

01.12.2022
Sl. No.14
as/akd/PA
[INTERIM BAIL
CONFIRMED]

C. R. M. (DB) 3590 of 2022

In Re: An application for bail under Section 439 of the Code of Criminal Procedure filed on 28.09.2022 in connection with S.T.F. Police Station Case No. 1 of 2022 dated 01.01.2022 under Sections 120B/121/121A/122/123/124A of the Indian Penal Code and Sections 16/18/18B/20/38/39 of the Unlawful Activities (Prevention) Act.

And

In Re: ***Pratik Bhowmik***

... .. Petitioner

Mr. Subhasish Ray
Mr. Avik Ghatak

... .. for the petitioner

Mr. Saswata Gopal Mukherjee .. Id. Public Prosecutor
Mr. Sudip Ghosh
Mr. Apurba Kumar Datta

... .. for the State

1. A ticklish issue has arisen in this bail application.
2. Petitioner was arrested on 03.04.2022. On 05.04.2022, a prayer was made before the Chief Judge, City Sessions Court for addition of offences under Sections 16/18/18B/20/38/39 of the Unlawful Activities (Prevention) Act (*in short 'UAPA'*) and the prayer was allowed. Co-accused viz. Jayita Das was produced before the court of sessions and was remanded to police custody till 01.04.2022. By the selfsame order she was directed to be produced before the Chief Metropolitan Magistrate, Calcutta for further remand. In the meantime, petitioner continued to be remanded by the learned Magistrate from time to time. Upon expiry of 90 days, petitioner wrote a letter from jail praying for statutory bail which was produced before the learned Magistrate on 05.09.2022. Thereafter, on 19.09.2022 petitioner made a formal prayer for statutory bail. On

20.09.2022 an application was made before the Sessions Judge for extension of the remand in terms of the proviso to Section 43D(2) of the UAPA. On 22.09.2022, learned Sessions Judge extended the period of detention of the petitioner under the proviso to Section 43D(2) of the UAPA behind the back of the petitioner. His prayer for statutory bail being turned down, petitioner has approached this Court.

3. As the petitioner had applied for statutory bail prior to the application for extension of further remand in terms of the said proviso, this Court was of the view petitioner has prima facie made out a case for statutory bail and released him on interim bail pending consideration of the following issues:-

(i) Whether the court of sessions was entitled to entertain an application for extension of the period of remand in terms of the proviso to Section 43D(5) of the UAPA when no special court had been notified by the State of West Bengal under Section 22(1) of the National Investigation Agency Act, 2008 (*in short 'NIA Act, 2008'*)?

(ii) Whether the petitioner could have been remanded by the learned Magistrate after offences under UAPA had been added?

(iii) Whether the petitioner in the facts of the case is entitled to statutory bail?

4. For an appreciation of the aforesaid issues it may be relevant to refer to certain provisions of the NIA Act, 2008.

Section 2(h) of the NIA Act reads as follows:-

“2. Definitions. – (h) ‘Special Court’ means [a Court of Sessions designated as Special Court] under Section 11 or, as the case may be, under section 22;”

Powers of the Special Court are adumbrated in Section 13.

Section 13(1) of the Act reads as follows:-

“13. Jurisdiction of Special Courts. – (1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.”

Section 16 of the Act provides for the procedure and powers of the special court. Sub-section (1) of the said provision reads as follows:-

“16. Procedure and powers of Special Courts. – (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.”

Sections 11 & 22 of the said Act provide for setting up of special courts by the Central Government and State Government respectively to try scheduled offences.

Sub-section (3) of Section 22 reads as follows:-

“22. Power of State Government to [designate Court of Session as] Special Courts. – (3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is [designated] by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.”

5. Unlawful Activities (Prevention) Act, 1967 is one of the enactments included in the schedule of the NIA Act.

Section 2(1)(d) of the UAPA defines ‘court’ as follows:-

“2. Definitions. – (1) In this Act, unless the context otherwise requires,-

(d) 'court' means a criminal court having jurisdiction, under the Code, to try offences under this Act [and includes a special court constituted under section 11 or under [section 22] of the National Investigation Agency Act, 2008 (34 of 2008);”

Section 43D of the Act provides for a modified application of the Code of Criminal Procedure in the matter of dealing with cases under UAPA. Sub-section (2) of Section 43D of the Act reads as follows:-

“43D. Modified application of certain provisions of the Code.

– (2) Section 167 of the Code shall apply in relation of a case involving an offence punishable under this Act subject to the modification that in sub-section (2), -

(a) the references to ‘fifteen days’, ‘ninety days’ and ‘sixty days’, wherever they occur, shall be construed as references to ‘thirty days’, ‘ninety days’ and ‘ninety days’ respectively; and”

(b) after the proviso, the following provisos shall be inserted, namely:-

‘Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.”

6. A combined reading of the NIA Act with the UAPA would show that the special court constituted by the Central Government or the State Government, as the case may be, under the NIA Act has exclusive jurisdiction to try offences under UAPA.
7. In view of Section 16 of the said Act, the said Court can take cognizance of such offences directly without the case being committed to it.
8. In terms of proviso to sub-section (2) of Section 43D of the UAPA, the Court is also empowered to extend the period of detention pending investigation on a report of the Public Prosecutor

indicating progress of investigation and specific reason for detention of the accused beyond 90 days but not more than 180 days.

9. What happens if the investigation is conducted by a state agency and no special court is notified under sub-section (1) of Section 22 of the NIA Act?

The answer, in our view, is provided in sub-section (3) of section 22 of the NIA Act. The sub-section provides until a special court is designated by the State Government under sub-section (1), the jurisdiction conferred by the Act on a special court, notwithstanding anything contained in the Code, shall be exercised by the Court of Sessions of the division in which the scheduled offence is committed and it shall have all the powers and should follow the procedure provided under Chapter-IV of the Act.

10. By operation of the aforesaid provision of law, the Court of Sessions becomes the court of first instance and is empowered to take cognizance without the case being committed to it and try any case involving any scheduled offence including UAPA.

11. In ***Bikramjit Singh vs. State of Punjab***¹, the Apex Court was called upon to decide whether the Magistrate had jurisdiction to remand the accused and extend the period of detention in terms of proviso to Section 43D(2) of the UAPA in the face of a notification issued by the State of Punjab designating special courts under NIA Act. The Bench held as follows :-

“25. When these provisions are read along with Section 2(1)(d) and the provisions in Section 43-D(2) UAPA, the scheme of the two Acts, which are to be read together, becomes crystal clear. Under the first proviso in Section 43-D(2)(b), the 90-day period indicated by the first proviso to Section 167(2) of the Code can be extended up to a maximum period of 180 days if ‘the Court’ is satisfied with the report of the Public Prosecutor indicating progress of investigation and specific reasons for detention of the

¹ (2020) 10 SCC 616

accused during the period of 90 days. 'The Court', when read with extended definition contained in Section 2(i)(d) of the UAPA, now speaks of the Special Court constituted under Section 22 of the NIA Act. What becomes clear, therefore, from a reading of these provisions is that for all offences under the UAPA, the Special Court alone has exclusive jurisdiction to try such offences. This becomes even clearer on a reading of Section 16 of the NIA Act which made it clear that the Special Court may take cognizance of an offence without the accused being committed to it for trial upon receipt of a complaint of facts or upon a police report of such facts. What is equally clear from a reading of Section 16(2) of the NIA Act is that even though offences may be punishable with imprisonment for a term not exceeding 3 years, the Special Court alone is to try such offence – albeit in a summary way if it thinks it fit to do so. On a conspectus of the abovementioned provisions, Section 13 read with Section 22(2)(ii) of the NIA Act, in particular, the argument of the learned counsel appearing on behalf of the State of Punjab based on Section 10 of the said Act has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State.”

12. Similar view was taken in ***Sadique & Ors. vs. State of Madhya Pradesh***².

13. However, in ***Fakhrey Alam vs. State of Uttar Pradesh***³, the Apex Court observed as follows :-

“8. On the other hand, learned counsel for the State submits that the judgment of this Court in *Bikramjit Singh's case* (supra) was in the given situation prevalent in the State of Punjab, but on the other hand in State of Uttar Pradesh the competent Court was of the special Chief Judicial Magistrate and it is only recently now about a month back that special Courts had been notified.”

It further held:-

“11. Insofar as the first aspect is concerned, suffice to say that the situation in the State of Uttar Pradesh is different and it is not as if there were any notified special courts in existence.”

14. In ***Naser Bin Abu Bakr Yafai vs. State of Maharashtra & Anr.***⁴, the Apex Court observed as follows:-

“56..... the principle enunciated by this Court in *Bikramjit Singh* would not apply to the present case since there existed no Special Courts in the State of Maharashtra designated under Section 22 of the NIA Act (since the investigation was being conducted by ATS, Nanded, which had the jurisdiction over the case.)”

² (2022) 6 SCC 339

³ 2021 SCC OnLine SC 532

⁴ (2022) 6 SCC 308

15. What fell for decision in *Naser Bin Abu Bakr Yafai* (supra) is whether the mere registration of FIR by NIA would amount to commencement of investigation and prayer for extension of remand be required to be made before the designated Special Court and not the Chief Judicial Magistrate who was designated as a Court of remand for cases investigated by ATS. Validity of designation of the Chief Judicial Magistrate as a Court of remand in cases involving UAPA even if investigated by ATS had not been challenged and did not fall for decision.
16. In none of the aforesaid cases, the power of the Court of Sessions to exercise the jurisdiction and powers of the special court including the power to remand till the special court is designated under Section 22(1) of the NIA Act had fallen for decision.
17. It is a settled proposition of law that a judgment cannot be considered as an authority for a point which was neither raised nor decided⁵. Ratio of a judgment is to be elicited from the factual backdrop of the case and the issues which were raised, argued or decided therein. A judgment cannot be treated as an authority for a proposition which would logically be inferred therefrom.
18. Section 2(d) of the UAPA, inter alia, defines the 'court' as one which is empowered to try the offence under the Code including the Special Court constituted under NIA Act.
19. Section 43D(2) empowers the said court to extend the period of remand till 180 days pending investigation.
20. As the Court of Sessions is empowered to take cognizance and try scheduled offences as per section 22(3) of NIA Act until the

⁵ Rajput Ruda Meha and Ors. vs. State of Gujarat, AIR 1980 SC 1707; Mittal Engineering Works (P) Ltd. vs. Collector of Central Excise, Meerut, (1997) 1 SCC 203 [para 8]

Special Court is notified, it becomes the competent court to remand the accused as well as extend the period of remand in terms of proviso to Section 43D(2) of the Act as a surrogate of the Special Court.

- 21.** It would be argued that Section 22(3) of the NIA Act confers the jurisdiction on the Court of Sessions (in the absence of a designated special court) to try the offences under UAPA only and not the power of remand including the power to extend the period of remand which is traceable to different enactments, i.e. the Code or Section 43D(2) of the UAPA.
- 22.** This is a fallacious argument as it would lead to a void in the power of remand.
- 23.** Sub-section (1) of Section 167 of the Code of Criminal Procedure does not empower a Magistrate to remand an accused beyond thirty days (as amended by UAPA) if he does not have the power to try or commit the case. Section 13 read with Section 16 of the NIA Act provides offences under UAPA shall be tried by the Special Court and cognizance of such offences may be taken without the case being committed to it. In absence of Special Court by operation of sub-section (3) of Section 22, such powers shall vest in the Court of Sessions.
- 24.** As the Magistrate neither has the power to try nor commit cases involving UAPA, addition of offences under UAPA to the FIR would denude the Magistrate of the power to remand an accused beyond thirty days. Thereafter, the remand power is to be exercised by the court which is empowered to take cognizance and try the offence, i.e. the Special Court and in its absence, the Court of Sessions.

25. In this regard, reference may be made to ***State of Tamil Nadu vs. V. Krishnaswami Naidu And Another***⁶ where the Apex Court held the Special Judge under Criminal Law (Amendment) Act, 1952 who has power to take cognizance and try offences shall also have the power to remand the accused during investigation and the expression 'Magistrate' under section 167 Cr.P.C. must be interpreted to include a Special Judge.

26. In the light of the aforesaid discussion, we hold as follows:-

- (i) *Once offences under UAPA are added to a case, Magistrate is denuded of his power to remand in terms of Section 167 of the Code of Criminal Procedure (as amended in UAPA) beyond a period of 30 days;*
- (ii) *Thereafter, the accused must be produced before the Special Court constituted under Section 11 or 22 of the NIA Act (as the case may be) for the purposes of remand as well as extension of the period of remand in terms of proviso to Section 43D(2) of the UAPA;*
- (iii) *In the absence of a Special Court constituted as aforesaid, Court of Sessions shall exercise all powers and jurisdiction of the Special Court in terms of Section 22(3) of the NIA Act including the power to remand as well as the power to extend the period of remand in terms of proviso to Section 43D(2) of the Act.*

27. In view of the aforesaid declaration of law, we are constrained to hold that the Magistrate did not have the power to remand the petitioner to custody beyond 30 days after the offences under UAPA were added. However, remand orders were passed pursuant to the

⁶ (1979) 4 SCC 5

directions of the Sessions Court. It is trite law an act of Court should not prejudice a party. If an accused has been illegally remanded to custody due to an incorrect interpretation of law such detention would not be deducted for the purpose of statutory bail. The moot question is whether the accused had been purported to be remanded under section 167 Cr.P.C. In ***Gautam Navlakha vs. National Investigation Agency***⁷ the Apex Court held as follows:-

“101. ... if the Court purports to invoke and act under Section 167, the detention will qualify even if there is illegality in the passing of the order. What matter in such cases is the actual custody.

102. However, when the Court does not purport to act under Section 167, then the detention involved pursuant to the order of the Court cannot qualify as detention under Section 167.”

28. In the factual matrix of the case, the petitioner had applied for statutory bail before the Magistrate who was incorrectly remanding him to custody. Such prayer ought to have been made before the Court of Sessions which is empowered to exercise powers of remand in UAPA cases. However, hyper-technical approach cannot be taken in the matter of statutory bail. When the petitioner had made an application for statutory bail before the court, which was remanding him, though incorrectly, and such application had been made before the prayer for extension of further remand in terms of sub-section (2) of Section 43D of UAPA, we are of the view he was entitled to statutory bail.

29. Accordingly, we confirm the interim bail granted to the petitioner vide order dated 17th November, 2022 on the same terms and conditions.

⁷ 2021 SCC OnLine SC 382

30. The application for bail, thus, stands **allowed**.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)