IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.355 OF 2021

Iqbal Ahmed Kabir Ahmed ...Appellant
(Ori.accused No.3)

vs.

The State of Maharashtra ...Respondent

Mr. Mihir Desai, Senior Advocate a/w. Ms. Kritika Agarwal, Mr. Shahid Nadeem i/b. Mr. Mohd. Shaikh, for the Appellant.
Mrs. A.S. Pai, Spl. PP for Respondent-NIA.
Mr. V.B. Konde-Deshmukh, APP for the Respondent-State.

CORAM : **S.S. SHINDE &**
N.J. JAMADAR, JJ.

JUDGMENT RESERVED ON : 14th JULY, 2021
JUDGMENT PRONOUNCED ON : 13th AUGUST, 2021

(THROUGH VIDEO CONFERENCING)

JUDGMENT : (Per N.J.Jamadar, J.)

1. This appeal under section 21 of the National Investigation Agency Act, 2008 (NIA Act) is directed against an order dated 27th May, 2019 passed by the learned Special Judge on an application (Exhibit 141) in NIA Special Case No. 3 of 2018, preferred by the appellant-original accused No. 3 for enlarging him on bail, whereby the said application for bail came to be rejected.

2. The background facts leading to this appeal can be stated in brief as under:

The appellant has been arraigned as accused No. 3 in RC No.03/2016/NIA/MUM registered by NIA for the offences punishable under section 120B and 471 of Indian Penal Code and sections 13, 16, 18, 18B, 20, 38 and 39 of Unlawful Activities (Prevention) Act, 1967 (UAPA) and section 4, 5 and 6 of the Explosives Substances Act, 1908 (the Explosives Act). Initially, the accused No. 3 was arrested by ATS, Kalachowki police station on 7th August, 2016 in C.R. No. 8 of 2016. Charge sheet was filed by ATS on 7th October, 2016. Upon transfer of investigation to NIA, the later re-registered the crime as RC-03/2016/NIA/MUM and, post further investigation, filed supplementary charge sheet on 17th July, 2019.

3. The gravamen of indictment against the accused is that accused No. 1 namely Naserbin Abubaker Yafai (Chaus) has been in contact with the members of Islamic State/Islamic State of Iraq and Levant (ISIL)/ Islamic State of Iraq and Syria/Daish, a terrorist organization, which has been banned by the Government of India vide notification K.A. 534(A) on 16th February, 2015.

Accused No. 1 Naserbin Abubaker Yafai (Chaus) and No. 2 Mohd Shahed Khan procured material to prepare an IED. The appellant/ accused No. 3 was a co-conspirator with the co-accused. Pursuant to disclosure made by the co-accused the electric switch board whereon the IED was soldered in the house of appellant/accused No. 3 was discovered. Likewise, the oath (baith) owing allegiance to banned terrorist organization was recovered from the house of accused No. 3. The accused have thus been arraigned for the offences punishable under section 120B of Indian Penal Code and section 13, 16, 18, 18B, 20, 38 and 39 of UAPA and section 4, 5 and 6 of the Explosives Act.

4. In the backdrop of the aforesaid nature of the accusations, the learned Special Judge was persuaded to reject the prayer for release on bail. The fact that the oath (baith) was recovered from the house of the accused No. 3 in pursuance of the discovery made by the co-accused, the discovery of the use of electric switch board to facilitate the preparation of the bomb, the procurement of the sim card by making use of false documents and the statement of the witnesses recorded during the course investigation which indicated that the accused, including accused No. 3, used to

assemble at Mumtaz Nagar, opposite Mohamadiya Masjid, Parbhani and provoked each other to perpetrate unlawful activities weighed with the learned special Judge to reject the prayer for release on bail. Hence, the accused No. 3 is in appeal.

5. An affidavit is filed by Mr. Vikram M. Khalate, S.P. IPS, NIA, on behalf of NIA, in opposition of the prayer for bail.

6. Appeal is admitted and, with the consent of counsels for the parties, taken up for final disposal.

7. We have heard Mr. Mihir Desai, learned senior advocate for the appellant and Mrs. A.S. Pai, learned Special Public Prosecutor for respondent-NIA. With the assistance of the learned counsel for the parties, we have perused the material on record including the documents and statements of protected witnesses, copies of which were tendered by the learned PP, which according to the prosecution shed light on role attributed to the appellant/accused No. 3 and incriminate him.

8. Mr. Mihir Desai, learned senior counsel would urge that the

learned special Judge committed a manifest error in negativing the prayer for bail. According to Mr. Mihir Desai, the learned special Judge fell in error in not properly appreciating the role attributed to accused No. 3. Inviting the attention of Court to the charge framed in NIA Special Case No. 3 of 2018 on 17th March, 2021, Mr. Desai strenuously urged that the accused No. 3 has not been charged with the offences punishable under the Explosives Substances Act, 1908. Nor is it the case of the prosecution that accused No. 3 was found in possession of any explosives substances. Nothing incriminating has been recovered from accused No. 3.

9. Mr. Mihir Desai would further urge that there are two circumstances which allegedly incriminate the accused No. 3. One, the recovery of the oath (baith) from the house of accused No. 3 and the pointing out of the electric switchboard whereon the IED was allegedly soldered. Two, the statements of witnesses to the effect that the accused No. 3 participated in the meetings where the events concerning Islam were discussed, and the possible actions in respect of the perceived threat to Islam were allegedly deliberated upon. These two sets of allegations are not

sufficient to bring the acts and conduct of accused No. 3 within the dragnet of the UAPA, urged Mr. Desai.

10. In any event, having regard to the fact that the petitioner has been in custody for almost five years and it is very unlikely that the trial in NIA Special Case No. 3 of 2018, considering the pendency of the cases on the file of the learned special Judge and the number of witnesses which may be examined in the instant case, would be concluded in a reasonable time. Thus, on this count of the prolonged incarceration also the appellant deserves to be released on bail, lest the constitutional guarantee of right to life and personal liberty would be jeopardized, submitted Mr. Desai.

11. Per contra, Mrs. Pai learned special P.P, stoutly supported the impugned order. It was urged that, in the backdrop of the grave nature of allegations and the material on record which prima facie indicates that the allegations against the accused are true, the learned special Judge was well within his rights in declining to exercise the discretion in favour of accused No. 3. Taking the Court through the statements of witnesses (redacted), Mrs. Pai urged with a degree of vehemence that the offence of

criminal conspiracy is prima facie made out. In addition, there is evidence of recovery of oath (baith) and the electric switch board where the IED was soldered. In the backdrop of such incriminating material, the interdict contained in section 43D of UAPA comes into play and the accused can not released on bail, canvassed Mrs. Pai. Since the charge has been framed there is prospect of expeditious conclusion of trial. Thus, the prayer for release on bail on the ground of prolonged incarceration was also opposed.

12. To begin with, the considerations which normally weigh with the Court in granting or refusing go grant bail in a non bailable offence. Ordinarily, the nature and seriousness of the offence, the circumstances in which the offences were allegedly committed, the circumstances peculiar to the accused in a given case, the nature and character of the evidence/material pressed into service against the accused, the possibility or otherwise of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with and the larger public interest are the factors which influence the exercise of discretion.

13. Moreover, at the stage of granting bail a detail examination of material/ evidence and elaborate documentation of the merits of the case are not required to be undertaken. The Court is, however, expected to give reasons for granting or refusing to grant bail. Such an exercise is markedly different from discussing merits/demerits of the case, as a Court would do at the stage of determination of guilt or otherwise of an accused. The requirement of ascribing reasons becomes more critical where there are statutory restrictions in the matter of grant of bail like section 43D of the UAPA. Section 43D(5) contains an interdict against the grant of bail unless the Public Prosecutor has been given an opportunity of being heard and on a perusal of case diary or the report made under section 173 of the Code, the Court is of the opinion that there are no reasonable grounds for believing that the accusation against such person is prima facie true. Section 43D(6) provides that the restriction on granting of bail specified in section 43D(5) is in addition to the restriction under the Code or any other law for the time being in force on granting of bail.

14. We propose to approach the instant case in the backdrop of

the aforesaid legal premise.

15. In the context of the charge against the accused of perpetrating unlawful activities, terrorist acts, recruiting of persons for terrorist acts and/or being member of a terrorist gang or organization, and association with, and/or support to, terrorist organization, the material pressed against the accused primarily consists of the statements of witnesses who allegedly were members of the group which assembled opposite Mohammadiya Masjid, Parbhani and had regular discussions. The statements of four witnesses recorded on 10th August, 2016, 16th July, 2016 and 17th August, 2016 are material. (For convenience witnesses are referred as P-1 to P-4).

16. The witness (P-1) stated that he and his other friends including accused used to assemble post dinner in the ground in front of Mohammadiya Masjid, Mumtaj Nagar and discuss various issues including atrocities on Muslims in the country and world, Hindu organizations, beef ban, incidents at Dadri, Muzaffarpur and Gujrat riots. The possible solutions were also discussed. Some members discussed about ISIS. The witness further adds that during the course of discussions, he found accused Nos. 1 to 4 of

fundamentalist and Jihadi leaning. The accused were of the view that there were atrocities on Islam and they should do something to avenge the atrocities. The statement of second witness (P-2), recorded on 16th July, 2016, proceeds on the same line. The second witness, however, does not brand the accused as fundamentalist and Jihadi and that they spoke of avenging the atrocities on Islam. The third witness (P-3), whose statement was recorded on 10th August, 2016, stated that co-accused Mohd Shahed Khan (accused No. 2) spoke about the atrocities on Muslims in Syria and the acceptance of the *Khilafat* of one Abi Bakr Al Baghdadi Al Hussaini Al Quraishi. At that time the appellant Iqbal Ahmed Kabir Ahmed (accused No. 3) seconded the view of co-accused Mohd Shahed Khan (accused No. 2). The fourth witness (P-4) supported the first witness in attributing fundamentalist and Jihadi thoughts to the accused and that the accused were of the view that they should do something to avenge the incidents of atrocities on Islam.

17. In addition to the aforesaid statements, to connect the accused with the offences with which they are charged under UAPA, the prosecution banks upon the discovery allegedly made

on 7th August, 2016 by Naserbin Abubaker Yafai (Chaus) (accused No.1). The memorandum of disclosure statement recorded on 7th August, 2016 reveals that the accused No. 1 volunteered to show the place where the circuit to prepare a bomb was prepared and the oath form (baith) was kept. Pursuant to the said statement, the Naserbin Chaus (accused No. 1) allegedly led the police party to the house of appellant-accused and pointed out the electric board on which the circuit was soldered. The seizure memo further records that at the instance of accused No. 1, the appellant-accused produced the oath form(G/1), which came to be seized along with documents scribed in Urdu and Arabic(G/2). Attention of the Court was invited to the opinion of the handwriting expert, Central Forensic Science Laboratory, that the writing on the said oath form(G/1) and the specimen writing (S/7 to S/12) [of Mohd Raisoddin Siddique (accused No. 4)] were written by one and the same person.

18. The third set of material against the appellant/accused consists of the statements of witnesses P-5 to P-9 to the effect that the documents furnished by the fifth witness (P-5), whose statement was recorded on 21st September, 2016, were misused to

obtain a sim card.

19. In the light of the aforesaid material, Mrs. Pai, the learned PP, would urge with tenacity that the aforesaid material is sufficient to hold that there are reasonable grounds to believe that the accusation against the accused is prima facie true. Once such a prima facie finding is recorded, according to the learned PP, the interdict contained in section 43D(5) of the UAPA comes into play with full force and vigor and precludes the Court from releasing the accused on bail.

20. To lend support to this submission, learned PP placed a very strong reliance on the judgment of the Supreme Court in the case of **National Investigation Agency vs. Zahoor Ahmad Shah Watali**[1]**.** In the said case, after adverting to the provisions contained in section 43-D(5) to (7) of UAPA, the Supreme Court had observed as under:-

> *23. By virtue of the proviso to subsection (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar*

1 (2019) 5 Supreme Court Cases 1.

special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act.

21. Laying emphasis on the observations to the effect that 'the expression "prima facie true" would mean that the material /evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report must prevail until contradicted and/or overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the said offence,' it was submitted that in the absence of any contra material, the Court would not be justified in discarding the material which the prosecution has pressed into service against the accused, if it prima facie renders the accusation true.

22. Mr. Mihir Desai, learned senior advocate for the appellant, joined the issue by canvassing a submission that the aforesaid pronouncement in the case of **Zahoor Ahmad** (supra) can not be so construed as to foreclose scrutiny of the evidence/material adduced by the prosecution so as to judge whether it is of such quality as to satisfy the existence of reasonable grounds for the belief that the accusation is prima facie true. In order to bolster up this submission, the learned counsel placed reliance on the judgment of this Court in the case of **Dhan Singh vs. Union of**

India (Criminal Appeal No. 580 of 2016); and of the Supreme Court in the cases of **Union of India vs. K.A. Najeeb**[2] **and Arup Bhuyan vs. State of Assam**[3]

23. In the case of **Dhan Singh** (supra), a Division Bench of this court after adverting to the provisions of section 43D(5) of UAPA and the pronouncement of the Supreme Court in **Zahoor Ahmad** (supra) and the judgment of Gauhati High Court in **Redaul Hussain Khan vs. The National Investigation Agency**[4] enunciated the import of the words "'prima facie" coupled with the word "true"' as they appear in section 43D(5) in the following words:

> "*When the word, 'prima facie', is coupled with the word, 'true', it implies that the court has to undertake an exercise of cross- checking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made are inherently improbable, or wholly unbelievable, it may be difficult to say that a case, which is prima facie true, has been made out. In doing this exercise, the Court have no liberty to come to a conclusion, which may virtually amount to an acquittal of the accused. Mere formation of opinion by the court on the basis of the materials placed before it is sufficient.*"

2 (2021) 3 Supreme Court Cases 713.
3 2011(3) SCC 377.
4 2010 SCC OnLine Gau 606.

24. At this juncture, in our view, it is imperative to consult a three Judge Bench judgment of the Supreme Court in the case of **Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra**[5] reference to which was made by the Supreme Court in the case of **Zahoor Ahmad** (supra) for guidance.

25. In the case of **Ranjitsingh** (supra), the contours of the power of the Court to grant bail, in the face of the interdict contained in section 21(4) of the Maharashtra Control of Organised Crime Act, 1999, arose for consideration. Section 21(4) of the MCOCA reads as under:

> *(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless-*
> *(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and*
> (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that lie is not likely to commit any offence while on bail.

26. On a plain reading of clause (b) of section 21(4) of MCOC Act it becomes evident that, it contains an interdict against grant of

5 (2005) 5 Supreme Court Cases 294.

bail unless the Court satisfies itself that there are reasonable grounds for believing that the accused is 'not guilty of such offence' and that the accused is 'not likely to commit any offence while on bail'. In the backdrop of aforesaid provision, the Supreme Court in the case of **Ranjitsingh** (supra) expounded the legal position as under:

> *35. Presumption of innocence is a human right. [See Narendra Singh and Another Vs. State of M.P., (2004) 10 SCC 699, para 31] Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-Section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of Sub-section (4) of Section 21 must be given a proper meaning.*
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> *36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the Court to record such a finding? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?*

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on records only for grant of bail and for no other purpose .

38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence.
.....

44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of

> *bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.*
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> (emphasis supplied)

27. It would be contextually relevant to note that adverting to the restrictive provisions in special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, in the case of **Zahoor Watali** (supra), the Supreme Court observed that the requirement in those special enactments to record an opinion that there are reasonable grounds for believing that the accused is not guilty of the alleged offence stands on a different footing. It was in terms observed that there is a degree of difference between the satisfaction to be recorded for the purpose of UAPA that there are reasonable grounds for believing that the accusation against such person is, "prima facie true". In one sense the degree of satisfaction is lighter when the Court has to opine that the accusation is prima facie true as compared to the opinion that the accused is not guilty of such offences as required under the other special enactments.

28. In our considered opinion, if the expression, "reasonable grounds to believe that the accusation is prima facie true" and "reasonable grounds for believing that the accused is not guilty" are compared and contrasted, a greater degree of satisfaction is required to record an opinion that there are reasonable grounds to believe that the accused is not guilty of the alleged offence, albeit prima facie. The restriction on grant of bail under the special enactments which provide for recording a satisfaction that there are reasonable grounds to believe that the accused is not guilty of the offences charged under those enactments, appears to be more stringent.

29. We humbly draw support to the aforesaid view from the observations of the three Judge Bench of the Supreme Court in the case of **K.A. Najeeb** (supra). In the said case also the charge was, inter alia, for the offences punishable under sections 16, 18, 18-B, 19 and 20 of UAPA. Dealing with the submission on behalf of the Union of India against the grant of bail in the light of the statutory rigour under section 43D(5) of UAPA and based on the judgment of the Supreme Court in the case of **Zahoor Watali** (supra), the three judge Bench expounded legal position as under:

> *20. "Yet another reason which persuades us to enlarge the respondent on bail is that section 43-D(5) of UAPA is comparatively less stringent than section 37 of the NDPS. Unlike, the NDPS where competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, section 43-D(5) of UAPA merely provides another possible ground for the competent Court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion etc."*
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> (emphasis supplied)

30. Section 37(1)(b)(ii) is pari materia clause section 21(4)(b) of MCOC Act (extracted above) and enjoins the Court to record the satisfaction that there are reasonable grounds for believing that the accused is not guilty of such offences and that he is not likely to commit any offence while on bail.

31. In view of the aforesaid exposition of the legal position, we readvert to the consideration of the material arrayed against the accused. First and foremost, the tenor of the statements of the four witnesses (P-1 to P-4), even if taken at par, would indicate that the accused persons and those witnesses used to have discussions over the threats to Islam; real, perceived or imaginary.

Indeed, two of the witnesses have stated that possible solutions to such threats, were also discussed including actions of ISIS. In the context of the accused No. 3, what has been attributed to him is that he seconded the views of one of the co-accused, who supported the activities of ISIS. These statements appear to be in the realm of discussion and deliberation which the accused and those witnesses had. At this juncture, there is no prima facie material to indicate that the accused No. 3 instigated the commission of offence or insurgency. Nor there is, prima facie, material to indicate that the accused No. 3 advocated violent reactions.

32. In our view, there is considerable substance in the submission of Mr. Desai that the material qua the accused, at the highest, is in the realm of discussions. Mere discussion or for that matter advocacy of a particular cause, according to Mr. Desai, would not fall within the dragnet of an offence. To lend support to this submission, Mr. Desai placed reliance on the observations of the Supreme Court in the case of **Shreya Singhal vs. Union of India**[6].

6 (2015) 5 Supreme Court Cases 1.

> *13. This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".*

33. The recovery of the oath form (baith) from the house of the accused No. 3, nay at the instance of the accused No. 3, also does not seem to squarely incriminate the accused No. 3. Evidently, the co-accused Naserbin Abubaker Yafai (Chaus) (accused No.1) made a disclosure statement that those forms were distributed to many persons. Moreover, from the own showing of the prosecution, the contents of the oath form(G/1) are not in the handwriting of the accused No. 3. We have perused the official translation of the said

form(B/6) (page 79 of the appeal memo) which appears to be a declaration of the acceptance of one Abi Bakr Al Baghdadi Al Hussaini Al Quraishi as the "Caliph" of the Muslims. The mere possession of such oath form, without subscribing thereto, prima facie, does not appear to be an incriminating circumstance.

34. This takes us to the submission on behalf of the respondent that the fact that electric switch board in the house of the accused No. 3 was used to solder the material to prepare a bomb leads to no other inference than that of accused No. 3 being a confederate in the conspiracy to commit terrorist acts. Two factors are of critical significance. One, nothing incriminating has been recovered from the possession of the accused No. 3 in the context of charge of preparing IED. Two, the accused No. 3 has not been charged with the offence punishable under the Explosives Substances Act, 1908. The fact that the co-accused has pointed the switch board in the house of the accused, where the material was allegedly soldered, without seizure of any article or material therefrom, prima facie, may not amount to the discovery of a fact which distinctly relates to the said disclosure statement. Nor the said statement can be admitted against the accused No. 3, under

sec.10 of the Evidence Act, as with the arrest of accused No. 1, the conspiracy came to an end. For these reasons, at this juncture, in our view, the alleged discovery can not be, prima facie, fastened against the appellant.

35. The upshot of aforesaid consideration is that the material which is pressed into service against the appellant, prima facie, does not appear to be of such quality as to sustain a reasonable belief that the accusation against the appellant is true. In the totality of the circumstances, the bar envisaged by section 43-D(5) may not operate with full force and vigor.

36. This leads us to the second limb of the submission on behalf of the appellant based on the long period of incarceration as an under trial prisoner. The accused No. 3 came to be arrested on 7th August, 2016. Thus, he is in custody for more than five years. Charge came to be framed on 17th March, 2021, almost after 4 ½ years of the arrest. We were informed, the recording of evidence is yet to commence. Mr. Desai submitted that, the prosecution proposes to examine more than 150 witnesses. As of 19th April, 2021, the learned special Judge, seized with the NIA Case No.3 of

2018, had 225 cases on his file, including 16 NIA special cases, 43 MCOCA special cases and 64 Sessions Cases.

37. If all these factors are considered in juxtaposition with each other, there is no likelihood of the instant case being decided within reasonable time in near future. In contrast, having regard to the number of witnesses which the prosecution proposes to examine to substantiate the indictment against the accused, coupled with the number of NIA and MCOCA special cases which the learned special Judge is seized with, an inference become inescapable that considerable time would be required for the conclusion of the trial in the instant case. Though the learned PP tried her best to persuade us to hold that, as the charge has already been framed, a direction for expeditious conclusion of trial would serve the purpose, yet, the fact that the effective trial is yet to commence dissuades us from acceding to said proposition. It is extremely unlikely that the trial can be completed in near future.

38. In the aforesaid setting of the matter, right of accused to speedy trial, which flows from the right to life under Article 21 of the Constitution, comes to the fore.

39. This right to speedy trial, in the prosecutions where the special enactments restrict the powers of the Court to grant bail, faces a competing claim of the interest of society and security of State. In such prosecutions, if the trials are not concluded expeditiously, the procedure which deprives the personal liberty for an inordinate period is then put to the test of fairness and reasonableness, envisaged by Article 21 of the Constitution. Where the period of incarceration awaiting adjudication of guilt become unduly long, the right to life and the protection of fair and reasonable procedure, envisaged by Article 21, are jeopardized.

40. In the case of **Saheen Welfare Association vs. Union of India**[7] the Supreme Court considered the conflicting claims of personal liberty emanating from Article 21 and protection of society from the terrorist acts, which the Terrorist and Disruptive Activities (Prevention) Act, 1987 professed to achieve. The Supreme Court reconciled the conflicting claims of individual liberty and the interest of the community by issuing directions for release of the under trial prisoners, who had suffered long incarceration, depending upon the gravity of the charges. The observations of the Supreme Court in para 9 to 11 and 13 to 14 are material and

7 1996 SCC (2) 61.

hence extracted below:

> *9] The petition thus poses the problem of reconciling conflicting claims of individual liberty versus the right of the community and the nation to safety and protection from terrorism and disruptive activities. While it is essential that innocent people should be protected from terrorists and disruptionists, it is equally necessary that terrorists and disruptionists are speedily tried and punished. In fact the protection to innocent civilians is dependent on such speedily trial and punishment. The conflict is generated on account of the gross delay in the trial of such persons. This delay may contribute to absence of proper evidence at the trial so that the really guilty may have to be ultimately acquitted. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted, but who remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA. They suffer severe hardship and their families may be ruined.*
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> *10] Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh's case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21.*
>
> *11] These competing claims can be reconciled by taking a pragmatic approach.*
>
> *13] For the purpose of grant of bail to TADA detentes, we divide the under trials into three classes, namely, (a) hardcore under trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general arid to the complainant and prosecution witnesses in particular; (b) other undertrials whose overt acts or involvement*

directly attract Sec.3 and/or 4 of the TADA Act; (c) under trials who are roped in, not because of any activity directly attracting Sec.3 and A, but by virtue of Sec.120B or 147, I.P.C., and; (d) those under trials who were found possessing Incriminating articles in notified areas & are booked under Section 5 of TADA.

14] Ordinarily, it is true that the provisions of Sections 20(8) and 20(9) of TADA would apply to all the aforesaid classes. But while adopting a pragmatic and just approach, no one can dispute the fact that all of them cannot be dealth with by the same yardstick. Different approaches would be justified on the basis of the gravity or the charges. Adopting this approach we are of the opinion that undertrials falling within group (a) cannot receive liberal treatment. Cases of undertrials falling in group (b) would have to be differently dealt within. in that, if they have been in prison for five years or more and their trial is not likely to be completed within the next six months, they can be released on bail unless the court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant the family members of the complainant, or witnesses. Cases of undertrials falling in groups (c) and (d) can be dealt with leniently and they can be released if they have been in sail for three years and two years respectively……."

41. The aforesaid judgment was referred with approval, by the Supreme Court in the case of **K.A.Najeeb** (supra) wherein the Supreme Court while emphasizing that under trials cannot be indefinitely detained pending trial, expounded in clear terms that once it is found that timely conclusion of trial would not be possible and accused has suffered incarceration for a significant period of time, the Court would be obligated to enlarge the

accused on bail. The observations in paragraph 15 and 17 are instructive and thus extracted below:

> *15] This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that under trials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail.*
>
> *17] 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 prescribed sentence. Such approach would safeguard against possibility of provisions like Sec.43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.* (emphasis supplied)

42. The Supreme Court has thus exposited the legal position that the statutory restriction like section 43-D(5) of the UAPA per se does not operate as an impediment on the powers of the constitutional Court to grant bail, if a case of infringement of the constitutional guarantee of protection of life and personal liberty is made out, and the rigours of such statutory restriction would melt down in the face of long incarceration of an under trial prisoner. In such a situation, the prayer of entitlement for bail on the count of prolonged delay in conclusion of trial is required to be appreciated in the backdrop of period of incarceration, the prospect of completion of trial in a reasonable time, the gravity of the charge and attendant circumstances.

43. Reverting to the facts of the case, as indicated above, the recording of evidence is yet to commence. By any standard, it is very unlikely that the trial would be concluded in a reasonable period. We have adverted to the nature of the material/evidence which, according to the prosecution, incriminates the accused and our prima facie view thereon. The gravity of the charges against the appellant is required to be considered through the aforesaid prism. In any event, the appellant has already undergone the

minimum term of imprisonment prescribed for the offences punishable under section 16,18 and 18B. Undoubtedly, the maximum sentence for these offences may extend to life imprisonment, like the offence punishable under section 20. The offences punishable under section 38 and 39, and 13 entail maximum punishment of 10 years and 7 years, respectively. Evidently, the appellant has undergone more than half of the maximum punishment prescribed for the offences, other than the offences which entail imprisonment for life. In the later cases also, the imprisonment can be from five years (where minimum is prescribed) to life.

44. In the aforesaid view of the matter, in our considered opinion, the further incarceration of the appellant, in the face of extremely unlikely situation of the trial being completed in near future, would be in negation of the protection of life and personal liberty under Article 21. The denial of bail, in such circumstances would render the procedure not only unreasonable but unconscionable as well.

45. The upshot of the aforesaid consideration is that the

appellant is entitled to be released on bail on merits and on the ground of prolonged incarceration, which infringes his right to life and personal liberty.

46. Having regard to the gravity of the offences, nature of the accusation and to protect the interest of the society at large we are, however, impelled to impose appropriate conditions. Hence, the following order:

ORDER

i] The appeal stands allowed.

ii] The impugned order stands quashed and set aside.

iii] The appellant Iqbal Ahmed Kabir Ahmed be released on bail on furnishing a P.R bond in the sum of Rupees One Lakh and one or two solvent sureties in the like amount to the satisfaction of the learned Judge, NIA Court.

iv] The appellant shall report the N.I.A., Mumbai Branch twice every week on Tuesday and Friday, between 10 am to 12 noon, for a period of one month from the date of his release. Thereafter, the appellant shall report the said office on every Tuesday between 10 am to 12 noon for the next two months. Thereafter, the appellant

shall report to the said office on first Tuesday of every month between 10 am to 12 noon, till conclusion of the trial.

v] The appellant shall attend each and every date of the proceeding before the NIA Court.

vi] The appellant shall remain within the jurisdiction of the NIA Court, i.e. Greater Mumbai, till the trial is concluded and shall not leave the area without prior permission of the NIA Court.

vii] The appellant shall surrender his passport, if any (if not already surrendered). If the appellant does not hold the passport, he shall file an affidavit to that effect before the NIA Court.

viii] The appellant shall not, either himself or through any other person, tamper with the prosecution evidence and give threats or inducement to any of prosecution witnesses.

ix] The appellant shall not indulge in any activities similar to the activities on the basis of which the appellant stands prosecuted.

x] The appellant shall not try to establish communication with the co-accused or any other person involved directly or indirectly in similar activities, through any mode of communication.

xi] The appellant shall co-operate in expeditious disposal of the trial and in case delay is caused due to him, then his bail would

be liable to be cancelled.

xii] In the event, the appellant violates any of the aforesaid conditions, the relief of bail granted by this Court will be liable to be cancelled.

xiii] After release of appellant on bail, he shall file undertaking within two weeks before the NIA Court stating therein that he will strictly abide by the conditions No. (iv) to (xii) mentioned herein above.

xiv] By way of abundant caution, it is clarified that the observations made in this judgment and order are limited to the consideration of the question of grant of bail to the appellant and they shall not be construed as an expression of opinion which bears on the merits of the matter at the trial. The learned special Judge shall proceed with the trial against the appellant and the co-accused uninfluenced by the observations made hereinabove.

The appeal accordingly stands disposed of.

(N.J. JAMADAR, J.) **(S.S. SHINDE, J.)**