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

\+ **CRL.A.768 /2018**

Reserved on: 31st August, 2018
Decided on: 13th September, 2018

ZAHOOR AHMAD SHAH WATALI .....Appellant

Through: Mr. Vikas Pahwa, Senior Advocate along with Mr. Shariq J. Reyaz, Mr. Tushar Agarwal, Mr. Sumer Singh Boparai, and Mr. Karan Singh Khanuja, Advocates.

versus

NATIONAL INVESTIGATING AGENCY ....Respondent

Through: Mr. Sidharth Luthra, Senior Advocate along with Mr. Abhay Prakash Sahay, Mr. Anoopam Prasad, Ms. Mehak Jaggi, Mr. Aroon Menon, and Mr. Anirveda Sharma, Advocates for NIA

CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This is an appeal under Section 21(1) read with Section 21(4) of the National Investigation Agency Act, 2008 ('NIA Act') against an order dated 8th June 2018 passed by the learned District & Sessions Judge/Special Court (NIA), New Delhi (hereafter 'the learned DS&J/trial Court') rejecting the bail application dated 2nd January, 2018 of the Appellant, Zahoor Ahmad Shah Watali in NIA Case No.RC-10/2017/NIA/DLI.

Case against the Appellant

2. The aforementioned case was registered by the National Investigating Agency ('NIA'), the Respondent herein, against 12 accused persons, including the Appellant, who has been arrayed as Accused No.10 ('A-10'). The case has been registered under Section 120-B, 121, 121-A of the Indian Penal Code ('IPC') as well as Sections 13, 16, 17, 18, 20, 38, 39 and 40 of the Unlawful Activities Prevention Act, 1967 ('UAPA').

3. The charge sheet filed against the Appellant before the trial Court on 18th January, 2018 states that he received money from Hafeez Mohammad Syed ('A-1'), from the Inter Services Intelligence ('ISI') of Pakistan, the Pakistan High Commission in New Delhi ('PHC') and also from 'a source' in Dubai and then remitted money to the leaders of the All Parties Hurriyat Conference ('APHC'), a conglomerate of 26 political/social/ religious organizations whose agenda is to create an atmosphere conducive to the attainment of their goal in Jammu and Kashmir of secession from the Union of India as well as to separatists and stone-pelters.

4. According to the charge-sheet, the Appellant was acting as a conduit to transfer funds from terrorist organizations operating out of Pakistan and from other sources to India to fuel violence in J&K. As noted by the trial Court, in paragraph 3.1 of the impugned order, the case of the NIA is that the Appellant thus played a crucial role in the funding of terrorist activities.

The charge sheet

5. A copy of the charge-sheet filed by the NIA in the trial Court on 18th January 2018 is enclosed with the present memorandum of appeal as

Annexure-C. The charge-sheet is in 64 pages. There are 12 accused. A-1 is Hafeez Mohammad Syed, described as the head of the banned terrorist organization 'Lashkar-e-Toiba' ('LET'), A-2 is Mohammed Yusuf Shah @ Syed Salahuddin, stated to be the head of banned terrorist organization Hijbul Mujahiddin ('HM'); A-3 is Aftab Ahmad Shah @ Aftab Hilali Shah @ Shahid-ul-Islam, described as the spokesman and media advisor of the APHC (Mirwaiz Umar Farooq Faction); A-4 is Altaf Ahmad Shah @ Fantoosh, described as the public relations officer and chief organizer as well as Secretary of the APHC; A-5 is Gulam Mohammad Khan, the chairman of National Front which is described as a political separatist outfit of J&K.; A-6 is Farooq Ahmad Dar @ Bitta Karate, described as the Chairman Jammu and Kashmir Liberation Front (R); A-7 is Mohammad Akbar Khanday, described as spokesperson/ media advisor of Hurriyat Conference (G); A-8 is Raja Mehrajuddin Kalwal, described as President of Tehreek-e-Hurriyat, District Srinagar; A-9 is Bashir Ahmad Bhat @ Peer Saifullah, an Imam in a Masjid and a personal assistant of Syed Ali Shah Geelani as well as a secretary of Tehreek-e-Hurriyat; A-11 is Kamran Yusuf, a photo journalist; and A-12 is Javed Ahmad Bhatt who is a hawker of home appliances.

6. After filing of the charge-sheet, A-11 and A-12 have been granted regular bail. A-1 and A-2 have not been arrested. All the other accused, including the present Appellant (A-10) are in judicial custody.

7. As far as the Appellant is concerned, he was arrested on 17th August, 2017 and has been in judicial custody since then. Although in the charge-sheet in

the column for 'age', his date of birth is indicated as 25th June 1952, the Court is informed that this is not his correct date of birth. His age shown as '75 years', is also stated to be inaccurate, although he is definitely over 70 years old.

8. The portion of the charge-sheet that is relevant to the Appellant is from paragraph 17.6 onwards, which titled 'funding of secessionist and terrorist activities in Jammu and Kashmir'. The paragraph begins with the statement "If publicity and propaganda is oxygen for terror groups, terror financing is like its blood." It proceeds to state:

> "Terror financing provides funds for recruitment, operationalization of training and training camps, procurement of arms and ammunition, operational cost of planning and resources for terrorist acts, running of underground networks, well-planned stone pelting, school burnings, targeted attacks, provision of legal support for terrorists and over- ground workers facing judicial process, ex-gratia payment for militants killed in terrorist operations, regular payments to the families of terrorists and militants killed or convicted, funds for propaganda to clergy as well as relief measures for civilian population and also in case of natural disasters.
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> The investigation in the case has revealed that the secessionists are mobilizing funds from all possible sources to fuel unrest and support the on-going secessionist and terrorist activities in Jammu & Kashmir."

9. Paragraph 17.6.1 of the charge-sheet is titled 'funding from Pakistan'. It says that the Hurriyat leaders are receiving funds from Pakistan through conduits and also from the PHC directly. According to the NIA, this was substantiated by an incriminating document seized from the house of Ghulam Mohd. Bhatt during search. Ghulam Mohd. Bhatt worked as the

cashier-cum-accountant with accused Zahoor Ahmad Shah Watali (A-10), a known Hawala conduit.

10. It is further stated in paragraph 17.6.1 (i) that the said document, which is described in the charge-sheet as Document No.132 (a), showed that the Appellant was receiving money from A-1 via ISI, from the PHC and also from a source based in Dubai. It is then asserted that the Appellant was remitting the same to the Hurriyat leaders, as well as separatists and stone-pelters in Jammu and Kashmir. According to the NIA, the said document has been maintained in the regular course of the Appellant's business and has been signed by the Appellant himself. It is again asserted that the said document shows that Hurriyat leaders were receiving funds from Pakistan through the officials of the PHC and through the Appellant. It is further stated that the signature of the Appellant has also been verified and as per the expert report his signature on the questioned document matched the specimen handwriting as well as his admitted handwriting.

11. Paragraph 17.6.1 (ii) of the charge-sheet states that the role of Pakistan for funding secessionist activities also surfaced during the scrutiny of an "unedited version of the audio/video furnished by the office of India Today TV News Channel" wherein A-5 is said to have admitted that "the secessionists and terrorists of the Valley are receiving financial support from Pakistan and would have received approximately Rs.200 crores to organize anti-India protests and agitations after the killing of Burhan Wani, the Commander of HM." *Inter alia* it is stated that A-5 admitted to the pivotal role played by the PHC to receive and convey instructions from Pakistan.

12. Paragraph 17.6.1 (iii) again refers to the same audio/video which purportedly revealed that A-6 (Bitta Karate) likewise admitted that funds were being sent by Pakistan to the secessionists and terrorists in the Kashmir Valley including himself "for organizing forcible closures, anti-India protests and processions and stone-pelting on the security forces."

13. Paragraph 17.6.1(iv) of the charge-sheet alleges that the PHC in New Delhi used to organize functions and meetings in New Delhi to which the Hurriyat leaders from Kashmir were invited and they were given instructions and funds on a regular basis. It is further stated:

> "These funds were given to various allied groups of the APHC and investigations have revealed that a First Secretary level officer of Pakistan High Commission in New Delhi would act as a channel and A-10 Zahoor Ahmed Shah Watali would act as a courier to deliver the funds to the Hurriyat leadership. These funds as explained above were used to foment the secessionist and separatist activities and unrest in the Valley in an organized manner."

14. It may be noticed at this stage that in the charge-sheet no one in the PHC is named. It is not asserted that the NIA is unable to proceed against such individual because of any diplomatic immunity or status. Further, except for a reception held at the PHC at New Delhi on 22nd March, 2013, no dates of functions/meetings organized by the PHC in Delhi where the Hurriyat and other separatist leaders were given instructions and funds have been mentioned. The invitation card from the PHC inviting him to the above function is said to have been seized from the house of A-6. It is stated that the investigation "also established that A-4 was in direct contact with the

High Commission of Pakistan in New Delhi and would apprise him about the situation in Jammu and Kashmir". There is no document forming part of the charge-sheet or any statement of any witness that A-10 was invited to the PHC and given funds or instructions by anyone in the PHC.

15. Paragraph 17.6.2 of the charge sheet is subtitled 'Funding from Terrorist Organizations based in Pakistan". Here it is asserted that the same incriminating document No.132 (a) which was seized from the house of Ghulam Mohd. Bhatt, who worked as Cashier-cum-Accountant with the Appellant, showed that the Appellant received money from A-1 and remitted it to the Hurriyat leaders who were responsible for causing the secession of J&K from the Union of India.

16. Paragraph 17.6.3 is subtitled "Local donations/ Zakat/ Baitulmal." It is stated that the Hurriyat has an established network of cadres at districts and local levels. There are district presidents of the Hurriyat and block level leaders who have the responsibility to raise funds through donations during the religious festivals in the month of Ramzan. It is stated that in a well-established system, receipt books are printed and funds are collected from shopkeepers, businessmen, and residents of Kashmir. Money is also collected to become a member of the Tehreek-e-Hurriyat. The selected members are made *rukuns* and asked to propagate the separatist ideology of the Hurriyat. These *rukuns* acts as foot soldiers and ensure that *bandhs* and *hartals* are successful. They also lead the processions and participate in stone-pelting. It is stated that the Hurriyat leadership appeals to the public to contribute money generously by way of donations for their so called

freedom movement. Reference is made to the website of the Hurriyat Conference which carries a message from Shah Ahmad Shah Geelani (not an accused) asking people to come forward for donations in the month of Ramadan to help the families of martyrs and prisoners. This is said to substantiate the fact that "Hurriyat is raising funds through donations and using the same to fuel secessionist activities and to support the families of killed and jailed terrorists."

17. Paragraph 17.6.4 is subtitled 'LoC Trade'. According to the NIA, the separatists leaders are raising funds through the LoC trade by way of directing Kashmiri traders to do under-invoicing of the goods which were imported through LoC barter trade. Parts of the profits from selling the goods to traders in Delhi is alleged to be shared with Hurriyat leaders and other separatists, which in turn is used for anti-India propaganda for mobilizing the public to organize protests and stone-pelting and to support the families of killed/jailed militants. It is said that there are *hawala* operators based in Srinagar, New Delhi and other parts of the country.

18. Specific to the Appellant are the allegations made in Paragraph 17.6.5 of the charge-sheet which is subtitled 'Hawala'. This being the principal allegation against the Appellant, requires to be summarized as under:

(i) The Appellant is one of the conduits to bring money from off-shore locations of India to fuel anti-India activities in Jammu and Kashmir. Reference is again made to the same incriminating document i.e. D No.132 (a).

(ii) A-10 was bringing money from off-shore locations to India "by layering it through the scores of firms and companies he has opened". Reference is made to an NRE account of the Appellant at the J&K Bank where, from 2011 till 2013, he is said to have received Rs.93, 87, 639. 31 from 'unknown sources'.

(iii) The Appellant was showing foreign remittances under 'other income' in his proprietorship M/s Trison International, Srinagar. Foreign remittances in the sum of Rs.2,26,87,639.31 were received by the Appellant in different accounts from 2011 to 2016. It is repeated that Rs.93,87,639.31 was received in his NRE account from 2011 to 2013.

(iv) It is stated that Rs.14 lacs were remitted in the account of a medical college in Jammu through NEFT on 9th April, 2013 against the fees deposited for his son (who incidentally is a medical doctor and through whom the present appeal has been filed). It is stated that Rs.60 lacs were remitted in the current account of the Appellant in J&K Bank. Rs.5 lacs were remitted in the account of M/s Trison Farms and Constructions Pvt. Limited ('TFCPL'). It is stated that all these foreign remittances "are from unknown sources".

(v) On 7th November, 2014, one Nawal Kishore Kapoor (who initially was a witness but has, since the filing of the charge-sheet, been arrayed as an accused himself), a resident of United Arab Emirates ('UAE') entered into an agreement with TFCPL, whose Managing Director ('MD') is the Appellant to take land measuring 20 *kanals* in Budgam in J&K on lease in consideration of a sum of Rs.6 crores as premium and Rs.1,000/- annual rent for an initial period of 40 years which could be extended through mutual agreement. In the said

agreement, TFCPL was declared as the absolute owner of the land. Mr Kapoor remitted a total sum of Rs.5.579 crores in 22 instalments between 2013 and 2016 to the Appellant.

(vi) During investigation it was revealed that no land exists in the name of TFCPL as per the balance sheet of that company. Further, it was ascertained that Rs.5,57,90,000 was mobilized by Mr. Kapoor from unknown sources and remitted to Appellant to lease a piece of land which does not even exist in the name of TFCPL and therefore the agreement itself lacks legal sanctity. According to the NIA, this "proves that the said agreement was a cover" created by the Appellant "to bring foreign remittances from unknown sources to India".

(vii) The Chartered Accountant ('CA') who signed the audited balance sheet of M/s Trison International., TFCPL and M/s Yasir Enterprises for various years between 2013-14 and 2015-16 "did so without seeing any supporting documents". According to the NIA, the balance sheets of the above entities/companies were sent to the CA by Mustaq Mir, Cost Accountant and Shabir Mir, CA from Wizkid Office, Srinagar through email and he was asked to sign on them in Delhi without showing any documents. According to the NIA, this also clearly showed that the Appellant was remitting money received from unknown sources to India.

(viii) TFCPL raised an unsecured loan of Rs.2,65,55,532/- from the Directors of the company, i.e. the Appellant, his wife, and his three sons in the Financial Year ('FY') 2010-11 in the form of both cash and cheque and this was used to repay the secured loan of Rs.2,94,53,353/- in the books of J&K Bank. The source of money

with the Directors could not be explained satisfactorily by the Appellant.

(ix) The seizure from the house of the Appellant of a list of ISI officials and a letter from Tariq Shafi, proprietor of Al Shafi Group addressed to the PHC recommending grant of visa to the Appellant "shows his proximity with Pakistani Establishment". It is stated that the name of Tariq Shafi figures in the document of foreign contributions seized from the house of the Appellant's cashier-cum-accountant Ghulam Mohd. Bhatt.

19. Paragraph 17.9 of the charge sheet is sub-titled 'CDR Analysis'. According to the NIA, the CDRs revealed the conduct of the accused persons "with each other with some militants/OGWs (Over Ground Workers) and the hawala conduit" i.e. the Appellant and the other accused. It is asserted that the Appellant was telephonically in contact with A-3, A-4, A-5 and A-6. It is also stated that A-3 to A-12 are in contact with each other either directly or indirectly. The chart showing their inter-linkages is set out as part of the charge-sheet.

20. Paragraph 17.10 of the charge sheet is sub-titled 'Summing Up'. Paragraph 18 is subtitled 'Charge'. Specific to the Appellant are the allegations in paragraph 18.9 stating:

> "A-10 is a known hawala dealer and financer and has a number of cases against him which are being investigated by sister investigation agencies."

21. The charge-sheet does not set out the details of the other cases against the Appellant being investigated. This Court too has not been shown any

such details.

22. Paragraph 18.10 of the charge sheet refers to the CDR linkages establishing that "A-3 to A-10 are with constant communication with each other and there is a clear meeting of minds of the above accused in hatching the conspiracy with the support of A-1 and A2 and the other secessionist leaders of Hurriyat Conference and other terrorist organizations of Jammu and Kashmir."

23. Paragraph 18.13 of the charge-sheet sets out in tabular form the names of the accused and the offences with which they are charged. Paragraph 18.14 refers to sanction having been received by the Ministry of Home Affairs, Government of India on 16th January, 2018 for prosecuting the accused under the UAPA provisions. Paragraph 18.16 states that further investigation will continue under Section 173 (8) of Cr PC.

In the trial Court

24. As noticed earlier, the charge-sheet was filed on 18th January, 2018. Cognizance was taken by the trial Court on 2nd February, 2018. The application filed by the Appellant on 3rd January, 2018 for regular bail was listed on nine dates between 12th January, 2018 and 18th May, 2018, when arguments were concluded. While the bail application was reserved for orders, an order dated 23rd May, 2018 was issued by the High Court of Delhi on the administrative side transferring the pending matters from the Court of the Additional Sessions Judge ('ASJ') to the Court of the D&SJ "with immediate effect". As a result, the bail application, which was otherwise reserved for orders, got transferred to the Court of D&SJ and again listed for

hearing on 17th July, 2018.

Order of this Court

25. Aggrieved by the above transfer of the case to the Court of the D&SJ, the Appellant, through his son, Dr. Yawar Watiali filed W.P. (C) No.5990/2018 in this Court. It was submitted that "the previous Judge who has heard the bail application ought to dispose of the bail application as all submissions have been practically concluded."

26. In its order dated 31st May, 2018 disposing of the said writ petition, the Division Bench of this Court distinguished the decisions in ***Javed Ahmed Tantray v. Delhi High Court*** (decision dated 17th September, 2013 in W.P. (C) No.5661/2013) and the Full Bench in ***Subhashni Malik v S.K. Gandhi 2016 SCC-OnLine (Del.) 5058*** and observed as under:

> "In the present case, no doubt some adverse impact would be felt by the petitioner because his bail application was heard and was scheduled for disposal, nevertheless, the Court is of the opinion that no exception can be taken to the general approach that barring rare cases, the Court which is entrusted with the case through transfer should deal with it fully."

27. The Court then directed as under:

> "Keeping in mind, however, the likelihood of some prejudicial impact, given that the bail application in the petitioner's case was heard for some time, the Court is of the opinion that instead of the date scheduled for hearing i.e. 17.07.2018, the concerned Judge Ms. Poonam Bamba, District & Sessions Judge should advance the hearing of the case NIA vs. Hafeez Mohammad Syed, RC No. 10/2017/NIA/DLI and it should be listed before her on 4th June, 2018."

28. The Division Bench requested the trial Court to "proceed and hear the bail application expeditiously and if possible on day-to-day basis and on conclusion of hearing pass appropriate orders preferably by the end of June, 2018". Thereafter the case was heard before the learned D&SJ on 4th and 5th June, 2018 and the impugned order was passed on 8th June, 2018.

Impugned order of the trial Court

29. In the impugned order, the learned D&SJ came to the following conclusions:

(i) From a plain reading of Section 17 of the UAPA it is clear that the funds may have been collected/raised from a legitimate source and that "the actual user of such funds is not a must." The offence is attracted when funds are raised, collected or provided with the knowledge that such funds "are likely to be used by such person/terrorist / terrorist organization / terrorist gang for commission of terrorist act."

(ii) The fact that the Appellant was receiving money from abroad/(A-1), from the HCP and others and was passing on the said funds to Hurriyat leaders was "prima facie borne out from D-152 read with statement of PW-29 and D-154 (expert's report) as per which the signatures of the accused on D-152 were compared with his admitted handwriting and were verified and found to be similar." [Document D-152 referred to by the learned D&SJ is in fact the same as D-132(a)]. Thus, the submission of defence counsel that the said document could not be looked into at all even to form a prima facie

opinion "cannot be accepted". The decision of the Supreme Court in ***Manohar Lal Sharma v. Union of India (2017) 11 SCC 783*** is "also of no assistance to the accused".

(iii) The association/proximity of A-4 and A-6 with the Appellant was also prima facie borne out from the statement of protected witness PW-48. The Appellant's link "with people who have role in governance of Pakistan and its Hurriyat leaders" had also "prima facie come on record vide statement of PW-52, documents D-3, D-4, D-4(e) etc and other material on record". The trial Court then came to the following conclusions:

> "7.10. In view of the above facts and circumstances, the statements of witnesses/ material/documents and other material placed on record by NIA, offences as alleged against the accused are prima facie made out. Therefore, in view of the bar under proviso to Section 43D (5) UA (P) Act, the accused's prayer for bail cannot be granted."

30. The trial Court then proceeded to deal with the prayer for interim bail on health grounds and rejected it after noting that he was being provided appropriate medical attention at the jail hospital and at the RML Hospital as well as AIIMS. Nevertheless, the Jail Superintendent was directed to provide proper medical care and treatment to the Appellant as and when requested.

31. This Court has heard the submissions of Mr Vikas Pahwa, learned Senior Counsel appearing for the Appellant and Mr Sidharth Luthra, learned Senior Counsel appearing for the NIA. The Court has also been taken through the documents which formed part of the record before the trial

Court, reference to some of which will be made presently.

Relevant provisions of the UAPA

32. Before proceeding to deal with the submissions, the Court would first like to refer to the provisions of the UAPA that have been invoked by the NIA against the Appellant. It may be recalled that Section 13 (punishment for unlawful activities); Section 16 (punishment for terrorist act); Section 17 (punishment for raising funds for terrorist act); Section 18 (punishment for conspiracy); Section 20 (punishment for being member of terrorist gang or organization); Section 39 (offence relating to support given to terrorist organization); and Section 40 (offence for raising funds for a terrorist organization) of the UAPA have been invoked.

33. Relevant to the present appeal is Section 43-D of the UAPA which modifies the application of certain provisions of the Cr PC in their application to the UAPA. Specific to the question of bail to an accused charged with UAPA offences is Section 43-D (5) of the UAPA which reads as under:

> "(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:
>
> Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

34. In other words, the proviso to Section 43-D (5) of the UAPA states that an accused shall not be released on bail if the Court "on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are "reasonable grounds for believing that the accusation against such person is prima facie true." A careful reading of the above proviso indicates that:

(i) As opposed to the general criminal law, under the UAPA grant of bail is the exception. If the prosecution either through the case diary or through the charge sheet is able to show 'reasonable grounds' for believing that the accusation is 'prima facie' true then the accused person "shall not be released on bail".

(ii) As far as the accused person is concerned, in order to be able to be considered for the grant of bail, he will have to demonstrate that the prosecution has not been able to discharge the above burden viz., that there are reasonable grounds to show that the accusation against him is *prima facie* true.

(iii) For forming such an opinion, what the trial Court will peruse is the case diary 'or' the charge-sheet under Section 173 Cr PC. At a stage prior to the filing of the charge sheet, the case diary can be looked into by the trial Court to find out about the progress of the investigation and about the material gathered against the accused person. The charge sheet is the culmination of the analysis of the investigation officer (IO) of all the material gathered and reflects his opinion about the guilt of the accused. Although it is argued by Mr Luthra that the trial Court could peruse both the case diary as well as the charge-sheet, the legislative intent is clear that once a charge-sheet

has been filed, the trial Court will look to the charge-sheet as it is the expression of opinion formed by the Investigating Officer ('IO') after analyzing the evidence that has been gathered, all of which ought to have been referred to in the case diary.

35. What is 'reasonable' will of course differ from case to case. The Supreme Court in ***Hitendra Vishnu Thakur v State of Maharashtra AIR 1994 SC 2623*** in the context of the Terrorism and Disruptive Activities Act, 1985 ('TADA'), observed as under:

> "... Of late, we have come across some cases when the Designated Courts have charge-sheeted and/or convicted an accused person under TADA even though there is not even an iota of evidence from which it could be inferred, even prima facie, let alone conclusively, that the crime was committed with the intention as contemplated by the provisions of TADA, merely on the statement of the investigating agency to the effect that the consequence of the criminal act resulted in causing panic or terror in the society or in a section thereof. Such orders result in the misuse of TADA. The Parliament, through Section 20A of TADA has clearly manifested its intention to treat the offences under TADA seriously in as much as under Section 20A(1), notwithstanding anything contained in the Cr.PC, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20A(2) no court shall take cognizance of any offence under TADA without the previous sanction of the authorities prescribed therein. Section 20A, was thus, introduced in the Act with a view to prevent the abuse of the provisions of TADA.
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> 13. We would, therefore, at this stage, like to administer a word of caution to the Designated Courts regarding

> invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same provision of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the, record and apply their mind to see whether the provisions of TADA are even prima facie attracted."
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> ...An onerous duty is therefore cast on the Designated Courts to take extra care to scrutinise the material on the record and apply their mind to the evidence and documents available with the investigating agency before charge-sheeting an accused for an offence under TADA. The stringent provisions of the Act coupled with the enhanced punishment prescribed for the offences under the Act make the task of the Designated Court even more onerous, because graver the offence, greater should be the care taken to see that the offence must strictly fall within the four corners of the Act before a charge is framed against an accused person. Where the Designated Court without as much as even finding a prima facie case on the basis of the material on the record, proceeds to charge-sheet an accused under any of the provisions of TADA, merely on the statement of the investigating agency, it acts merely as a post office of the investigating agency and does more harm to meet the challenge arising out of the 'terrorist' activities rather than deterring terrorist activities. The remedy in such cases would be worse than the disease itself and the charge against the State of misusing the provisions of TADA would gain acceptability, which would be bad both for the criminal and the society."

36. Likewise in ***Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Vijaya 1990 Cri LJ 1869***, the Supreme Court observed as under:

> "While invoking a criminal statue, such as the Act, the prosecution is duty bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. When a statute provides special or enhanced punishments as compared to the punishments prescribed for similar offences under the ordinary penal laws of the country, a higher responsibility and duty is cast on the Judge to make sure there exists prima facie evidence for supporting the charge levelled by the prosecution. Therefore, when a law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law"

37. It is, therefore, the settled legal position that as far as the statutes concerning serious offences inviting grave consequences are invoked, the trial Court will scrutinize the material with extra care. What the trial Court certainly should not do is to proceed "merely on the statements of the investigating agency" because if it does so, it would be acting "merely as a post-office of the investigating agency" and this would do "more harm to meet the challenge arising out of terrorist activities rather than deterring terrorist activities."

38. Section 43-D (6) of the UAPA also makes it clear that the restrictions in the proviso to Section 43-D (5) of the UAPA are in addition to the restrictions under the Cr PC or any other law for the time being in force for granting of bail. These restrictions spelt out in Section 438 Cr PC require the criminal Court to consider factors such as:

(i) The nature and gravity of the accusation.

(ii) The criminal antecedents of the person seeking bail.

(iii) The possibility of the applicant fleeing from justice.

(iv) Whether the accusation has been made with the object of injuring or humiliating the applicant by having him arrested.

39. The question before the trial Court and before this Court is therefore whether the material gathered by the NIA in the present case could have enabled the trial Court to come to the conclusion that there were reasonable grounds for believing that the accusations against the present Appellant were *prima facie* true?

40. In examining the material on record, one feature that stands out is that the statements of several persons that have been recorded by the NIA during the course of its investigation have been referred to as 'PWs'. Mr Luthra clarified that these persons, at this stage, were only 'proposed/prospective' witnesses and not 'prosecution witnesses'. This fine distinction has to be kept in mind. Statements recorded under Section 161 Cr PC do not constitute admissible evidence. They can only be used to confront the witnesses who subsequently appear at the trial. This has to be kept in view while referring to such statements at this stage.

Statements under Section 164 Cr PC

41. Mr Luthra at the beginning of his arguments referred to the statements under Section 161 Cr PC and the documents gathered (which are again untested and therefore could not be read as 'evidence' at this stage). He also referred to the fact that three of the statements of the witnesses had in fact been recorded before a Metropolitan Magistrate ('MM') under Section 164 Cr PC, but had been kept in a sealed cover enclosed along with the charge-

sheet. Relevant to the present Appellant were two such statements which figure at serial numbers 277 and 278 in the list of documents enclosed with the charge-sheet. These are described in a tabular form enclosed to the charge sheet as under:

277.	Statement of Protected Witness 'Charlie' under Section 164 Cr PC dated 21.12.2017.		Available in the Hon'ble court of Spl Judge NIA in sealed cover
278.	Statement of protected witness 'Romeo' under section 164 Cr PC dated 15.12.2017		Available in the Hon'ble court of Spl Judge NIA in sealed cover

42. It may be mentioned at this stage that at serial numbers 279 to 284 are the statements of other protected witnesses: 'Romeo', 'Alpha', 'Gamma', 'Pie', 'Potter', 'Harry' and 'xxx'.

43. It is not denied that copies of the above statements, including those of 'Charlie' and 'Romeo' which are relevant as far as the case against the Appellant is concerned, are kept in a sealed cover but as of date have not been supplied to the Appellant. Mr Luthra stated that the statements of 'Charlie' and 'Romeo' were before the learned D&SJ. It, however, does not appear that the learned D&SJ actually perused them. The impugned order makes no reference to the said statements.

44. Paragraph 7.9 of the impugned order, extracted hereinbefore, refers to statements of "PW-52, documents D-3, D-4, D-4(e) etc" and "other material on record". The Court is unable to read the expression "other material on record" used by the trial Court as including the above statements under

Section 164 Cr PC, copies of which have not been provided to the Appellant. In the considered view of this Court, if such documents were not provided to the Appellant, they could not have been referred to by the prosecution and consequently could not have been referred to by the trial Court while dealing with the bail application of the Appellant.

45. Mr. Luthra then referred to Section 17 of the NIA Act and Section 44 of the UAPA, both of which are identically worded. Section 17 NIA Act reads as under:

> "17. Protection of witnesses.
>
> (1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the Special Court so desires.
>
> (2) On an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, if the Special Court is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.
>
> (3) In particular, and without prejudice to the generality of the provisions of sub--section (2), the measures which a Special Court may take under that sub-section may include-
>
> (a) the holding of the proceedings at a place to be decided by the Special Court;
>
> (b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;
>
> (c) the issuing of any directions for securing that the identity and

address of the witnesses are not disclosed; and

(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.

(4) Any person who contravenes any decision or direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to one thousand rupees. "

46. Both under Section 17 NIA Act and Section 44 of the UAPA, the prosecution can apply to the Court to hold proceedings 'in camera' on the ground that the life of the witness is in danger. What is permitted to be kept 'secret' by the Court is "the identity and address of such a witness". It can permit avoiding the mention of the "names and addresses of the witnesses" in the orders, judgments or any record of the case accessible to the public. The trial Court can issue directions "for securing that the identity and address of the witness are not disclosed".

47. It is not possible to read Section 17 of the NIA Act or Section 44 of the UAPA as an exception to Section 207 read with Section 173 Cr PC which mandates that an accused shall be supplied copies of the police report and other documents relied upon by the prosecution in the charge-sheet "without delay" and "free of cost". Section 207 Cr PC reads as under:

"207. Supply to the accused a copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

48. The first proviso to Section 207 Cr PC makes an exception only in respect of the documents mentioned in Section 207 (iii), which in turn refers to the statements recorded under Section 161 (3) Cr PC. There is no exception to providing 'confessions and statements, if any, recorded under Section 164 Cr PC' which has been mandated in terms of Section 207 (4) Cr PC. Reference may also be made to Section 173(6) Cr PC which again refers to the statement under Section 161 Cr PC, which is mentioned in Section 173 (5) (b) and it is only when the police officer is of the view that any part

of such statement is not relevant or its disclosure to the accused is not essential in the interest of justice and is not expedient in the public interest that he appends a note requesting the Magistrate "to exclude that part from the copies to be granted to the accused and stating his reasons for making such a request." In other words, even in respect of statements under Section 161 Cr PC, there is no wholesale exclusion of the entire document from being provided to the accused. What is permitted is the redaction of certain portions of the documents. In the context of Sections 17 of the NIA Act and 44 of the UAPA, the prosecution cannot withhold from the accused the statements recorded under Section 164 Cr PC of prospective witnesses. With the said statements having been tendered to the trial Court along with the charge sheet, they have to mandatorily be provided to the accused in terms of Section 207 Cr PC. What is permissible in terms of Section 17 NIA Act and Section 44 UAPA is that portions of those statements which reveal the identities and addresses of the makers of such statements may be redacted. Even portions that might by their very wording reveal the identity and address of the makers of the statements could be redacted. This will of course differ from case to case and a call in that regard will be taken by the Court concerned when approached with an application by the prosecution.

49. It was then submitted that it is possible that in the present case, because of the nature of their contents, the entire statement under Section 164 Cr PC may have to be withheld. However, the Court finds that as far as the present case is concerned, it is not the case of the NIA that the entire statement is required to be withheld. It requires to be noted that on 12th April, 2018, while the bail application was still being heard, an application was filed

before the trial Court by the Senior Public Prosecutor of the NIA both under Section 17 of the NIA Act and Section 44 of the UAPA praying that the identity of the aforementioned witnesses i.e. 'Charlie', 'Romeo' 'Alpha', 'Gamma' etc. not be disclosed. The prayer was not that the whole of the statements of those persons recorded under Section 164 Cr PC should be withheld from the Appellant.

50. The Court has not been shown any provision either under the NIA Act or the UAPA that is an exception to the mandatory requirement under Section 207 read with Section 173 Cr PC that the police report shall be furnished without delay to the accused along with the copies of the documents relied upon by the prosecution including statements under Section 161 Cr PC, and importantly, statements under Section 164 Cr PC.

51. The Court also finds that in the charge-sheet filed before the trial Court, by the NIA on 18th January, 2018, which has been referred to extensively in the present order, there is no reference to the above statements under Section 164 Cr PC. If indeed the statements of 'Charlie' and 'Romeo' recorded under Section 164 Cr PC on 15th December 2017 and 21st December, 2017 respectively were critical for the trial Court to form an opinion on the culpability of the Appellant for the offences with which he has been accused, it is unusual for the IO not to have referred to them.

52. Mr Luthra referred to the decision of the Supreme Court in ***K. Veeraswami v. Union of India (1991) 3 SCC 655*** where an observation was made by the Supreme Court that it is not necessary for the charge-sheet itself to contain detailed analysis of the evidence and that the trial Court had to

come to its conclusion on charge not only on the narration in the charge-sheet but all documents accompanying it. The above broad legal proposition is unexceptionable. However, when, in the context of the relatively high burden placed on an accused in terms of the proviso to Section 43 D (5) UAPA, of having to demonstrate that the prosecution has not been able to show that there exists reasonable grounds to show that the accusation against him is *prima facie* true, the absence of any reference in the charge sheet to the statements under Section 164 Cr PC, which are of a higher probative value than the statements under Section 161 Cr PC, is significant.

53. In any event, the statements under Section 164 Cr PC which form part of the documents relied upon by the prosecution in support of the charge sheet cannot be kept back from an accused and the accused be expected to discharge the onerous burden of demonstrating, for the purposes of bail in terms of the proviso to Section 43 D (5) UAPA, that the prosecution has not shown the existence of reasonable grounds for believing that the accusations against him are *prima facie* true.

54. The net result of the above discussion is that with the statements under Section 164 Cr PC purportedly recorded of 'Charlie' and 'Romeo' not being provided to the Appellant, not having been discussed in the charge-sheet, and with those statements not having been examined by the trial Court while passing the impugned order, the prosecution i.e. the NIA cannot rely on such statements in this Court to oppose the grant of bail to the Appellant.

55. The Court clarifies that the question whether the said statements of 'Charlie' and 'Romeo' under Section 164 Cr PC should be kept out of

reckoning for the purposes of the order on charge will be decided by the trial Court, in light of what might transpire hereafter, and independent of the above observations of this Court. It will be open to both parties to again independently make submissions on this aspect before the trial Court at the appropriate stage.

Document 132 (a)

56. Now turning to the material on record, the NIA has placed considerable reliance on Document No. 132(a), referred to by the trial Court in its impugned order as D-252. The said document, which is a typed sheet, reads as under:

"***Foreign contributions and expenditures 2015/2016***

2015			
3.3.2015	2,50,000 AED	Mudassir Wani	
8.3.2015	10,00,000		Masrat Alam
7.4.2015	15,00,000 Rs.		Yasin Malik
29.04.2015	10,00,000 Rs.		Shabir Shah
3.5.2015	3,00,000 AED	Tariq Shafi (From Hafeez Saeed)	
6.7.2015	5,00,000 Rs.		Haj Exp.
20.07.2015	25,00,000 Rs.		Geelani Sb
30.08.2015	10,00,000 Rs.		Personal (Dubai visit)
13.09.2015	15,00,000 Rs.		Altaf Fantoosh (Geelani Sb)
21.11.2015	5,00,000 Rs.		Shagufta
2016			
15.03.2016	30,00,000 Rs.	HCP	
10.04.2016	10,00,000 Rs.		Personal
17.06.2016	12,00,000 Rs.		Advocate Shafi Rishi
16.06.2016	15,00,000 Rs.		Naseem Geelani
20.10.2016	40,00,000 Rs.	Iqbal Cheema HCP	
21.11.2016	20,00,000 Rs.		Geelani Sb

57. Certain features of the above document have not been disputed by the NIA. The first is that it was a loose sheet of paper which was found amongst several other documents by the NIA when it undertook a search of the residential premises of Ghulam Mohammad Bhatt, the accountant of the Appellant. It was not recovered from the residence or place of business of the Appellant. Secondly, while all other documents pertaining to the accounts of the Appellant and his various business entities were on A-4 sized plain paper, this document was a single green sheet legal sized paper. Thirdly, while other documents did not contain the signature of the Appellant, the Appellant's signature was found on the right hand bottom corner of the above document.

58. Fourthly, it is a document not typed on any letterhead of the Appellant or any of his business entities. The Appellant's connection with the document is sought to be drawn by the NIA because of his signature on the right hand bottom. The document is not shown to be part of the books of accounts maintained by the Appellant in the regular course of business.

59. In this context, a reference may be made to the decision of the Supreme Court in ***Manohar Lal Sharma*** (*supra*) which was in the context of the Income Tax Act, 1961, and where the Supreme Court was dealing with the question of admissibility of the loose sheets purporting to be financial accounts, that were recovered pursuant to raids undertaken at various locations. After referring to the decision in ***CBI v V.C. Shukla (1998) 3 SCC 410***, the Supreme Court observed in ***Manohar Lal Sharma*** (*supra*) as

under:

> "278. With respect to the kind of materials which have been placed on record, this Court in *V.C. Shukla's case* (supra) has dealt with the matter though at the stage of discharge when investigation had been completed but same is relevant for the purpose of decision of this case also. This Court has considered the entries in Jain Hawala diaries, note books and file containing loose sheets of papers not in the form of "Books of Accounts" and has held that such entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible.
>
> ……
>
> 282. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by this Court."

60. The person who could explain what is written in Document No. 132 (a) was Ghulam Mohammad Bhatt from whom it was recovered. The document is stated to have been seized on 16th August, 2017 from his house. He was summoned thereafter on 30th August, 2017 i.e. two weeks after the seizure. Mr Bhatt purportedly referred to the single loose green sheet recovered from his premises. He stated that the accounts of the Appellant and his entities were "maintained and updated by him".

61. The next statement of Mr Bhatt was recorded on 1st November, 2017. While he was asked to explain the several financial statements recovered, he was not asked about the above Document No. 132 (a). Mr Bhatt had joined the investigation in June 2017, prior to the raid at his residential premises. If

indeed the Document 132 (a) is incriminating in the manner suggested by the NIA, that it was available in the residence of Mr Bhatt till 16th August, 2017 appears unlikely.

62. While the genuineness and the evidentiary value of Document 132 (a) is yet to be established by the NIA at the trial, since this one document is being relied upon by the NIA as being central to its case against the Appellant, it is but inevitable that the trial Court and now this Court has to discuss it in some detail for the purpose of deciding whether the Appellant can be released on bail.

63. The question that arises is whether there is anything to show with reference to each of the dates mentioned in the above Document No. 132 (a) that the figures shown against the entry on each date (purporting to be specific amounts of money) was in fact received by the Appellant in his personal accounts or in the accounts of any of his entities. Although the case of the NIA is that the money has been received, there is no document or statement, which forms part of the charge sheet, which in fact indicates this.

64. The above document is also relied upon by the NIA as providing proof of the linkages of the Appellant to A-1, through the entry dated 3rd May, 2015 and with the Pakistan High Commission (PHC) through the entries dated 15th and 20th October, 2016. Yet none from the PHC has been named, much less statement of such a person been recorded to confirm that those figures represented money that was received from the PHC.

65. The case of the NIA in the charge sheet is that the same document is also

proof of the fact that the monies so received were passed on to the Hurriyat leaders. Reference is made to the fourth column of the above document where the names of some of the Hurriyat leaders are mentioned. However, there is nothing to show that the money was received by the Appellant and then transmitted by him to any of the named Hurriyat leaders. Nor have any of the 'prospective witnesses' including Mr Bhatt made any statement to that effect.

66. Mr. Luthra urged that the signature of the Appellant in the right hand bottom corner of the document has been confirmed by the handwriting expert to match the specimen signature of the Appellant. In reply it was pointed out by Mr. Vikas Pahwa, learned Senior counsel for the Appellant, that the mere fact that the Appellant's signature appeared on the document did not mean that he had in fact signed the document in acceptance of the truth of its contents. According to him, it is too early to speculate whether the Appellant when he signed the paper, if at all, put his signature on a blank green legal size paper which may be have then been used for legal purposes for an affidavit etc.

67. It is indeed too early in the case to speculate whether the Appellant in fact signed the document after it was typed out and whether his signature amounts to accepting the truth of its contents or for that matter whether the contents of the document in question constitute conclusive proof of what the NIA alleges the document to be.

68. In the circumstances, the Court is not satisfied that a sheet of paper containing typed entries and in loose form, not shown to form part of the

books of accounts regularly maintained by the Appellant or his business entities, can constitute material to even 'prima facie' connect the Appellant with the crime with which he is sought to be charged. The conclusion of the trial Court that this document shows the connection of the Appellant with the other accused as regards terrorist funding does not logically or legally flow from a plain reading of the document.

Other documents

69. Mr Luthra then referred to the statements of Mustaq Ahmad Mir and Shabbir Ahmad Mir, the reply of Mr Mustaq Ahmad Mir (Ex.D-214), the CFSL report dated 6th November, 2017 (document D-154); the seizure memo dated 3rd June, 2017 (document D-3) regarding the recovery being made from the residence of the Appellant; the seizure memo of the same date of the recoveries from the office of the TFCPL (document D-4); and the bunch of papers seized from the Appellant [D-4(e)] referred to by the trial Court.

70. Beginning with the last referred document, [D-4(e)], it is actually a bunch of documents, the first of which is a letter dated 28th June, 2016, written by the Prime Minister of Pakistan Mr Mohammad Nawaz Sharif to the Appellant thanking him for the bouquet sent to him with wishes for his good health and well being.

71. Then there is a letter dated 20th November, 2007 from the President of the Azad Jammu and Kashmir, Chambers of Commerce and Industry, addressed to the Appellant, appointing the Appellant as an Honorary Trade Consultant at Srinagar. It notes that Pakistan and India had

initiated/undertaken a number of Kashmir related CBMs (confidence building measures) in the recent past to provide respite to the Kashmiris on both sides of the LoC (Line of Control):

> "1.Pakistan and India have initiated/undertaken a number of Kashmir related CBMs in recent past to provide respite to the Kashmiris on both sides of the LoC. One such CBM which is under active consideration is commencement of trade between both parts of Kashmir. Necessary modalities including the items to be traded are being worked out."

72. The other documents reflect the correspondence carried out in the regular course of business between the Appellant's business entities and other entities including the Al-Shafi Group of companies, headquartered at Lahore. A business invitation was extended to the Appellant on 7th February, 2014 by Mohd. Tariq Shafi, the director of Al-Shafi Group of companies to visit them for business negotiations. There is a letter of the same date addressed by Mr. Mohd. Tariq Shafi to the PHC in New Delhi for grant of Pakistan Business Visa to the Appellant.

73. It must be noticed at this stage that the NIA does not dispute that the Appellant is a leading businessman in Kashmir. He runs a conglomerate of business entities and has been active in the context of the Indo-Pakistan trade. Nothing has been shown to this Court from the entire bunch of documents which would suggest that these trade activities were geared toward funding of terrorist activities, as alleged in the charge-sheet.

74. Turning next to the statements of Mr. Mustaq Ahmad Mir and Mr. Shabbir Ahmad Mir, it requires to be stated, at the risk of repetition, that

these have no evidentiary value as they are merely statements under Section 161 Cr PC. Even if taken at face value, they only indicate that some of the entries in the accounts and in particular the source of credit entries were not properly explained. It appears that the accounts of the entities are regularly audited. It is not possible to *prima facie* conclude that these 'unknown sources' were in fact connected to any of the other accused and that remittances were received from Pakistan or UAE for terrorist activities. There has to be something more substantial than mere audited accounts that may have entries that require explaining and might be of interest to the income tax authorities.

75. The above documents do not enable this Court to *prima facie* conclude, as the trial Court has in paragraph 7.8 of the impugned order, that the Appellant received money from A-1 or PHC or others and was passing on the said funds to the Hurriyat leaders for funding terrorist activities and stone pelting.

76. The statement of the 'protected witness', referred to by the trial Court as W-48, about the Appellant's proximity with A-4 and A-6 has been perused. It is not supported by any other statement or material on record. It cannot be construed as material that would enable the prosecution to show that the accusation against the appellant about his funding terrorist activities is *prima facie* true.

77. Turing to the transaction of lease involving Mr. Naval Kishore Kapoor, it is explained on behalf of the Appellant that only individuals domiciled in Kashmir can hold properties there. There was no declaration of 'ownership'

of lands by the companies and in any event it was a lease. The lease itself has not been shown to be a sham transaction. As regards the NRE account, it is pointed out that it has since been closed and the fine amount was also paid. As regards the CDRs, it is pointed out that there may have been exchange of calls between the Appellant and A-6 but not between the Appellant and A-3, A-4 or A-5. This cannot at this stage be said to constitute material to show that the accusation of a criminal conspiracy between the Appellant and A-6 for commission of terrorist offences is *prima facie* true. It also emerged during the course of the hearing of this appeal that neither the APHC nor any of its 26 constituent organisations are 'banned' organisations within the meaning of the UAPA.

78. The entire discussion by the trial Court of the material forming part of the charge sheet is contained in three short paragraphs i.e. in paragraphs 7.8, 7.9 and 7.10 of the impugned order. It is cryptic. The following observations made by the High Court of Andhra Pradesh in ***Davender Gupta v. National Investigating Agency (2014) SCC-Online AP 192*** are relevant here:

> "...till the truth comes out, it is always better to keep the fingers crossed, and to respect the age-old principle, that an accused cannot be equated to a convict, even before the trial is conducted and the judgment is rendered. Further, whatever be the considerations in economic offences, even an inadvertent attempt to implicate persons in terrorist related cases, otherwise than on the basis of strong and foolproof evidence would, as an immediate consequence, embolden, if not encourage the real perpetrators."

79. As to other requirements of Section 438 Cr PC, nothing has been shown to the Court about the previous criminal involvement of the Appellant in any

offence. Nothing also has been shown to the Court about the possibility of the Appellant fleeing from justice, if he is released on bail. The record shows that the Appellant is a septuagenarian and is suffering from various medical ailments. He has been in judicial custody for more than a year. It has been more than six months since the charge-sheet has been filed. He is not shown to have tampered with the evidence or interfered with any of the 'prospective/protected' witnesses.

80. The following observations by the Supreme Court in ***Sanjay Chandra v CBI AIR 2012 SC 830*** are relevant in this context:

> "In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it

> would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

81. In light of the above discussion, this Court holds, for the limited purposes of the present appeal, that there are no reasonable grounds to form an opinion at this stage that the accusations against the Appellant under the UAPA are *prima facie* true. The Court is also not satisfied at this stage that there is *prima facie* material to show the involvement of the Appellant in any criminal conspiracy with the other accused justifying the accusations for the offences under Section 120-B IPC or Section 121, 121-A, 124-A IPC. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities.

Conclusion

82. The impugned order dated 8th June, 2018 of the trial Court is accordingly set aside. The Appellant is directed to be released on bail subject to his furnishing a personal bond in the sum of Rs.2 lakhs with two sureties of like amount to the satisfaction of the trial Court, and further subject to the following conditions:

(i) The Appellant shall report to the IO in charge of the case as and when required. He shall provide to the IO as well as the trial Court the mobile phone on which he can be contacted and his current address where he will be available. He will keep both the IO and the trial Court informed promptly if there is any change in either.

(ii) He will not influence or intimidate the proposed/prospective

prosecution witnesses or tamper with the evidence of the prosecution in any manner.

(iii) The Appellant will surrender his passport before the trial Court at the time of execution of the bail bonds. He will not travel out of the country without prior permission of the trial Court.

(iv) If there is any breach of the above conditions, it will be open to the NIA to apply to the trial Court for cancellation of bail.

83. It is clarified that the observations of this Court in this order both on facts and law are based on the materials forming part of the charge sheet and are *prima facie* in nature and for the limited purpose of considering the case of the Appellant for grant of bail. They are not intended to influence the decisions of the trial Court at any stage of the case hereafter.

84. The appeal is allowed in the above terms.

S. MURALIDHAR, J.

VINOD GOEL J.

SEPTEMBER 13, 2018
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