IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.389 OF 2020

The National Investigation Agency,]
Ministry of Home Affairs,]
Government of India, Cumballa Hill]
Telephone Exchange, 7th Floor, Peddar]
Road, Mumbai.] … Appellant

Versus

Areeb Ejaz Majeed,]
R/at: "C" Wing, Flat No.206,]
Sarvodaya Residency, Patri Pool,]
Kalyan (West), District – Thane and]
Also, r/at: 46/17, Majeed House,]
Annasaheb, Vartak Road, Kalyan]
(West).] … Respondent

…

Mr. Anil C. Singh, Additional Solicitor General with Mr. Sandesh Patil, Mr. Aditya Thakkar and Mr. D. P. Singh i/b Mr. Vishal Goutam for the appellant - National Investigation Agency (NIA).

Mr. Areeb Ejaz Majeed, respondent in person (He is produced in Court by Arthur Road Central Prison, Mumbai).

…

CORAM : S.S. SHINDE &
MANISH PITALE, JJ.

RESERVED ON : 04TH FEBRUARY, 2021

PRONOUNCED ON : 23RD FEBRUARY, 2021.

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JUDGMENT:-

1. The National Investigation Agency (**"NIA"**) has filed the present appeal challenging order dated 17/03/2020 passed by the Additional Sessions Judge and Special Judge under the National Investigation Agency Court, Greater Mumbai (**"NIA Court"**) whereby the bail application filed by the respondent was allowed and the respondent was directed to be released on bail subject to specific conditions. The NIA Court granted stay of its own order till 27/03/2020. The NIA immediately approached this court by filing the present appeal. On 26/03/2020, this court continued the stay of the aforesaid impugned order passed by the NIA Court, as a consequence of which, the respondent has continued in custody.

2. The facts, in brief, leading to filing of the present appeal are that on 28/11/2014, a First Information Report (**"FIR"**) was registered at the behest of the NIA against the respondent for offences punishable under Section 125 of the Indian Penal Code (**"IPC"**) and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 (**"UAPA"**). It was the case of the NIA that the respondent along with three absconding accused persons had visited Iraq ostensibly for pilgrimage along with other persons, who were on pilgrimage but, the accused persons including the

respondent never visited the sites of pilgrimage and, instead, escaped into Iraq and Syria with the intention of indulging in jihadi activities by joining Islamic State for Iraq and Levant (**"ISIL"**). According to the NIA, the said accused persons including the respondent herein formed an unlawful association with an intention to promote terrorism in Iraq, Syria and India. They also participated in terrorist activities in Syria and Iraq and they were likely to commit such acts in India also. The respondent had allegedly returned to India with the intention of carrying out such terrorist acts in India, including blowing up the Police Headquarter at Mumbai.

3. On 29/11/2014, the NIA arrested the respondent and produced him before the jurisdictional NIA Court at Mumbai and he was remanded to police custody. Thereafter, investigation was undertaken and eventually, detailed charge-sheet running into thousands of pages was filed in the NIA Court against the respondent. There is no dispute about the fact that the respondent has continued in custody since the aforesaid date of his arrest, thereby showing that he has remained in custody for more than six years.

4. The respondent had initially applied for grant of default bail, but the said application was rejected. Thereafter, he had filed two applications for grant of bail on merits, which stood

dismissed and, there is no dispute about the fact that the appeals filed against such orders were rejected by this court.

5. Thereafter, he moved another bail application before the NIA Court, which was also rejected on merits. In the appeal filed against the said order, a Division Bench of this court recorded the submissions made on behalf of the respondent that since certain materials, including depositions of witnesses examined by the prosecution which allegedly deviated from their statements in the charge-sheet, were not looked into by the NIA Court, it had become necessary to send the matter back to the NIA Court for fresh consideration of the said bail application moved on behalf of the respondent. Accordingly, by order dated 04/02/2020, this Court quashed the order of the NIA Court by directing in Criminal Appeal No.1341 of 2019 that the application for bail (Ex-445) filed by the respondent deserves to be restored back to the file of NIA Court for considering it afresh in accordance with law. Accordingly, the application stood restored for fresh consideration before the NIA Court. It is in pursuance of the said application being restored that the NIA Court heard arguments afresh and passed the impugned order dated 17/03/2020, whereby the bail application of the respondent stood conditionally allowed.

6. The NIA Court while passing the impugned judgment and

order proceeded on two aspects. Firstly, that the pace of the trial was slow and there was likelihood of long time required for examining the remaining witnesses. On this basis, the NIA Court concluded that since the law laid down by the Hon'ble Supreme Court in ***Shaheen Welfare Assocation v. Union of India & Ors.***[1] applied in favour of the respondent, the bail application could be granted on the said aspect of the matter. Secondly, the NIA Court considered the material on record, particularly, the depositions of witnesses, who were already examined by the prosecution and it reached a finding that at that particular stage when about 49 witnesses were already examined, the prosecution had not succeeded to prove *prima facie* case. On this basis, referring to Section 43D(5) of the UAPA, the NIA Court held in favour of the respondent on this aspect also and granted relief to the respondent.

7. Mr. Anil Singh, learned Additional Solicitor General ("**ASG**") appeared on behalf of the appellant-NIA and submitted that the aforesaid two aspects on which the NIA Court had held in favour of the respondent, were erroneously applied in the facts and circumstances of the present case. As regards the approach of the NIA Court regarding the merits of the matter, it was vehemently submitted that when the two earlier bail applications had been rejected on merits after filing of the charge-sheet upon appreciation of material on record by the NIA Court itself, there

[1] (1996) 2 SCC 616

was no propriety on the part of the NIA Court to now hold in the impugned judgment and order that the case of the NIA did not appear to be *prima facie* true. It was submitted that examination of some of the witnesses by the prosecution could not be said to be a change in circumstances for entertaining the last bail application. According to learned A.S.G., the error of the NIA Court was compounded when the said Court proceeded to peruse the depositions of the prosecution witnesses already examined to reach a finding that at that stage, the prosecution had not succeeded to prove a *prima facie* case. The error was further accentuated by the observation of the NIA Court that at that stage, it could not be concluded that the prosecution would certainly develop a chain of evidence to reach the desired destination of guilt of the respondent. It was submitted that this was a glaring error committed by the NIA Court.

8. According to the learned A.S.G., such an approach adopted by the NIA Court was fraught with risk because bail applications are likely to be moved by such accused persons during the course of the trial when the witnesses are being examined, by claiming that the evidence of witnesses examined till a particular stage, did not appear to support the case of the prosecution. It was submitted that such a course could never be adopted by the court and once the bail applications had been dismissed on merits, particularly in a matter under the UAPA, the Court was expected

to allow the proceedings of examination of witnesses and trial to be completed, without allowing the accused to approach the court for grant of bail in the interregnum. It was vehemently submitted that the NIA Court ought to have referred to the reasoning given in earlier two orders rejecting the applications for bail preferred by the respondent on merits. It was submitted that without reference to the said reasoning given in the earlier orders passed by the NIA Court, as well as this court, wherein categorical findings were given that accusations against the respondent were found to be *prima facie* true, the NIA Court could not have departed from such findings, only on the basis that some of the prosecution witnesses were examined during the course of trial. In this regard, learned A.S.G. placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Kalyan Chandr Sarkar v. Rajesh Ranjan & Anr.***[2].

9. It was also submitted that although the considerations for grant of bail and those for cancellation of an order of bail are independent and do not overlap with each other, since in the present case, the NIA Court completely misdirected itself and considered irrelevant material while ignoring relevant material including earlier orders rejecting bail to the respondent, the impugned judgment and order deserved to be interfered with. It was submitted that the NIA Court while passing the impugned judgment and order completely failed to appreciate the settled law

[2] (2004) 7 SCC 528

in this regard. Learned ASG placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Ram Govind Upadhyay v. Sudarshan Singh & Ors.***[3].

10. Learned A.S.G. further submitted that as many as 107 witnesses are yet to be examined by the NIA Court and, therefore, this was not a stage where the NIA Court could have jumped to the conclusion that it could not be concluded that the prosecution would certainly develop a chain of evidences to reach the desired destination of guilt of the respondent. According to the learned A.S.G., the approach adopted by the NIA Court is absolutely perverse while granting bail to the respondent. In this context, learned A.S.G. invited attention of this court to the serious allegations levelled against the respondent and the absconding co-accused in the present case. It was brought to the notice of this court that the respondent admittedly left for Iraq with the three absconding co-accused persons ostensibly to go on a pilgrimage but, these accused persons did not return to India despite the fact that they had visa of only one month and they escaped into Iraq and Syria to participate in terrorist activities in the said countries. It was emphasized that these countries have friendly relations with India and, therefore, it was a grave crime committed by the said accused persons.

[3] (2002) 3 SCC 598

11. Learned A.S.G. invited attention of this court to various documents and other material on record to contend that the absconding co-accused persons had put statements on social media which clearly indicated the active participation of the respondent in the terrorist activities in Iraq and Syria and the ill-intention with which he had entered into India in order to commit such terrorist acts. It was emphasized that this included the plan to blow up the Police Headquarter at Mumbai. Attention of this court was also invited to various posts in the social media as well as photographs indicating that the respondent had taken training in Iraq and Syria for carrying out such terrorist acts. It was also submitted that the ISIL had issued a travel pass to the respondent, thereby indicating that he had left this country in order to actively participate in terrorist activities and that he had returned to India to further carry out such terrorist attacks in India. Learned A.S.G. also showed a video recording of about 25 minutes to us in our chambers in the presence of the respondent to further buttress the claims of NIA that the respondent was actively involved in dangerous terrorist activities, which justified the charges leveled against him under Sections 16 and 18 of the UAPA as also Section 125 of the IPC. It was submitted that the absconding co-accused were seen in the video clipping making statements against the sovereignty and integrity of India and their plans to carry out dreadful terrorist activities in India.

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12. It was submitted that when the detailed charge-sheet in the present case demonstrated the voluminous material available against the respondent in respect of the offences with which he has been charged and in the face of the two bail applications already dismissed on merits after filing of the charge-sheet, there was absolutely no reason for the NIA Court to have allowed the bail application of the respondent by the impugned judgment and order. Learned A.S.G. placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***NIA v. Zahoor Ahmad Shah Watali***[4], which pertains to the question of grant of bail to an accused person charged with offences under the UAPA. It was submitted that releasing the respondent on bail would put the witnesses to risk of being pressurized and that the proceedings before the trial court would be prejudicially affected.

13. As regards the second aspect of the matter which had impressed the NIA Court i.e. the fact that the respondent was behind bars for six years and the trial was proceeding at a slow pace, learned A.S.G. submitted that the NIA Court had erred on this aspect also. It was submitted that the NIA Court, during the pendency of the present appeal, had examined few more witnesses and now admittedly 107 witnesses remained to be examined. It was submitted that this court should direct the day-to-day proceedings before the NIA Court so that the proceedings could

[4] (2019) 5 SCC 1

be expedited. It was further submitted that the NIA Court committed a grave error in applying the ratio of the judgment of the Hon'ble Supreme Court in ***Shaheen Welfare Association (supra)***. No reason was given by the NIA Court to categorize the respondent in category (b) as laid down in the said judgment. It was further submitted that in the said judgment itself, the Hon'ble Supreme Court had recorded that directions were being given as a one time measure in the backdrop of the accused languishing in jail during the trial under Terrorist and Disruptive Activities (Prevention) Act, 1987 ("**TADA**"). On this basis, it was submitted that the NIA Court was not justified in holding that the respondent deserved a favourable order in his favour, only because the trial was pending for some time. By relying upon Sections 16 and 18 of the UAPA, it was submitted that if convicted, the respondent could be sentenced for imprisonment for life and, therefore, the pendency of the trial in the present case did not justify a direction to release the respondent on bail.

14. As regards the recent judgment of the Hon'ble Supreme Court delivered in the case of ***Union of India v. K.A. Najeeb***[5], it was submitted that in the said case, in the peculiar facts and circumstances of that case, the Hon'ble Supreme Court had held in favour of the accused. The co-accused in the said case were convicted and sentenced only for 8 years and since the accused therein had already undergone much more than 5 years in

[5] Order dated 01/02/2021 in Criminal Appeal No.98 of 2021

custody, the Hon'ble Supreme Court had held that he could be released on bail. Such was not the factual scenario in the present case. On this basis, it was submitted that the impugned judgment and order deserved to be set aside.

15. On the other hand, the respondent appearing in person, submitted that the NIA Court had correctly granted bail by passing the impugned judgment and order. The respondent has been appearing in person before the NIA Court and before this court. Although he was asked whether he wanted to engage a counsel or an advocate from legal aid panel could be appointed, he submitted that he desired to represent his own case. We have no hesitation to observe that the respondent maintained decorum throughout the hearing conducted before us and, he sought to demonstrate why the contentions raised on behalf of the NIA were unsustainable.

16. On the aspect as to whether the NIA Court could consider depositions of the witnesses already examined and whether this could be a change in circumstances for consideration of third bail application on merits moved by the respondent, he submitted that 12 of the witnesses out of 49 witnesses examined by the NIA had already turned hostile and they had to be cross-examined by the prosecutor himself. It was submitted that when key witnesses, on whom the NIA was relying, had not been able to support the

case against the respondent, he was entitled to approach the court for consideration of his bail application on merits. It was submitted that nothing prevented the NIA Court to take into consideration this vital aspect of the matter while allowing the bail application.

17. It was submitted that the entire case against the respondent was cooked up by NIA and there was no material to support the allegations made against the respondent. According to the respondent, he could not shy away from the fact that he had left India in the year 2014 as a 21 year old, to Iraq and Syria. But, he submitted that it was his father, who contacted the NIA and other Governmental agencies to bring him back to India and, it was in pursuance of such efforts that the Indian Consulate at Turkey had itself facilitated the travel of the respondent back to India. It was submitted that all the charges levelled against the respondent about the alleged terrorist activities in Iraq and Syria were imaginary and there was nothing to show that the respondent was associated with the absconding co-accused for any such terrorist act or violence leading to death or injuries to any person. It was further submitted that the whole theory of the respondent having returned to India with the intention to commit terrorist activities, including blowing up the Police Headquarters at Mumbai, was also an imaginary theory and, there was absolutely nothing to connect the respondent with any activities for which he could be

charged either under the IPC or under the UAPA. In this behalf, much emphasis was placed by the respondent on the fact that although he was charged for an offence under Section 20 of the UAPA also pertaining to being a member of the terrorist gang or a terrorist organization, while framing of charges, the said charge was not framed against him under the said section and this court had confirmed the said approach adopted by the NIA Court. It was emphasized that the appeal filed by the NIA bearing Criminal Appeal No.369 of 2017, whereby the NIA had challenged the non-framing of the charge under Section 20 of the UAPA was dismissed by this court, by order dated 09/08/2017.

18. On this basis, it is submitted that there was absence of any material to show that even *prima facie* the accusations made against the respondent could be said to be true. As regards the documents on which reliance was placed by learned A.S.G., most of which were certain posts uploaded on social media allegedly by the absconding co-accused persons and others, indicating involvement of the respondent in terrorist acts, it was submitted that such material when perused in detail, demonstrated that no connection of such material could be drawn with the respondent. As regards the photographs on which reliance was placed by learned A.S.G., it was submitted that merely because the respondent had posed with a gun in his hand, did not *ipso facto* demonstrate that the accusations made against him could be said

to be true. As regards the alleged transit pass issued by ISIL, it was submitted that the purported transit date on the said document shows that it was issued in December, 2014 while the respondent had already returned to India and stood arrested by the NIA on 29/11/2014 itself. As regards the video clipping shown to this court, it was submitted that nowhere, did the persons seen in the video ever take the name of the respondent and, there was no connection even *prima facie*, established between the contents of the video clipping and the respondent herein. Thus, it was submitted that the NIA Court was justified in rendering a finding that at this stage, the prosecution was unable to bring on record material to show a *prima facie* case against the respondent and that it could not be concluded that the prosecution could develop a chain of evidences to show the guilt of the respondent.

19. As regards the aspect of delay in trial proceedings before the NIA Court and the respondent languishing in jail for more than six years, it was submitted that the ratio of the judgment of the Supreme Court in ***Shaheen Welfare Association (supra)*** was correctly applied by the NIA Court. It was emphasized that the prosecution had taken almost five years in examining 51 witnesses whereas 107 witnesses remained to be examined, thereby showing that the trial would take at least six to seven years. It was submitted that the punishment under Sections 16 and 18 of the

UAPA ranged between five years and imprisonment for life, thereby indicating that the respondent had already undergone substantial part of the sentence. It was submitted that the NIA Court was not just dealing with cases under the NIA Act but, it was also dealing with cases as a special court under the UAPA, Maharashtra Control of Organized Crime Act (**"MCOCA"**), TADA as well as Prevention of Terrorism Act (**"POTA"**). It was submitted that therefore, only one day in a week was allotted to the case of the respondent, due to which the progress of the trial was extremely slow and there was no possibility of the trial being completed in the near future.

20. The respondent has placed much emphasis on the aforesaid recent judgment of the Hon'ble Supreme Court in the case of ***K.A. Najeeb (supra)*** wherein it has been held that where the trial takes a long time and the accused is languishing in jail, the court can take note of the said fact and despite findings against the accused, on the touchstone of proviso to Section 43D(5) of the UAPA, bail can be granted, as the rigours of such provision would melt down where there is no likelihood of the trial being completed within a reasonable time. It was brought to the notice of this court that the Hon'ble Supreme Court has also taken note of the judgment in ***Shaheen Welfare Association (supra)***. On this basis, it was submitted that the appeal deserved to be dismissed. The respondent categorically submitted that he is ready and

willing to abide by any condition that this court may additionally impose for upholding the impugned judgment and order passed by the NIA Court.

21. On the basis of the aforesaid contentions raised by the rival parties, it is clear that there are two aspects that need to be considered while deciding the present appeal. The first question pertains to the approach adopted by the NIA Court in the present case while entertaining and rendering findings in favour of the respondent when two of his earlier bail applications had been rejected on merits after perusing the detailed material on record in the form of the charge-sheet and findings rendered against the respondent, on the touchstone of proviso to Section 43D(5) of the UAPA. It is also necessary to consider the specific contention raised on behalf of the appellant-NIA that the bail application ought not to be permitted to be moved by the accused in the midst of the trial, after some of the prosecution witnesses had been examined, on the basis that the material that had come on record did not seem to support the case of the prosecution. It was submitted that the examination of some of the prosecution witnesses could not be said to be a change in circumstance for the accused to move such bail application and that the proceedings in the trial ought to be permitted to be continued uninterrupted.

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22. We have heard learned A.S.G. appearing for the appellant and respondent-accused in-person. With their assistance, perused copies of the charge-sheet and documents placed on record by the appellant. In the present case, there is no dispute about the fact that the bail application which stood allowed by the impugned judgment and order was the third bail application on merits moved by the respondent, apart from the first bail application claiming default bail. In other words, two earlier bail applications moved by the respondent stood rejected on merits with the findings that the material on record demonstrated that the accusations levelled against the respondent were found to be *prima facie* true. These findings had been approved by this court. In such a situation, the respondent moved the last bail application again on merits on the premise that the 49 witnesses so far examined by the NIA Court did not appear to bring home the case of the prosecution, particularly when 12 such witnesses had turned hostile who had to be cross-examined by the prosecution itself. It is on the basis of such material that the respondent claimed in the last bail application that no *prima facie* case was made out by the prosecution and that, even in future, there was slim possibility of the prosecution bringing material on record to prove the guilt of the respondent.

23. We are of the opinion that when two earlier bail applications were rejected on merits, the reasoning given in those

orders were required to be adverted to, before taking a departure and holding in favour of the respondent. A perusal of the impugned judgment and order clearly shows that no such exercise was undertaken by the NIA Court and, there was no reference to the reasoning given in the earlier orders whereby the bail applications were rejected by the court. Merely because some prosecution witnesses had been examined, some of whom had turned hostile, could not be a ground to revisit findings on merits rendered twice over when earlier bail applications of the respondent were rejected. If such procedure of moving bail applications on merits upon examination of some prosecution witnesses is permitted, there would be no end to such applications being moved by the accused, thereby derailing the trial proceedings and asking the courts to revisit findings on merits on half baked evidence. If such an approach is permitted, the accused may move successive bail applications during the course of examination of further prosecution witnesses and conversely the prosecution may move applications for cancellation of bail already granted, by relying on evidence brought on record during the course of examination of prosecution witnesses. This cannot be permitted. This aspect was completely ignored by the NIA Court while passing the impugned order.

24. Apart from the fact that there was no reference to the reasoning adopted by the NIA Court, as well as this court, while

rejecting the earlier two bail applications on merits, the findings rendered in favour of the respondent in the impugned judgment and order on merits also appear to be flawed. This would be evident from the following extract from the impugned judgment and order.

> *"17. The prosecution has relied upon many social web site accounts allegedly opened and operated by applicant. The screen shots of activities of those accounts including chatting and other relevant material is flooded in the prosecution case. Prosecution ahs also examined the cyber technicians to bring on record that those activities were conducted through the applicant's social media accounts. However, the prosecution, at this stage, is unable to bring any such material covering section 16 of the UAP Act for the 'terrorist-act'. The submission of SPP Gonsalvis on the other hand is acceptable that the present prosecution case is based entirely upon the circumstantial evidence and bit by bit the chain of incidents will be proved in the light of the evidence of the prosecution witnesses to be examined one by one. But, the examination of in all 49 witnesses in this situation does not give even specific direction at this stage to proceed further. At the examination of all cited witnesses the prosecution would able to bring on record material to be considered however at this stage the prosecution has not succeeded to prove the prima facie case.*

> *18. No doubt, the prosecution discloses grave suspicion against the applicant about his probable involvement in the alleged offence. But this will not itself take place of* prima facie *case as defined by the various decisions of the Hon'be Upper Courts as discussed (supra). The prosecution is not much categorical to reveal the line of examination of the forthcoming witnesses and their relevance to bring on record material about terrorist acts of the applicant. Thus, at this stage, it cannot be concluded that the prosecution would certainly develop a chain of evidence to reach to desired destination of the guilt of the applicant. No prima facie case can be opined in favour of prosecution in the light of witnesses examined".*

25. It is strange that the NIA Court had held that "at this stage" the prosecution had not succeeded to prove *prima facie* case on the basis of examination of 49 witnesses and that the prosecution had failed to give a specific direction. It is further held that although the prosecution disclosed grave suspicion against the respondent against his involvement in the alleged offences but "at this stage" it cannot be concluded that the prosecution would certainly develop a chain of evidence to reach the desired destination of guilt of the respondent. It is on the basis of such flawed logic that the NIA Court then opined that no *prima facie* case could be said to be made out by the prosecution in the light of the witnesses examined.

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26. We are of the opinion that such approach cannot be countenanced particularly in the backdrop of the fact that the finding regarding *prima facie* truth about the accusations had been rendered twice over against the respondent when the earlier two bail applications were rejected on merits. Learned A.S.G. is, therefore, justified in relying upon the judgment of the Hon'ble Supreme Court in ***Kalyan Chandra Sarkar (supra)*** wherein it was held in paragraph 20 as follows:

> *"20. Before concluding, we must note though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. In the impugned order we do not see any such fresh ground recorded by the High Court while granting bail. It also failed to take into consideration that at least on four occasions order refusing bail has been affirmed by this Court and subsequently when the High Court did grant bail, this Court by its order dated 26th July, 2000 cancelled the said bail by a reasoned order. From the impugned order, we do not notice any indication of the fact that the High Court took note of the grounds which persuaded this Court to cancel the bail. Such approach of the High Court, in our opinion, is violative of the principle of binding nature of*

judgments of superior court rendered in a lis between the same parties, and in effect tends to ignore and thereby render ineffective the principles enunciated therein which have a binding character."

27. We are of the opinion that the fresh grounds on which the NIA Court proceeded in the present case in favour of the respondent cannot be said to be fresh grounds at all and merely because some of the prosecution witnesses stood already examined, it could not be a ground for re-visiting the findings already rendered against the respondent. Learned A.S.G. was also justified in relying upon the judgment of the Hon'ble Supreme Court in ***Ram Govind Upadhyay (supra),*** wherein the Hon'ble Supreme Court referred to the consideration pertaining to grant of bail and cancellation of an order granting bail. It was laid down that non-consideration of relevant material and aspects while grant of bail and ignoring relevant material could be a ground for interfering with an order granting bail in the present case. We are of the opinion that the NIA Court certainly ignored relevant considerations, including the reasoning given in earlier orders rejecting the applications for bail on merits. We are of the opinion that considering evidence of 49 witnesses already examined, when 107 witnesses remained to be examined, was an irrelevant consideration taken into account by the NIA Court while holding in favour of the respondent by the impugned judgment and order.

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28. In view of the aforesaid, we do not propose to go in detail into the interpretation of the various documents referred to by learned A.S.G. on the merits of the matter, particularly those on record of the NIA Court indicating the connection of the respondent with the absconding co-accused, as also the proposed activities that the accused were planning to undertake in India. We do not wish to give any opinion on the merits of such documents as also the video clipping, particularly because the detailed charge-sheet running into thousands of pages is the substratum on the basis of which, two bail applications stood rejected on merits. We are of the opinion that such findings rendered on the touchstone of proviso to Section 43D(5) of the UAPA do not deserve to be re-visited by detailed consideration of the charge-sheet again, merely because some prosecution witnesses have been examined, which according to the respondent, do not seem to support the case of the prosecution. It would not be appropriate to comment upon the merits of the rival contentions. Suffice it to say that we believe that the findings rendered in the orders rejecting the earlier two bail applications of the respondent were justified. Therefore, insofar as the aforesaid aspect of the matter is concerned, the impugned judgment and order passed by the NIA Court cannot be sustained.

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29. But, the case of the respondent on the second aspect of the matter appears to be on firm footing. There is no dispute about the fact that right to fair and speedy trial is a right recognized under Article 21 of the Constitution of India. The Hon'ble Supreme Court and various High Courts, including this court, have consistently held that the undertrials cannot be allowed to languish for years together in jail, while the trials proceed at snail's pace. If ultimately, the accused are found to be not guilty, the number of years, months and days spent by such accused as undertrials in jail, can never be given back to them and this is certainly a violation of their valuable right under Article 21 of the Constitution of India. Therefore, right to speedy trial has been recognized and reaffirmed consistently by the judgments of the superior courts.

30. In cases where the accused are facing charges under Special Acts like UAPA, parameters for grant of bail are more stringent, as a consequence of which, the undertrials in such cases remain in custody while the trials are pending. This is because they are accused in serious and heinous offences and their rights are required to be balanced with the rights of the society and citizens at large. The courts are required to perform a balancing act, so as to ensure that a golden mean is reached between the rights of the individual and those of the society at large.

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31. It is in the context of Special Acts that the Hon'ble Supreme Court in the case of ***Shaheen Welfare Association (supra)*** held that the long time taken by courts in disposal of the cases would justify invoking Article 21 of the Constitution of India to issue directions to release the undertrials on bail. The said judgment was rendered in the context of TADA, which also had stringent provisions with regard to grant of bail. Although, it was stated in the said judgment itself that the directions given therein were in the form of one time measure, the said judgment has been recognized as having laid down principles for grant of bail to undertrials, who could be classified in different categories.

32. It has been held in the said judgment that the undertrials could be categorized into three categories, depending upon the role with which they were charged in the context of special provisions of TADA. It was held that those categorized in category (a) were hardcore criminals, whose release would prejudice the prosecution case, apart from being a menace to the society and they could not be given liberal treatment. But, it was held that the other undertrials who could be categorized in category (b), (c) and (d) could be dealt with differently and depending upon the duration that they had spent in custody, they could be released on bail subject to specific conditions.

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33. In the present case, the NIA Court has categorized the respondent in category (b) and, by applying the ratio of ***Shaheen Welfare Association (supra)***, it has been held that since the respondent has spent more than five years in jail as an undertrial, he deserved to be granted bail, subject to two stipulations being satisfied. It was found that these two stipulations were firstly, that there was no likelihood of the trial being completed in the next six months, and secondly, that the respondent did not have any antecedents or that, if released, he would not be harmful to the complainant and witnesses or their family members.

34. It needs to be examined that whether the NIA Court was justified in holding that the respondent could be categorized in category (b) as indicated in the judgment of ***Shaheen Welfare Association (supra)*** and further as to whether he satisfied the aforesaid two stipulations.

35. In the present case, the respondent has been charged with offences under Sections 16 and 18 of the UAPA apart from Section 125 of the IPC. There is no dispute about the fact that the charge under Section 20 of the UAPA was not framed by the NIA Court itself against the respondent despite the fact that offence under the said section was registered against him. Section 16 of the UAPA pertains to punishment for a terrorist act and it is

specified therein that if death has resulted as a consequence of such terrorist act, the accused could be punished with sentence of death or imprisonment for life. It was further specified that in any other case, the sentence could be imprisonment for life or for a sentence, which shall be not less than five years. Section 18 of the UAPA pertains to punishment for conspiracy and there also it is provided that the sentence could range between five years and imprisonment for life. In the present case, the respondent has been charged on the basis that he along with the absconding co-accused committed terrorist acts in Iraq and Syria and further that he actively took part in such acts with the intention to strike terror in the minds of the people. He also stood charged under Section 125 of the IPC for waging war against the Governments of Iraq and Syria, who happen to be friendly nations with India. There is also reference made on behalf of the NIA to the fact that the respondent had allegedly returned to India with an intention to carry out terrorist activities in India, including blowing up of Police Headquarters at Mumbai. In any case, no death was caused by the alleged plans hatched by the respondent, since he was arrested the moment he landed in India.

36. In this backdrop, it cannot be said that the NIA Court committed an error in categorizing the respondent in category (b) above and thereby applying stipulations laid down in the judgment of the Hon'ble Supreme Court in ***Shaheen Welfare***

Association (supra). There is no dispute about the fact that the respondent has remained in custody as an undertrial for more than six years now. The process of examining 51 witnesses has taken more than five years and admittedly there are 107 more witnesses to be examined by the prosecution. Therefore, there is no likelihood of the trial being completed within the next six months. It is an admitted position that the proceedings under the NIA Act are undertaken by the NIA Court once in every week and that the said court is also dealing with cases pertaining to other Special Acts like the MCOCA, TADA, POTA, etc. Therefore, there is every likelihood of the trial continuing for the next few years. There is also no dispute about the fact that even if convicted for the offence with which the respondent is charged, he could be sentenced for imprisonment for a period ranging between five years and life imprisonment. It is crucial that the respondent has undergone more than six years as an undertrial.

37. Considering the aforesaid facts, it needs to be examined as to whether the law laid down by the Hon'ble Supreme Court in the context of granting bail to undertrials, who have already undergone incarceration for number of years, needs to be applied in the case of respondent. In this context, it is necessary to keep in mind that the respondent is accused of offences under the Special Act i.e. the UAPA.

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38. It is in this context of the aforesaid Special Act like the UAPA that the Hon'ble Supreme Court has rendered the latest pronouncement in the case of ***K.A. Najeeb (supra)***. While considering the stringent provisions of the Special Acts i.e. the UAPA pertaining to bail, the Hon'ble Supreme Court has held as follows:

> *18. It is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

39. Apart from the fact that the Constitutional Courts can certainly take note of violation of fundamental rights guaranteed under Part III of the Constitution of India, particularly the right

to life under Article 21 of the Constitution in the context of right to speedy trial, it is specifically held that the rigours of stringent provisions of bail as found in Section 43D(5) of the UAPA would melt down where there is no likelihood of the trial being completed in a reasonable time and the period of incarceration already undergone exceeds substantial part of the prescribed sentence. This is an aspect which becomes significant in the facts of the present case. We are conscious of the fact that even a sentence of life imprisonment can be imposed for the offence with which, the respondent has been charged under the UAPA and the IPC but, we cannot ignore the fact that the sentence could range between five years to imprisonment for life. This is particularly significant in the backdrop of the fact that the respondent has admittedly already undergone incarceration for more than six years while the trial is underway before the NIA Court. Looking to the pace at which about 51 witnesses have been examined, which took more than five years for the NIA Court, there is clearly no likelihood of the trial being completed within a reasonable time in the near future. Therefore, we are of the opinion that on this aspect, no error can be attributed to the impugned judgment and order passed by the NIA Court, while holding in favour of the respondent.

40. The other aspect of the matter is, as to whether it can be said that releasing the respondent would amount to prejudicially

affecting the trial and whether there would be possibility of influencing the witnesses and tampering with the evidence. We have observed that the respondent is an educated person, who was completing his graduation in Civil Engineering when he left for Iraq at the age of 21 years. He categorically stated before us that as a 21 year old, he was carried away and that he had committed a serious mistake, for which he had already spent more than six years behind bars. In the past more than six years of his incarceration, the respondent has argued his case on his own before the NIA Court. He represented his own case before this Court as well as the NIA Court and we could find that he was presenting his case by maintaining decorum and in a proper manner. During the course of hearing, it transpired that his father is a doctor of Unani medicine and his sisters are also doctors. His brother is an engineer. This shows that he comes from an educated family and that if stringent conditions are imposed upon him, with an undertaking to cooperate with the trial proceedings before the NIA Court, his release on bail may not be harmful to the society at large and it would not adversely affect the trial proceedings before the NIA Court.

41. Therefore, we are of the opinion that on the second aspect of the matter, the findings rendered by the NIA Court need to be upheld. In view of the above, although we have held that the findings rendered by the NIA Court on the merits of the matter

in the impugned judgment and order are unsustainable and consequently they are set aside, on the second aspect of the matter pertaining to the long pendency of the trial and the respondent having already undergone incarceration for more than six years, we are inclined to uphold the impugned order on the said ground. Yet, we intend to impose further stringent conditions on the respondent while upholding his release on bail. Consequently, part of the impugned order deserves to be modified by imposition of further conditions. Hence, the following order:

:O R D E R:

(a) The impugned order dated 17/03/2020 passed by the NIA Court granting bail to the respondent-accused is sustained on the ground of the respondent-accused having already undergone incarceration for more than six years and likelihood of the trial being delayed for considerable period. The impugned order is accordingly partly modified as under:

(b) The respondent-accused **Areeb Ejaz Majeed** is released on bail upon furnishing P.R. Bond of Rs.1,00,000/- with solvent surety bond of two

solvent sureties in the like amount on following terms:

(i) The respondent-accused shall stay with his family at Kalyan and he shall submit a list of at least 3 blood relatives, having permanent abode in Mumbai or its suburbs or Kalyan, Dist. Thane with their detailed residential and working place addresses with documentary proof.

(ii) The respondent-accused and sureties must immediately inform the case in-charge NIA officer in case of change of residential addresses.

(iii) The accused shall produce 'residential address verification certificates' of him and surety issued by case in-charge NIA officer after physical verification.

(iv) The respondent-accused shall report to in-charge NIA officer once in a week and produce the proof before court on relevant fixed dates.

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(v) The respondent-accused shall report to the Kalyan (West) Police Station, Kalyan, Thane twice a day i.e. in the morning between 8.00 a.m. and 10.00 a.m. and in the evening between 6.00 p.m. and 8.00 p.m. on every day for the first two months from the date of his release. Thereafter, he shall report to the said police station once a day in the morning between 8.00 a.m. and 10.00 a.m. on every day for the next two months. Thereafter, he shall report to the said police station on every Monday, Wednesday and Friday in the morning between 8.00 a.m. and 10.00 a.m. for the next two months and thereafter, he shall report to the said police station on every Sunday and Wednesday in the morning between 8.00 a.m. and 10.00 a.m., till conclusion of the trial.

(vi) In case he remains absent and arrest warrant is issued against him, then he would not be again released on bail unless special reasons are shown.

(vii) The respondent-accused shall surrender his

passport, if any, immediately with case in-charge NIA officer.

(viii) The respondent-accused shall not make any statement regarding the aforesaid proceedings pending before the NIA Court in any form of media i.e. print media, electronic media, etc. including social media.

(ix) The respondent-accused shall not indulge in any activity similar to the activities on the basis of which the said FIR stood registered against him for offences under the IPC and UAPA.

(x) The respondent-accused shall not try to establish communication with co-accused or any other person involved directly or indirectly in similar activities or make any international call to any person indulging in similar activities as alleged against him, through any mode of communication.

(c) The respondent-accused shall co-operate for expeditious disposal of the trial and, in case, the

delay is caused by him, then his bail would be liable to be cancelled.

(d) The respondent-accused shall not influence any witnesses or tamper with the evidence either himself or through anyone else.

(e) In the event, the respondent-accused violates any of the aforesaid conditions, the relief of bail granted by this court will be liable to be cancelled.

42. The appeal stands disposed of in above terms.

(MANISH PITALE, J.) (S.S. SHINDE, J.)

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43. After pronouncement of the judgment and order, learned A.S.G. orally prayed that this court may grant stay of the order pronounced today, in view of the fact that the interim order of stay was already operating since 26/03/2020. The respondent-accused appearing in-person opposed the said prayer, submitting that the interim stay was granted by this court to the order of the NIA Court in the backdrop of the fact that Covid-19 pandemic had just started, at the relevant time.

44. We have heard learned A.S.G. as well as the respondent-accused on this aspect of the matter. We are of the view that since we have partly upheld the order of the NIA Court and granted bail to respondent-accused, albeit with further stringent conditions, we do not accede to the prayer made by learned A.S.G. Accordingly, the oral prayer is rejected.

45. The Registry to immediately forward a copy of this judgment and order to the Superintendent of Bombay Central Prison as well as by e-mail or any other fastest mode of communication and report compliance of this direction by 3.00 p.m. today.

(MANISH PITALE, J.) **(S.S. SHINDE, J.)**

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