at the time of hearing.

8 The first point that was urged by learned Prosecutor is that the I Appeal is not maintainable and it ought not to have been entertained as order of Trial Court in Cr.M.P.No.408 of 2022 filed by the prosecution for 'extension of time period of detention beyond 90 days'



Crl.A.Nos.1317 and 1319 of 2022

(hereinafter 'extension prayer' for the sake of brevity and convenience)

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being an order acceding to extension prayer is an interlocutory order. To be noted, I Appeal is directed against order dated 22.12.2022 made by trial court in Cr.M.P.No.408 of 2022 which is an extension prayer petition and II Appeal is directed against order of Trial Court dated 22.12.2022 made in Cr.M.P.No.409 of 2022 which shall hereinafter be referred to as 'default bail petition' for the sake of convenience and clarity.

9 The argument of learned Prosecutor is that a statutory appeal under Section 21 of NIA Act will not lie against an interlocutory order. In support of this submission, learned prosecutor pressed into service an order made by a Hon'ble Full Bench of Gauhati High Court in ***(The State) The National Investigation Agency, Ministry of Home Affairs, Government of India, represented by the Superintendent of Police, NIA, Branch Office, Guwahati, Assam Vs. Akhil Gogoi*** being order dated 30.09.2022 in Crl.A.No.121 of 2020. Placing emphasis on this order and some observations thereat, learned Prosecutor contended that if trial court negatives the extension plea under Section 43D(2)(b), the prosecution will have the right of appeal under Section 21 but if the

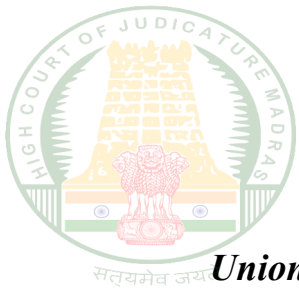


Crl.A.Nos.1317 and 1319 of 2022

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converse happens, i.e., if the plea is allowed, the accused will not have the right of appeal. We are unable to accept this argument on a simple and straight forward logic which reminds us of the age old adage 'Sauce for the Goose is Sauce for the Gander too'. If the logic is that extension plea refusal brings to end the proceedings in which such order was made and rights of parties are finally determined, the same would apply to an order acceding to the plea too. In this regard, we find that Gauhati High Court itself has specifically said that requirement of other party also is finally determined.

10 Therefore, looked at from any perspective, the argument of learned Prosecutor that extension prayer order is an interlocutory order does not hold water and we have no hesitation in saying that statutory appeal under section 21 of NIA Act will lie. Be that as it may, learned Senior Counsel for appellants pressed into service two case laws, both rendered by two different coordinate Hon'ble Division Benches of this Court. One is *Mubarak* case being *Union of India represented by Superintendent of Police, National Investigation Agency, Hyderabad Camp @ Chennai Vs. Mubarak @ Mohammed Mubarak* reported in *2018-1-L.W. (Crl.) 825* and the other is *Divan Mujibeer* case being



Crl.A.Nos.1317 and 1319 of 2022

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*Union of India represented by the Inspector of Police National Investigation Vs. Divan Mujipeer* reported in *2022 SCC OnLine Mad 1096 : (2022) 1 LW (Cri) 467*.

11 In *Mubarak* case, the issue as to seeking police custody belatedly, i.e., post first 15 days of remand arose and in that context, Hon'ble Division Bench after holding that NIA Act itself is a procedural law and drawing inspiration from oft quoted *Madhu Limaye Vs. State of Maharashtra* reported in *AIR 1978 SC 47* concluded that 'interlocutory order' is not defined either in Cr.P.C or in NIA Act and upheld the principle that an appeal being a proceeding preferred by an affected party before a superior forum seeking to rectify the wrong / erroneous order / decision of the court concerned is permissible when it turns on Article 21. The submission of learned senior counsel is that the case on hand is one such matter and therefore, as the extension order affects the rights of liberty of appellants, an appeal would lie argument appeals to us and we hold that it is acceptable.

12 In *Divan Mujipeer* case, another Coordinate Bench considered the question as to whether an order of remand is essentially an interlocutory order and further question as to whether an appeal under



Crl.A.Nos.1317 and 1319 of 2022

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Section 21 of NIA Act would lie against such order. Placing reliance on *State represented by Inspector of Police Vs. N.M.T.Joy Immaculate* reported in (2004) 5 SCC 729, another Hon'ble Coordinate Division Bench came to the conclusion that an order of trial court refusing to grant police custody is one where the police custody proceedings have come to an end and therefore, it is not an interlocutory order. On this basis, the sequitur principle laid down is, such an order would be a final order amenable to appeal under Section 21 of NIA Act. A careful perusal of *Divan Mujipeer* case brings to light that in *Joy Immaculate* case, Hon'ble Supreme Court has approved the test regarding interlocutory / final order laid down in *S.Kuppuswami Rao Vs. King [AIR 1949 FC 1]* way back in 1949. Therefore, it is clear that if the proceedings in which the order is made stands concluded / terminated and it affects the rights of a party, an appeal would lie. In the case on hand, extension plea being acceded to certainly concluded the extension plea proceedings and it cannot be gainsaid that it does not affect the rights of appellants (more particularly sanctus and sacrosanct right to liberty ingrained in Article 21 of Constitution). In the case on hand, the appellants cannot make a fresh default bail plea as section 173 Cr.P.C final report has since been filed.



Crl.A.Nos.1317 and 1319 of 2022

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Reverting to **Akhil Gogoi's** case pressed into service by learned Prosecutor, a further careful perusal of this **Akhil Gogoi** judgment made by Gauhati High Court brings to light that Hon'ble Bench addressed itself to the question as to whether an order refusing to extend the period of investigation upto 180 days under Section 43D(2)(b) of UAPA can be construed as a interlocutory order and as to whether such an order would have a bearing on the proceedings of trial court itself. Hon'ble Gauhati High Court came to the conclusion that such an order will qualify as a final order inasmuch as the proceedings in which such orders were passed came to an end and the rights of one of the parties had been finally determined and the requirement of the other party had also been finally determined. In this view of the matter, Hon'ble Bench concluded that the appeal against the order refusing to extend the period of investigation upto 180 days will lie. In this view of the matter, we have no hesitation in holding that an appeal under Section 21 of NIA Act would lie as against the order dated 22.12.2022 acceding to the prosecution prayer for extension of remand period.

13 Hon'ble Full Bench of this Court in **Jaffar Sathiq @ Babu Vs. State** reported in **2021-2-L.W. (Crl.) 323** in a reference qua two



Crl.A.Nos.1317 and 1319 of 2022

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questions viz., (i) whether an application against the order passed by the District and Sessions Judge in a matter concerning UAP Act shall be numbered as a bail application or an appeal? and (ii) whether, it has to be posted before the Single Judge or a two Judges Bench of this Court? had answered the reference saying that an order passed by a Court of Session dismissing a bail application in a case involving offence(s) under UAPA must be challenged only by way of an appeal under Section 21 of NIA Act and such an appeal would lie only before a Division Bench. As regards *Jaffar Sathiq @ Babu* case which answers the reference, Hon'ble Full Bench has held that dismissal of bail application in cases involving UAPA by trial court when challenged in the High Court under Section 21 of NIA Act, such appeal would lie only before a Division Bench under Section 21(2) of NIA Act. An appeal in the High Court against trial court order dismissing the bail plea qua UAPA is under Section 21(4) and not under Section 21(2) but Hon'ble Full Bench has answered the reference by saying that such appeal would lie only before a Division Bench vide Section 21(2) of NIA Act. At present, this being the obtaining position as there is no disputation or contestation in the captioned criminal appeals that appeal against dismissal of bail plea has





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to be heard by Division Bench, we have heard out the II Appeal also as a matter of judicial discipline. However, we make it clear that the issue as to Hon'ble Full Bench slotting a Section 21(4) appeal also under Section 21(2) is left open for being considered and / or for further reference if the need arises in a case where there is disputation or contestation in this regard. To be noted, operative portion in *Jaffar Sathiq @ Babu* case vide paragraph 21 reads as follows:

'21.....Consequently, the question(s) referred are answered thus:

“An order passed by a Court of Session dismissing a bail application in a case involving offence(s) under the Unlawful Activities (Prevention) Act, 1967, must be challenged only by way of an appeal under Section 21 of the National Investigation Agency Act, 2008. Consequently, such an appeal would lie only before a Division Bench vide Section 21(2) of the National Investigation Agency Act, 2008. The decision of the Division Bench of this Court in *A. Raja Mohammed* (supra) and that of a learned single Judge in *Abdulla* (supra) to the contrary, will stand overruled.”

The reference is, accordingly, answered on the aforesaid terms.'

14 The next argument is very crucial as that turns on accused



CrI.A.Nos.1317 and 1319 of 2022

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not being produced either in person or through the medium of electronic video linkage on 22.12.2022 when the two applications were taken up. In this regard, two undisputed facts have to be taken into account. One undisputed fact is, the accused were not produced before trial court either in person or through electronic video linkage on 22.12.2022 and the other undisputed fact is that the prosecution filed charge sheet in the trial court at 11.00 a.m on 22.12.2022 after the filing of default bail petition under Section 167(2) Cr.PC (Cr.M.P.No.409 of 2022) by accused. In this regard, the factual position / trajectory as captured by the trial court in the impugned order in Cr.M.P.No.408 of 2022 at paragraph 5 is as follows:

'5.On perusal of records, it is found that on 20.12.2022, the petitioner/complainant filed the petition for extension of detention period of the accused persons u/s Sec.43(D)(2)(b) Unlawful Activities (Prevention) Amendment Act, 2008. In which, notice has been ordered to the accused persons through their counsel on 21.12.2022, for objections if any and posted to 22.12.2022. In the mean time, the respondents/accused persons filed petition u/s 167(2) of Cr.P.C. seeking for granting statutory bail vide Cr.M.P.No.409/2022 dated 22.12.2022. After filing the petition u/s 167(2) Cr.P.C. by the petitioners/accused, the prosecution side has filed the charge



Crl.A.Nos.1317 and 1319 of 2022

sheet at 11.00 a.m. today (22.12.2022)....'

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(Underlining made by this Court for ease of reference)

15 Therefore, it is very clear that the default bail petition was filed by accused before filing of charge sheet / final report under section 173 Cr.P.C which means that the plea is clearly entertainable.

16 This takes us to the question as to whether the accused not being produced before trial court on 22.12.2022 either in person or through electronic video linkage vitiates the impugned order in I Appeal, i.e., order granting extension of remand period. Learned Prosecutor placed strong reliance on a judgment of Hon'ble Supreme Court rendered by a two Member Hon'ble Bench on 10.04.2023 in ***Qamar Ghani Usmani Vs. The State of Gujarat*** in Criminal Appeal Nos.1045-1046 of 2023 [SLP (Crl) Nos.011196-011197 of 2022]. Learned Prosecutor placed before us a unreported copy of the judgment and on further research, this Bench found that this ***Qamar Ghani Usmani*** case is reported in ***2023 SCC OnLine SC 380***. Learned Prosecutor placed strong reliance on paragraph No.7 thereat to say that if an accused does not exercise the right to grant statutory bail before charge sheet is filed, he



Crl.A.Nos.1317 and 1319 of 2022

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has to only seek a regular bail. In any event, if he files it in time, it cannot defeat the statutory right which had accrued to the appellants. Learned Prosecutor emphasised that the accused was given notice and a counsel was present and this will suffice. In this regard, our task is fairly simple because Hon'ble Supreme Court post *Qamar Ghani Usmani* rendered *Judgebir Singh* order on 01.05.2023, i.e., *Judgebir Singh alias Jasbir Singh Samra alias Jasbir and others Vs. National Investigation Agency* reported in *2023 SCC OnLine SC 543*. In *Judgebir Singh*, it was made it clear that it cannot be gainsaid that extension application by prosecution is pending and that an appropriate order (in bail application) can be made only after extension application is decided. Considering the importance of the observations, we deem it appropriate to extract and reproduce paragraphs 76 to 78 of *Judgebir Singh* case which are under the caption 'AN EYE-OPENER LITIGATION FOR THE NIA/STATE POLICE'.

**'AN EYE-OPENER LITIGATION FOR THE NIA/STATE POLICE**

**76.** As is evident from the chronology of dates and events referred to in the earlier part of our judgment, the final report under Section 173(2) of the CrPC was filed in the Court of



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Crl.A.Nos.1317 and 1319 of 2022

SDJM, Ajnala on 15.11.2019. 15.11.2019 was the 161st day from the date of arrest of two of the appellants before us, namely, Jasbir Singh and Varinder Singh. They were the first to be arrested on 08.06.2019. The Punjab Police applied to the Court of the Additional Sessions Judge, Amritsar, for extension of time to complete the investigation invoking the proviso to Section 43D(2)(b) of the UAPA on 04.09.2019. When this application for extension of time was filed only two days were left for 90 days to expire. This is suggestive of the fact that the 91st day would have fallen on 07.09.2019. What is important to highlight is that the Additional Sessions Judge, Amritsar, looked into the extension application dated 04.09.2019 filed by the Punjab Police and ultimately, extended the time limit *vide* its order dated 17.09.2019 i.e., on the 101st day. By the time, the Additional Sessions Judge, Amritsar, passed an order extending the time, the period of 90 days had already expired. Indisputably, there was no chargesheet before the Court on the 91st day i.e., on 07.09.2019. The reason why we say that this is a grey area is because what would have happened if the appellants Jasbir Singh and Varinder Singh had preferred an application seeking statutory/default bail under Section 167(2) of the CrPC on the 91st day i.e., on 07.09.2019. The application seeking extension of time was very much pending. The Additional Sessions Judge could not have even allowed such application promptly i.e., on or before the 90th day without giving notice to the accused persons. The law is now well settled in view of the decision of this Court in the



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Crl.A.Nos.1317 and 1319 of 2022

case of *Jigar alias Jimmy Pravinchandra Aditya v. State of Gujarat* reported in 2022 SCC OnLine SC 1290 that an opportunity of hearing has to be given to the accused persons before the time is extended up to 180 days to complete the investigation. The only error or lapse on the part of the appellants Jasbir and Varinder Singh was that they failed to prefer an appropriate application seeking statutory/default bail on the 91st day. If such application would have been filed, the court would have had no option but to release them on statutory/default bail. The Court could not have said that since the extension application was pending, it shall pass an appropriate order only after the extension application was decided. That again would have been something contrary to the well settled position of law. This litigation is an eye opener for the NIA as well as the State investigating agency that if they want to seek extension, they must be careful that such extension is not prayed for at the last moment.

77. The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the court. However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, or a report seeking extension of time is preferred before the Magistrate or any other competent court, the right to default bail would be extinguished. The court would be at liberty to take cognizance



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CrI.A.Nos.1317 and 1319 of 2022

of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

78. Our observations in paras 76 and 77 respectively as above are keeping in mind the decision of this Court rendered by a three-Judge Bench in the case of *Sayed Mohd. Ahmad Kazmi v. State (Government of NCT of Delhi)* reported in (2012) 12 SCC 1, wherein in paras 25, 26 and 27 respectively, this Court observed as under:

*“25. Having carefully considered the submissions made on behalf of the respective parties, the relevant provisions of law and the decision cited, we are unable to accept the submissions advanced on behalf of the State by the learned Additional Solicitor General Mr. Raval. There is no denying the fact that on 17-7-2012, when CR No. 86 of 2012 was allowed by the Additional Sessions Judge and the custody of the appellant was held to be illegal and an application under Section 167(2) CrPC was made on behalf of the appellant for grant of statutory bail which was listed for hearing. Instead of hearing the application, the Chief Metropolitan Magistrate adjourned the same till the next day when the Public Prosecutor filed an application for extension of the period of custody and investigation and on 20-7-2012 extended the time of investigation and the custody of the appellant for a further period of 90 days with retrospective effect from*



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CrI.A.Nos.1317 and 1319 of 2022

*2-6-2012. Not only is the retrospectivity of the order of the Chief Metropolitan Magistrate untenable, it could not also defeat the statutory right which had accrued to the appellant on the expiry of 90 days from the date when the appellant was taken into custody. Such right, as has been commented upon by this Court in Sanjay Dutt [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] and the other cases cited by the learned Additional Solicitor General, could only be distinguished (sic extinguished) once the charge-sheet had been filed in the case and no application has been made prior thereto for grant of statutory bail. It is well-established that if an accused does not exercise his right to grant of statutory bail before the charge-sheet is filed, he loses his right to such benefit once such charge-sheet is filed and can, thereafter, only apply for regular bail.*

*26. The circumstances in this case, however, are different in that the appellant had exercised his right to statutory bail on the very same day on which his custody was held to be illegal and such an application was left undecided by the Chief Metropolitan Magistrate till after the application filed by the prosecution for extension of time to complete investigation was taken up and orders were passed thereupon.*

*27. We are unable to appreciate the procedure adopted by the Chief Metropolitan Magistrate, which has been*





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CrI.A.Nos.1317 and 1319 of 2022

*endorsed by the High Court and we are of the view that the appellant acquired the right for grant of statutory bail on 17-7-2012, when his custody was held to be illegal by the Additional Sessions Judge since his application for statutory bail was pending at the time when the application for extension of time for continuing the investigation was filed by the prosecution. In our view, the right of the appellant to grant of statutory bail remained unaffected by the subsequent application and both the Chief Metropolitan Magistrate and the High Court erred in holding otherwise.” (Emphasis supplied)*

17 Besides the position that ***Judgebir Singh*** was rendered by Hon'ble Supreme Court post ***Qamar Ghani Usmani*** (*Qamar Ghani Usmani* order is dated 10.04.2023 and *Judgebir Singh* order is dated 01.05.2023), ***Judgebir Singh*** facts fits nicely nay snugly qua the factual matrix in captioned criminal appeals as the neat question which was answered by Hon'ble Supreme Court is, what happens when a accused exercises his right for statutory bail on 91<sup>st</sup> day and prosecution seeks extension of remand period beyond 90 days (for filing Section 173 Cr.P.C final report), i.e., extension of time upto 180 days and when both applications are before the Court. In ***Judgebir Singh***, such extension of



Crl.A.Nos.1317 and 1319 of 2022

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time application was filed by prosecution when only two days were left for 90 days to elapse. This prayer was acceded to by the trial court on 101<sup>st</sup> day. To be noted, Hon'ble Supreme Court had made it clear that if Judgebir Singh and Varinder Singh (accused in that case) had preferred a default bail application under Section 167(2) of Cr.P.C on the 91<sup>st</sup> day when the prosecution application for extension of time was pending, the Court would have had no option but to release them on statutory bail / default bail. Hon'ble Supreme Court further went on to clarify that trial court could not have said that extension application of prosecution is pending and it shall pass appropriate order in the bail application only after extension application was decided. One more facet of *Judgebir Singh* case is, Constitution Bench declaration of law in *Sanjay Dutt* case and order of another Hon'ble Bench in *Jigar alias Jimmy Pravinchandra Adatiya* case were reiterated. The reason why we adopt this approach is the celebrated and time honoured *Padma Sundara Rao* case [*Padma Sundara Rao Vs. State of Tamil Nadu* reported in (2002) 3 SCC 533], where Hon'ble Constitution Bench laid down the manner in which a case law precedent has to be considered. The most relevant paragraph in *Padma Sundara Rao* case is paragraph 9 and the same



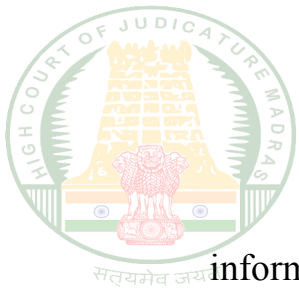
Crl.A.Nos.1317 and 1319 of 2022

reads as follows:

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'9.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board* [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom *British Railways Board v. Herrington*, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

18 As regards other points, we respectfully follow the Constitution Bench judgment in *Sanjay Dutt* being *Sanjay Dutt Vs. State through C.B.I., Bombay (II)* reported in (1994) 5 SCC 410. In the light of Article 145(3), it is well settled that the ratio of the Constitution Bench is a declaration of law. In *Sanjay Dutt*, it was held that the requirement of notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court



Crl.A.Nos.1317 and 1319 of 2022

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informing him that the question of extension of the period for completing the investigation is being considered, is necessary and subsequently in ***Jigar alias Jimmy Pravinchandra Adatiya Vs. State of Gujarat*** reported in ***2022 SCC OnLine SC 1290***, Hon'ble Supreme Court relying on ***Sanjay Dutt*** has made it clear that in such case where accused is not produced in Court, the accused need not even demonstrate prejudice when the point is projected.

19 In this view of the matter, we deem it appropriate to capture the submission of learned senior counsel that ***Qamar Ghani Usmani*** case is distinguishable on facts as that was a case where the accused were produced before trial court though at the time of first extension, accused were not produced. On a specific query as to how this factual distinction would come to the aid of the appellants, it was submitted that when the accused were not present, the principles that both petitions should have been taken up together and/or extension petition should be first taken up will not apply. In other words, it was argued that extension of remand petition ought not to have been taken in the absence of accused and the default bail plea should have been considered. In this regard, we remind ourselves that in ***Jigar alias Jimmy Pravinchandra Adatiya*** which was



Crl.A.Nos.1317 and 1319 of 2022

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reiterated in **Judgebir Singh**, Hon'ble Supreme Court had held that the accused need not demonstrate prejudice if not produced when extension petition is taken up.

20 A careful perusal of I impugned order and II impugned order or in other words impugned orders brings to light that said trial court had made impugned orders primarily on the ground that prosecution has filed the extension petition before 90 days elapsed (89<sup>th</sup> day) and default bail plea has been filed by appellants on the 91<sup>st</sup> day. (To be noted, trial court has clearly recorded in the impugned orders that section 173 Cr.P.C report was filed after the filing of default bail plea though on the same day). We find this reason to be one that II impugned order deserves to be interfered with as a default bail plea right remains inchoate till the 90<sup>th</sup> day elapses and it becomes an exercisable right only on the 91<sup>st</sup> day. This means that the appellants could not have filed default bail plea earlier and in any event, the charge sheet (section 173 Cr.P.C final report) has been filed only after the filing of default bail plea. As regards acceding to the extension plea of prosecution after having sought for extension on the 89<sup>th</sup> day by setting out five reasons (same have been extracted and reproduced infra elsewhere in this order), the prosecution filed the final



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report under section 173 Cr.P.C on the 91<sup>st</sup> day itself which means that the argument of appellants that extension plea has been made more for continued incarceration of appellants than for completing investigation gets sustained. For this reason, the I impugned order deserves to be interfered with. The sum sequitur is, both impugned orders deserve to be interfered with.

21 In the light of the narrative, discussion and dispositive reasoning supra, we reiterate the following findings :

(i)The default bail application under section 167(2) Cr.P.C being Cr.M.P.No.409/2022 ought to have been taken up first and the same having been filed on 91<sup>st</sup> day (before filing of charge sheet as recorded by said trial court) ought to have been decided;

(ii)Applying *Judgebir Singh* principle, said trial court would have had no option but to release the appellants on statutory / default bail;

(iii)The application of prosecution for extension of time ought not to have been taken up without production of accused before said trial court either in



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Crl.A.Nos.1317 and 1319 of 2022

person or through electronic video linkage. This is in the light of the declaration of law by a Constitution Bench in ***Sanjay Dutt*** case and further elucidation in ***Jigar alias Jimmy Pravinchandra Adatiya*** that in such cases, mere non production of accused before court when extension application of prosecution was taken up will suffice and it is not necessary to show prejudice. To be noted, both ***Sanjay Dutt*** and ***Jigar alias Jimmy Pravinchandra Adatiya*** have been reiterated by Hon'ble Supreme Court in ***Judgebir Singh***;

(iv)The prosecution which filed for extension of time / remand period (from 90 days to 180 days) by resorting to Section 43D(2)(b) of UAPA on 89<sup>th</sup> day giving five reasons ultimately filed charge sheet on 22.12.2022 on the 91<sup>st</sup> day itself. To be noted, as regards, Section 43D(2) of UAPA extension, it is not just *ipse dixit* of investigation but it is the report of the Public Prosecutor indicating the progress of the investigation and giving specific reasons for detention



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Crl.A.Nos.1317 and 1319 of 2022

of accused beyond 90 days. In the case on hand, five reasons including analysis of back up data in electronic devices said to have been seized from accused was cited but charge sheet has been filed in two days. This remains unexplained in the appellate court, i.e., this court also. Therefore, the argument of learned senior counsel for appellants that this extension prayer has been made only with the intention of prolonging the incarceration of appellants comes across as an argument that deserves to be sustained. To be noted, this is only a buttressing finding and it is not part of core finding or core dispositive reasoning leading to conclusion. Therefore, captioned criminal appeals deserve to be allowed.

22 We find our findings buttressed by some other aspects of the matter and they are as follows:

(a) In the case on hand, there is no Chapters IV and





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CrI.A.Nos.1317 and 1319 of 2022

VI offences qua UAPA and therefore, the rigor of Section 43D(5) proviso of UAPA which says that bail shall not be granted if there is reasonable ground for believing that the accusation against such person is prima facie true does not operate;

(b) There is no act of violence that has been attributed to appellants, i.e., neither covert nor overt;

(c) Accused have now remained incarcerated from 23.09.2022, i.e., for nearly one year (over 11 months). To be noted, in less than four weeks from now, one year from the date of arrest elapses and as charge sheet (final report under section 173 Cr.P.C) has been filed now, we find that the investigation has been completed;

(d) The prosecution at the time of filing extension of remand petition on 89<sup>th</sup> day vide report of learned Prosecutor had given five reasons for seeking extension but had filed charge sheet in barely two days therefrom, i.e., 91<sup>st</sup> day. To be noted, the five reasons are as follows:

i. The electronic devices seized from the accused



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Crl.A.Nos.1317 and 1319 of 2022

persons were sent to CFSL Hyderabad for data backup and analysis. The backed up data have to be analyzed for any anti national activities, which could have happened or planned in future.

ii.The accused No:2 Mohamaed Bilal Marikayar had used secret encrypted messaging apps/websites like JABER and PIDGIN. The conversation and the receipts/chats had to decoded and to be ascertained.

iii.The accused persons jointly and individually had conducted secret meetings in various places in Karaikal and the adjoining areas of Karaikal. The meeting details like the agenda and participants particulars are to be investigated.

iv.As per the call detail records of the accused persons A1 and A2 were present in the Chennai where a suspected meeting of PFI was held. After this meeting, the bomb blast in Coimbatore had occurred. The call details of the above three persons are submitted for the perusal of the Hon'ble court.

v.A handwritten script was seized from the A2 accused about the JIHAD and FIDAYEEN attack. The purpose of the script is to be verified and analyzed. The status report is also submitted for the perusal of the Hon'ble court.'

According to learned Senior counsel, the reasons given by the prosecution for extension of remand period are not



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CrI.A.Nos.1317 and 1319 of 2022

genuine. There is no acceptable explanation forthcoming from the Prosecution as to how they could file the final report within two days from the date of filing extension petition. In this regard, in the counter affidavit also, there is no explanation at all. Therefore, we have no hesitation in saying that I Appeal deserves to be allowed;

(e) In any event, in the case on hand, charge sheet has been filed on 22.12.2022 and therefore, the extension plea has served its purpose.

**CONCLUSION :**

23 In the light of the narrative, discussion and dispositive reasoning and the findings returned all of which have been set out supra, the following order is passed :

(a) Criminal Appeal No.1317 of 2022 and Criminal Appeal No.1319 of 2022 are allowed, setting aside the orders dated 22.12.2022 made in Cr.M.P.No.408/2022 in Cr.No.221/2022 and Cr.M.P.No.409/2022 in Cr.No.221/2022 respectively, by learned Sessions Judge (FAC), Karaikal;



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Crl.A.Nos.1317 and 1319 of 2022

(b)Sequitur of Criminal Appeal No.1319 of 2022

being allowed is that all the three accused / appellants are granted default bail, i.e., statutory bail under Section 167(2) of Cr.P.C on the following conditions:

(i)Appellants (each of the appellants) shall execute a bond and furnish two sureties each for a likesum of Rs.50,000/- [Rupees Fifty Thousand only] and one of the sureties should be a blood relative to the satisfaction of the learned Sessions Judge (FAC), Karaikal;

(ii)After coming out from jail, appellants shall stay at Karaikal and shall not leave Karaikal court territorial jurisdiction without the permission of the trial court;

(iii)Appellants shall appear and sign before the trial court every day at 10.30 a.m. until further orders;

(iv)Appellants shall surrender their Passports (if any) before the trial court and if



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CrI.A.Nos.1317 and 1319 of 2022

they do not hold passports, they shall file an affidavit to that effect in a form that may be prescribed by the trial court. In the latter case the trial court will if it has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify records and send a reply within three weeks. If there is no reply within the said period, the trial court will be entitled to act on the statement of the appellants;

(v)Appellants shall cooperate with the investigation;

(vi)Appellants shall not tamper with evidence and indulge in any other activities which are in the nature of preventing the investigation process;

(vii)Appellants shall inform the trial court the address where they reside and if there is any change of their addresses, it should be informed



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Crl.A.Nos.1317 and 1319 of 2022

to trial court;

(viii)Appellants shall use only one mobile phone each during the time they remain on bail and shall inform the trial court their mobile numbers;

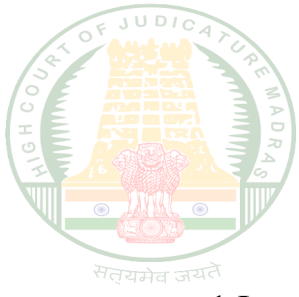
(ix)Appellants shall also ensure that their mobile phones remain active and charged at all times so that they remain accessible over phone throughout the period they remain on bail;

(x)The trial court will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

(M.S., J.) (R.S.V., J.)  
31.08.2023

Index : Yes  
Speaking Order  
Neutral Citation : Yes  
vvk

To



Crl.A.Nos.1317 and 1319 of 2022

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1. Inspector of Police,  
Town Police Station,  
Karaikal  
(In Crime No.221 of 2022)
2. Court of Sessions Judge,  
Karaikal.
3. The Superintendent,  
Puducherry Central Prison,  
Jailwall Road, Kalapet,  
Puducherry-605 014.
4. Public Prosecutor (Puducherry),  
Madras High Court,  
Chennai.



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Crl.A.Nos.1317 and 1319 of 2022

M.SUNDAR, J.  
and  
R.SAKTHIVEL, J.

vvk

Pre delivery judgement in  
Criminal Appeal Nos.1317  
and 1319 of 2022

31.08.2023