



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Pronounced on: 22.09.2023

CRL.A. 286/2023

SUHAIL AHMAD THOKAR

..... Appellant

Versus

NATIONAL INVESTIGATION AGENCY

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Kartik Murukutla, Advocate
For the Respondent : Mr. Gautam Narayan, SPP with Ms. Asmita Singh, Ms. Akriti & Mr. Harshit Goel, Advocates for NIA

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE ANISH DAYAL

J U D G M E N T

SIDDHARTH MRIDUL, J

1. The present appeal under Section 21(4) of the National Investigating Agency Act, 2008 (hereinafter referred to as 'the NIA Act') read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.')

assails the order dated 07.01.2023 passed by the Additional Sessions Judge-03, Special Judge



(NIA), Patiala House Courts, New Delhi, in the case arising out of RC-29/2021/NIA/DLI, registered by the NIA under Sections 120B, 121A, 122, 123 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and under Sections 18, 18A, 18B, 20, 38 & 39 of the Unlawful Activities (Prevention) Act, 1967, (hereinafter referred to as 'the UAPA Act'), whereby the bail application instituted on behalf of the appellant was dismissed.

2. Briefly, the facts as are necessary for the adjudication of the present appeal are encapsulated as under:-

2.1. It is the case of the prosecution that an FIR was registered subsequent upon the receipt of intelligence regarding the incubation of a larger conspiracy in the Kashmir valley. It is alleged by the prosecution, that the conspiracy, encompassed both the physical realm, as well as in the digital domain and had been orchestrated by violent and proscribed terrorist groups, including Lashkar-e-Taiba (LeT), Jaish-E-Mohammed (JeM), Hizb-ul-Mujahideen (HM), Al-Badr, as well other terrorist groups pointed elaborated in the charge sheet. It is further alleged that these groups were allegedly associated with entities such as 'The



Resistance Front (TRF), People Against Fascist Force (PAFF), and Mujahideen Ghazwat-ul-Hind (MGH)’.

2.2. It is furthermore alleged that, during the course of the investigation, it was unearthed that, the aforementioned terrorist groups, in collaboration with their facilitators and leaders based in Pakistan, along with their Over-Ground Workers within India, were involved in influencing and radicalizing susceptible local youth. It is also alleged that, the objective was to recruit and train these young individuals for participating in acts of terrorism, which included handling weapons, ammunition, and explosive materials. These actions were intended to execute acts of terrorism, involving attacks on civilians and security forces, with the intention of spreading fear within the Kashmir Valley and in various regions of India, subsequent to the revocation of Article 370 from the Constitution of India.

2.3. It is further the case of the prosecution that, based on the abovementioned intelligence, the National Investigation Agency (NIA) lodged the present FIR No: RC-29/2021INIA/DLI under Sections 120B, 121A, 122, 123 of



the IPC, and Sections 18, 18A, 18B, 20, 38, 39 of the UAPA Act. It is alleged in the charge sheet that the investigation had revealed that the larger conspiracy was masterminded by high-ranking leaders of various terrorist organizations, including Lashkar-e-Taiba (LeT), Hizb-ul-Mujahideen (HM), Al-Badr and other entities situated in Pakistan. It is further alleged that, the conspiracy was conceived subsequent to the revocation of Article 370, with the objective of reigniting acts of terrorism in Jammu and Kashmir, as well as, in other regions of India and to accomplish this malevolent objective, a central organization known as the “United Jihad Council” (UJC) was established as part of a larger conspiracy, in collaboration with other proscribed terrorist groups.

- 2.4. It is further alleged that, the entire operation was orchestrated under the guidance and support of Pakistan’s Intelligence Agency i.e. ‘Inter-Services Intelligence’ (ISI). The investigation further unveiled the formation of “coordination groups” as an integral facet of the conspiracy,



responsible for strategizing terrorist operations in the Kashmir Valley.

- 2.5. It is furthermore alleged that, these groups included individuals, who were outwardly engaged in lawful pursuits; but functioned as Over-Ground Workers, executing small-scale violent terrorist acts, like targeting civilians and military personnel.
- 2.6. The case of the prosecution in the subject charge sheet is that, the appellant played an active role in providing refuge to members of the aforementioned terrorist organizations and their associates within his domicile, with the aid of his acquaintances. The appellant was consequently arrested on 20.10.2021 and the chargesheet was filed against him and co-accused persons under Sections 120B, 121A, 122, 123 IPC in conjunction with Sections 18, 18A, 18B, 20, 38, and 39 of the UAPA Act.
- 2.7. The bail application instituted on behalf of the appellant was dismissed by the learned trial court vide order dated 07.01.2023, impugned in the present appeal, observing therein that the prosecution has been able to show that there



is *prima facie* evidence to substantiate the case and the accusations levelled against the appellant.

3. Mr. Kartik Murukutla, learned counsel appearing on behalf of the appellant vehemently assails the impugned order whilst submitting that there exists a conspicuous absence of material evidence implicating the Appellant in any criminal conspiracy with the alleged terrorist organizations; and specifically that the record remains bereft of any indicia establishing a nexus between the Appellant and the co-accused persons indicted in the chargesheet. It is contended on behalf of the appellant that the evidence tendered by the prosecuting agency held minimal probative value and while considering the *prima facie* case against the appellant, the *prima facie* threshold could not have been met without a preliminary assessment of the evidentiary probative value. It is urged that, this evaluation becomes pivotal in considering the case against the appellant during the stage of grant of bail, as the substantive nature or weight of the probative value must align with the satisfaction of the Court.

4. Learned counsel appearing on behalf of the appellant further contended that there existed no substantive evidence on record to corroborate a nexus between the Appellant and the “larger



conspiracy”, which is stated to be the genesis for registration of the present FIR. Furthermore, it was contended that there was an evident dearth of proof associating the appellant with any conspiracy related to the origination and implementation of “*hybrid terrorism*”. Additionally, learned counsel representing the appellant has placed significant emphasis on the fact that the learned Trial Court, in its impugned judgment, relied heavily upon patently inadmissible evidence, specifically the disclosure statement of the appellant, and erroneously arrived at the conclusion that the said disclosure statement resulted in the “*discovery of fact*”.

5. The learned counsel representing the appellant further contended that nothing incriminating was recovered from the possession of the appellant. It was urged that the document marked as D172 (*Explanation Memorandum of Forensic Data extracted from the confiscated Digital Devices*) did not encompass any content, establishing a link between the appellant and the larger conspiracy. The “Explanation” which has been ascribed to the appellant in the above mentioned document was inadmissible and appeared to be an endeavor to gloss over and overcome the conspicuous lack of evidence, demonstrating the involvement of the appellant in any



online group linked with the above mentioned terrorist organizations or dissemination of criminal content within those online groups.

6. Learned counsel representing the appellant further contended that the case of the prosecution rests upon the statement of two witnesses Uzair Ahmad Ganie (PW-271) and Fayaz Ahmad Ganie (PW-272), recorded under Section 161 of the Cr.P.C., wherein they fail to implicate the appellant in the alleged conspiracy. It was further emphasized that the testimony of PW-271, merely offers ambiguous and general information that lacks any incriminating value since the above mentioned witness characterized the appellant merely as a “friend” of a “militant”; a fact that intrinsically holds no material significance in establishing the appellant’s link with the present case. The statement of PW-272 only alludes to an incident wherein the appellant allegedly visited the residence of the said witness in the year 2020, accompanied by two individuals, identified *ipse dixit* as “militants”. Significantly, the said witness has conspicuously abstained from providing any specific detail regarding the manner in which he discerned that the accompanying persons were “militants”.

7. Learned counsel appearing on behalf of the appellant further submitted that a mere connection or endorsement of a terrorist



organization does not meet the essential pre-requisites for invoking the charges delineated under Sections 38 and 39 of the UAPA Act. Learned counsel also contends that in order to establish an offence under the above said sections, it is imperative that the affiliation or support in question is directed towards advancing the objectives of the said terrorist organization; which intent can only be inferred from the explicit action or demonstrable participation in the activities of the proscribed organization, as corroborated by the evidence tendered within the chargesheet.

8. Learned counsel appearing on behalf of the appellant further submitted that the jurisprudence concerning bail is well-established and consistently reaffirmed through a series of judgments pronounced by the Hon'ble Supreme Court of India and various High Courts. These judicial pronouncements have emphasized the gravity of curtailing an individual's liberty thereby necessitating an array of inexhaustible safeguards, principles, and guidelines. The Apex Court and High Courts have consistently reiterated the principle that '*bail is the rule, jail is the exception,*' requiring harmonizing the mitigating circumstances in favor of the accused, thereby maintaining an equilibrium and facilitating bail under a lenient approach.



9. Lastly, it was urged by the learned counsel appearing on behalf of the appellant that the investigation against the Appellant has reached its culmination, and the chargesheet has been filed, designating the Appellant as accused no. 25 therein. The Appellant, presently in the capacity of an undertrial is languishing in judicial custody and given the protracted nature expected of the on-going trial; it is respectfully submitted that the Appellant is *ex debito justitiae* entitled to be released on bail.

10. In order to buttress his exhaustive submissions Mr. Kartik Murukutla, learned Counsel appearing on behalf of the appellant, has placed reliance on the following decisions:-

- i. *National Investigation Agency vs. Zahoor Ahmad Shah Watali* reported as (2019) 5 SCC 1;
- ii. *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr* reported as (2005) 5 SCC 294;
- iii. *Thwaha Fasal vs. Union of India*, reported as (2021) SCC Online SC 1000;
- iv. *Iqbal Ahmed Kabir Ahmed vs. State of Maharashtra*, reported as 2021 SCC Online Bom 1805;
- v. *Yedala Subba Rao and Another vs. Union of India* reported as (2023) 6 SCC 65;
- vi. *Jyoti Babasaheb Chorge vs. State of Maharashtra* reported as 2012 SCC Online Bom 1460;
- vii. *Sudesh Kedia vs. Union of India* reported as (2021) 4 SCC 704;
- viii. *State vs. Nalini* reported as (1999) 5 SCC 253;
- ix. *P.K. Narayanan vs. State of Kerala* reported as (1995) 1 SCC 142;
- x. *John Pandian vs. State* reported as (2010) 14 SCC 129;



xi. *Asif Iqbal Tanha vs. State (NCT of Delhi)* reported as
2021 SCC Online Del 3253;

11. Per Contra, Mr. Gautam Narayan, learned Special Public Prosecutor appearing on behalf of the State, would categorically oppose the submissions made on behalf of the Appellant by vigorously urging that the learned Trial Court rightly rejected the Appellant's bail application through a judiciously reasoned order; meticulously addressing each and every speculative argument articulated by the appellant. Moreover, the said order does not exhibit any legal infirmity warranting any intervention by this Court.

12. Learned Special Public Prosecutor appearing on behalf of the State further submitted that, the appellant is attempting to divert the attention of this Court and seeking the conduct of a mini-trial requiring delving into statements of the of witnesses recorded under Section 161 Cr.P.C. as well as meticulous in depth scrutiny of the evidence; which indubitably is impermissible in law, at the stage of adjudicating a bail application. Mr. Narayan, learned SPP has further submitted that this Court is obligated only to consider the *prima facie* case against the appellant, as envisaged under Section 43 (D) (5) of the UAPA Act, and the limitations prescribed under Section 437 of the



Cr.P.C.

13. Learned Special Public Prosecutor appearing on behalf of the State, further argued that in order to adjudge a *prima facie* case against the appellant, it is of paramount importance to give due regard to the accusations put forth against the appellant in the chargesheet. The allegations portray the appellant as an integral member of a collective group of terrorists operating under the direction of terrorist organizations situate in Pakistan. The *modus operandi* involves disseminating and propagating the ideology of the said terrorist organizations within the Kashmir valley, with the intent of achieving radicalization and recruitment for their cause from amongst the general populace. Additionally, actively engaging in facilitating terrorist activities by coordinating and providing logistical support to militants situated in Kashmir valley. The prosecution relies heavily upon the evidentiary material annexed within the chargesheet, to demonstrate the active involvement of the appellant in sharing materials eulogizing and endorsing slain terrorists and proscribed terrorist groups. This sharing occurs across various online forums and social media platforms; thereby serving the dual purpose of radicalization as well as recruitment of local youth, for instigating fear



and terror in general public and promoting terrorist activities within the Kashmir Valley. Mr. Narayan, learned SPP further submitted that the prosecution is clearly able to establish that the appellant played an active role in arranging logistical support for militants in the Kashmir valley. The statement of PW-272, a pivotal witness in this narrative, leaves no room for doubt in indicating that the appellant took affirmative steps to secure shelter for two militants. Mr. Narayan further contends that the statements of both PW-271 and PW-272 corroborate the fact that the Appellant was affiliated with the network of terrorism. Hence, is it urged that there exists ample evidence requisite for arriving at the conclusion that the allegations leveled against the Appellant are *prima facie* true, as sufficient to meet the requirements of Section 43D(5) of the UAPA.

14. Mr. Gautam Narayan, Learned Special Public Prosecutor further submitted that the Learned Trial Court has appositely relied on the principles laid down by the Hon'ble Supreme Court in the case of *National Investigation Agency vs. Zahoor Ahmad Shah Watali*, reported as (2019) 5 SCC 1, to support the assertion that, when considering a bail application under Section 43D(5) of the UAPA Act, the court should presume that the evidence presented by the



prosecution holds sway unless rebutted or contradicted. Subsequently, the court must only assess whether this evidentiary material is “*good and sufficient on the face of it*” to establish the foundational elements of the alleged offence. The Learned Trial Court, it is underlined, has also taken cognizance of the fact that as per the legal doctrine propounded in *Watali (supra)*, the merits of the evidence against the accused cannot be analyzed at the stage of bail.

15. It was further submitted by Learned Special Public Prosecutor that in *Watali (supra)*, the Hon’ble Supreme Court has expounded upon the extent of inquiry permissible when considering a bail application under Section 43D(5) of the UAPA Act. The Apex Court clearly emphasized the importance of arriving at a conclusion based on broad probabilities regarding the involvement and participation of an accused in the commission of the offence, without delving into a detailed analysis of the merits and demerits of the evidence, at this stage.

It was further argued by Mr. Gautam Narayan, learned SPP that the Apex Court in *Watali (supra)*, explicitly criticized the approach taken by the High Court, in that case, where the admissibility of evidence against the accused was considered; whilst reiterated that the



principles laid down under Section 43D(5) of the UAPA Act, requires that the allegations against the accused, as presented in the FIR, along with the material cited in the chargesheet, should prevail unless disproved. Therefore, when evaluating a bail application, the question of the admissibility of evidence should not be entertained. Furthermore, the entirety of the allegations and material contained within the FIR, case diary and chargesheet must be considered to determine the *prima facie* veracity of the accusations against the accused.

16. It was further urged by Mr. Gautam Narayan, learned SPP that the Appellant has placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of *Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr* reported as (2005) 5 SCC 294, to assert that *bail should be granted if the material relied upon by the prosecution shall not ultimately lead to the conviction of the accused*. In this behalf it was submitted by the Learned Special Public Prosecutor that, the case of the Appellant is that the document i.e. D172 is inadmissible in evidence and that the statements of PW-271 and PW-272 are vague, leading to the conclusion that his conviction is highly improbable; which contention does not hold any water.



17. Mr. Gautam Narayan, learned SPP further submits that the reliance placed by the Appellant on *Ranjitsing (supra)* is totally misconceived and the arguments put forth by the appellant regarding the admissibility of material in the chargesheet are inappropriate at this stage, in view of the settled legal principles enunciated in *Watali (supra)*. As elucidated in *Watali (supra)*, the standard of satisfaction required for the Court to conclude that the allegations against the accused are *prima facie* true is less stringent than to opine an accused not guilty under Section 21(4)(b) of MCOCA, the provision under which bail was sought in *Ranjitsing (supra)*. It was further submitted by Learned Special Public Prosecutor that the statements relied upon by the Prosecution are not vague and as observed in *Watali (supra)*, the Court cannot delve into an examination of the admissibility of evidence at the stage of deciding a bail application. Therefore, the arguments advanced by the Appellant on the basis of *Ranjitsing (supra)* are specious.

18. Learned Special Public Prosecutor appearing on behalf of the State, further submitted that the Appellant has additionally sought to rely upon the judgment of the Hon'ble Supreme Court of India in the case of *Vernon v State of Maharashtra & Anr.* reported as 2023 SCC



OnLine 885, to assert that even at the stage of adjudicating a bail application under the UAPA Act, the Court must conduct, a surface-level analysis of the probative value of the material and the evidence produced by the prosecution, in order to arrive at a conclusion that the allegations against the accused are “*prima facie true*.” In this behalf it is urged that it is noteworthy to observe that the case of *Vernon (supra)* can be distinguished from the circumstances of the present case inasmuch as the evidentiary materials in the relied upon case were predominantly ‘hearsay’ in nature as the statements referred to therein did not attribute any overt or covert act of terrorism to the subject accused.

19. It was further argued by the Learned Special Public Prosecutor that the Appellant has placed reliance on the judgment of the Apex Court in the case of *Thwaha Fasal v Union of India* reported as **2021 SCC OnLine 1000**, in order to assert that mere affiliation or endorsement of a terrorist organization did not tantamount to the commission of an offence under the provisions of Sections 38 and 39 of the UAPA Act. In order to establish an offence under the aforementioned sections, it was urged by the learned counsel appearing on behalf of the appellant that, the affiliation or



endorsement was with the avowed intention of advancing the pursuits of the specified terrorist organization. The requisite intention could solely be deduced from the explicit actions or instances of direct involvement in the operations of the said terrorist organization, as elucidated by the evidence produced in the chargesheet. Mr. Narayan, learned SPP would urge that in *Thwaha Fasal (supra)*, the chargesheet filed relied upon the information disseminated by CPI (Maoist), as well as the vocalization of slogans endorsing CPI (Maoist) by the accused therein during his arrest. Considering the nature of the evidence produced against the said accused, the Hon'ble Supreme Court of India, in that case determined that, the evidence provided was grossly inadequate to establish the commission of offences, stipulated under Sections 38 and 39 of the UAPA Act. On the other hand, in the present case, it is evident from the material annexed with the chargesheet that, the Appellant endeavored to secure lodging for two members affiliated with Jaish-E-Mohammed (JeM) within the Kashmir valley. Therefore, the ratio in *Thwaha Fasal (supra)* is not attracted in the present case as the prosecution has adduced cogent material, showcasing the Appellant's direct involvement in aiding and providing shelter to the members of a



proscribed terrorist organization.

20. The Learned Special Public Prosecutor has submitted that, the Learned Trial Court had rightly rejected the appellant's bail application by a well-reasoned order dealing with each and every speculative argument canvassed by the latter. The learned SPP has further submitted that the impugned order does not suffer from any illegality, so as to warrant any interference by this Court.

21. Lastly, it was urged by the learned Special Public Prosecutor, that in the present case, the bar under Section 43D (5) of the UAPA Act, pertaining to the grant of bail stands resolute, in view of the fact that there exists significant evidence available on the record to substantiate the *prima facie* veracity of the accusations alleged against the appellant.

22. We have heard and carefully considered the submissions made on behalf of the learned counsel representing the parties and have perused the impugned judgment and the evidence adduced in the charge sheet.

23. The Hon'ble Apex Court, in the case of *Watali (supra)*, made an important observation regarding the consideration of evidence and material presented by the prosecution in relation to accusations made



in the First Information Report (FIR). The Court emphasized that, at the preliminary stage of bail, the material and evidence collected by the prosecution should be accorded weight and ought to prevail unless contradicted, overcome, or disproved by other evidence. Furthermore, the Court enunciated that at this preliminary stage, it was unnecessary for the court to conduct an exhaustive examination of the material in the charge sheet, with the primary focus being on the subject material and evidence provided in the FIR. Any subsequent evaluation ought to be conducted with due consideration of the initial evidence. This observation underscores the principle that during the early stages of the proceeding, the prosecution's evidence and material should be given significant weightage, and the court should eschew an elaborate examination on the merits of the case. The exposition of the law is extracted herein below:-

“23. By virtue of the proviso to sub-section (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 special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the 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 a 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 accused concerned 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 the 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. Nevertheless, we may take guidance from the exposition in Ranjitsing Brahmajeetsing Sharma [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paras 36 to 38, the Court observed thus: (SCC pp. 316-17).

24. In light of the elucidation in *Ranjitsing (supra)*, the Hon’ble Supreme Court of India further observed as follows in paragraph 24 of

Watali (supra):-

“24. A priori, the exercise to be undertaken by the Court at this stage—of giving reasons for grant or non-grant of bail—is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the



evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.”

25. Further, following a meticulous evaluation of the evidence gathered by the investigating agency, the Hon’ble Supreme Court of India, in *Watali (supra)*, made the following observations:-

“25. From the analysis of the impugned judgment [Zahoor Ahmad Shah Watali v. NIA, 2018 SCC OnLine Del 11185] , it appears to us that the High Court has ventured into an area of examining the merits and demerits of the evidence. For, it noted that the evidence in the form of statements of witnesses under Section 161 are not admissible. Further, the documents pressed into service by the investigating agency were not admissible in evidence. It also noted that it was unlikely that the document had been recovered from the residence of Ghulam Mohammad Bhatt till 16-8-2017 (para 61 of the impugned judgment). Similarly, the approach of the High Court in completely discarding the statements of the protected witnesses recorded under Section 164 Cr.P.C., on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is, in our opinion, in complete disregard of the duty of the Court to record its opinion that the accusation made against the accused concerned is prima facie true or otherwise. **That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 CrPC) and other material gathered by the investigating agency during investigation.**

26. Be it noted that the special provision, Section 43-D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. To wit, soon after the arrest of



the accused on the basis of the FIR registered against him, but before filing of the charge-sheet by the **investigating agency; after filing of the first charge-sheet and before the filing of the supplementary or final charge-sheet** consequent to further investigation under Section 173(8) CrPC, until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses, etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 CrPC), do not make out reasonable grounds for believing that the accusation against him is prima facie true. **Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.**

27. For that, the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is.”

26. In its recent decision, in the case of *Vernon v State of Maharashtra & Anr.* reported as **2023 SCC OnLine 885**, the Hon’ble Supreme Court has observed as follows:

“37. In the case of *Zahoor Ahmad Shah Watali* (supra), it has been held that the expression “prima facie true” would mean that the materials/evidence collated by the investigating agency in



reference to the accusation against the accused concerned in the chargesheet must prevail, unless overcome or disproved by other evidence, and on the face of it, materials must show complicity of such accused in the commission of the stated offences. What this ratio contemplates is that on the face of it, the accusation against the accused ought to prevail. **In our opinion, however, it would not satisfy the prima facie “test” unless there is at least surface-analysis of probative value of the evidence, at the stage of examining the question of granting bail and the quality or probative value satisfies the Court of its worth.** In the case of the appellants, contents of the letters through which the appellants are sought to be implicated are in the nature of hearsay evidence, recovered from co-accused. Moreover, no covert or overt terrorist act has been attributed to the appellants in these letters, or any other material forming part of records of these two appeals. Reference to the activities of the accused are in the nature of ideological propagation and allegations of recruitment. No evidence of any of the persons who are alleged to have been recruited or have joined this “struggle” inspired by the appellants has been brought before us. Thus, we are unable to accept NIA's contention that the appellants have committed the offence relating to support given to a terrorist organisation.”

27. On a conspectus of the principles culled out from the judgments of the Hon’ble Supreme Court of India extracted hereinabove and on a conjoint and harmonious interpretation of the provisions of the UAPA Act, we are axiomatically of the considered view that the relevant indicators relating to the extent of judicial examination required under Section 43-D(5) of the UAPA Act can be briefly encapsulated as follows:-

- **Limited Examination:** At the stage of bail under the UAPA Act, it is well-established that an extensive or detailed



examination of evidence is not necessary. The court should refrain from conducting an elaborate dissection of the evidence.


- **Broad Probabilities:** The role of a Court is to record findings based on broad probabilities regarding the involvement of the accused in the alleged offence. Meaning thereby that the court should assess whether there are reasonable grounds to believe that the accusations against the accused are *prima facie* true.
- **Admissibility of Documents:** Documents forming part of the evidence should not be discarded during the bail proceedings, on the grounds of admissibility. Admissibility is a matter of trial, and the court should consider such documents, as they are.
- **Holistic Analysis:** The credibility of various statements of witnesses should not be viewed in isolation during bail proceedings. The Court must consider the materials adduced as a whole and accordingly take them into account.
- **Surface Analysis:** A surface analysis of the probative value of the evidence must however be undertaken while examining the question of granting bail. The court ought not to delve into an in-depth examination of evidence but rather assess whether there are reasonable grounds to believe that the accusations against the accused are *prima facie* true.

28. In addition to the legal tenets expressed in the case of *Watali (supra)* the supplemental surface analysis of the probative value of the evidence, has been clearly emphasized by the Hon'ble Supreme Court in the case *Vernon (supra)*. Consequently, the pivotal query that now



confronts us pertains to whether there exist rational grounds for entertaining the *prima facie* veracity of the allegations levelled against the Appellant. This necessitates an evaluation of the corpus of the evidence adduced by the prosecution in the charge sheet.

29. The evidence collected by the prosecution against the appellant; in relation to the larger conspiracy; within the charge sheet dated 08.04.2022, is extracted herein below for the sake of completeness:-

a.	Name A-25	Suhail Ahmad Thokar 
b.	Father's Name	Abdul Rashid Thokar
c.	Age	20 years
d.	Sex	Male
e.	Nationality	Indian
f.	Religion	Islam
g.	Occupation	He was a member of proscribed terrorist organisations
h.	Address (present)	Village Hadigam, District Kulgam, J&K UT
i.	Address (permanent)	Village Hadigam, District Kulgam, J&K UT
j.	Whether Arrested/On Bail/Absconding	Arrested on 20.10.2021 and presently in Judicial Custody

30. Further, the evidence gathered by the investigating agency in connection with the subject larger conspiracy, encompassing manifestations in both the physical domain and the virtual realm, it



was delineated as follows:

“17.7. Investigation has revealed a well organised propaganda machinery operating in furtherance of the criminal conspiracy to portray terrorists activities undertaken in Kashmir and other parts of India as an outcome ‘of home grown resentment and insurgency. The first step, as described earlier, was to float new outfits with secular/indigenous names with an aim of deniability at international level and the second was to attract new cadres into the fold of these terror element of any terrorist enterprise, cyberspace was flooded with outfits. Since propaganda is a key radicalising material instigating impressionable youth with concocted and distorted narratives through a plethora of online instruments such as websites, blogs, Social Media channels/accounts, close groups over encrypted platforms etc. This was done a dual purpose of attaracting new foot soldiers and OGWs as well as striking terror in minds of people by claiming terrorists attacks, eologising slain terrorists, issuing threats and hitlists etc. Investigation has revealed interlinkages of all such online instruments and their convergence to Pakistan based handlers/operatives of proscribed terrorist organisations. Detailed technical analysis report of expert has revealed that same entities have been associated with different cyber accounts propagating terror activites for pseudo/frontal terrorist outfits such as “The Resistant Front’, ‘Kashmir Tigers’, ‘United Liberation Front of J&k’, ‘Al Aqsa Media J&K’ etc.

*** **

17.12. Traditionally newly recruited terrorists usually ex-filtrate to Pakistan for getting training in handling of weapons and explosives in terrorist camps ‘ani control and thereafter infiltrate back into in territory under Paki India for carrying out terrorist acts. These terrorists usually infiltrate back into India along with large consignment of sophisticated arms and ammunitions and they usually remain underground and operate from various hideouts. During investigation of the instant case, it has been found that the proscribed



terrorist organizations operating in J&K are using new modus operandi, whereby radicalised individuals are identified and scouted through cyberspace and thereby the handlers/ commanders of proscribed terrorist organizations based in Pakistan initiate them into the terrorist fold through secure messaging Apps. Thereafter, the newly inducted terrorists are further radicalised through dissemination of propaganda materials and provided online training in handling of weapons and explosives. Investigation revealed that the newly radicalized recruits are usually from various walks of life such as students, shopkeepers, journalists, etc. who could use their cover to remain rooted in society and clandestinely carry out the instructions of the Pakistan based handlers/ commanders. Such individuals are hybrid terrorists who appear to be common citizens going about his/her daily chores but in reality are ready to fulfil any instruction of their commanders including but not limited to posting propaganda graffiti on walls, snatching weapons of security forces, shooting innocent civilians/ security forces with small weapons, etc. The biggest advantage of such hybrid terrorists is that after committing such dastardly acts, they can easily blend into society without raising any suspicion. Investigation revealed that creation of such hybrid terrorists is the preferred modus operandi of Pak-based handlers/ commanders of various proscribed terrorist organizations.

17.13. Investigation has further established that the arrested accused persons A-4, A-9, A-11, A-12, A-13, A-14, A-15, A-18 A-20, A-21, A-25, A-26 and A- 27 were identified through these online propaganda groups and were acting as hybrid cadres of the frontal organizations floated under the conspiracy hatched by A-1, A-2 and other top commanders of proscribed terrorist organizations...

*** **

17.18. Investigation has brought on record that A-2 on directions of A-1, directly conspired with arrested accused persons A-3, A-5, A-6, A-8, A-17, A-20, A-22, A-23 and A-24 to assist active cadres associated with proscribed terrorist organizations and their newly formed frontal organizations, whereas the other arrested accused persons A-4, A-9, A-10, A-11, A-12, A-13, A-



14, A-15, A-16, A-18, A-20, A-21, A-25, A-26 and A-27, acting as hybrid cadres or lone wolf operators, got associated with online propaganda groups floated by various Pakistan based handlers of proscribed terrorist organizations on directions of A-1, A-2 and other commanders of the 'United Jihad Council', Due care was taken by A-1 and A-2 to ensure that all the other terrorists in this conspiracy did not know much about each other so that even if one of these was arrested, security agencies could not identify and locate other conspirators involved in the larger conspiracy.

*** **

17.45. During the course of investigation, it has been revealed that in furtherance of criminal conspiracy to wage a war against the Government of India, the accused A-2 on directions of A-1 and other top commanders of proscribed terrorist organizations floated a number of online propaganda groups under the names of frontal organizations such as Resistance Front, Kashmir Fight, People Against Fascist Forces (PAFF), ULF J&K, Maviya Al Hizbi, Al-Hizbi etc. as already discussed in para 17.6 above. Investigation has further established that the arrested accused persons A-4, A-9, A-11, A-12, A-13, A-14, A-15, A-18 A-20, A-21, A-25, A-26 and A-27, were associated with the above said online groups and were acting as hybrid cadres on behalf of proscribed terrorist organizations in order to motivate, radicalize and recruit local youths into terror ranks, to carry out small scale targeted attacks and for furtherance of activities of proscribed terrorist organizations.

*** **

17.76. Investigation has revealed A-16, A-25 and A-26 were also the part of many social media groups which were being used in the name of frontal organization for the proscribed terrorist outfits under the directions of Bashir Ahmed Peer @ Imtiyaz Alam (A-1) and Imtiyaz Kundoo @ Favaz Sopore (A-2) for assisting active cadres of procribed terror outfits to execute targeted attacks in the valley.

*** **



17.85 In furtherance of the conspiracy hatched on the directions of the accused A-1, A-2 and other commanders of proscribed terrorist organization, the **accused Suhail Anmed Thoker (A-25) got associated with a number of online propaganda groups floated by handlers of proscribed terrorist organization, and started working as a hybrid cadre and over ground worker for the active terrorists associated with proscribed terrorist organization.**

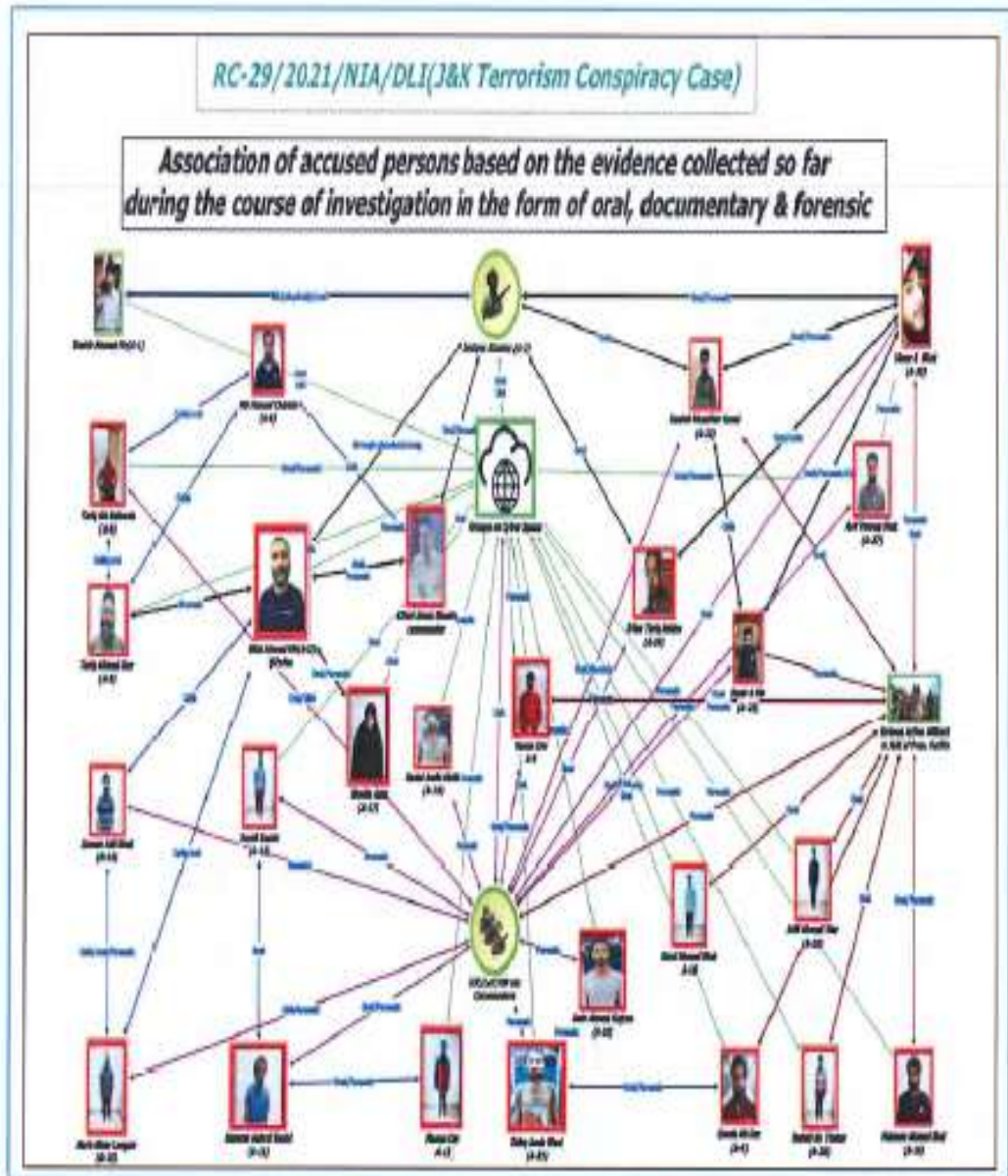
17.86 Investigation further revealed **that A-25** was working **as cadre for Rouf Dar resident of Hadigam, an active cadre of Hizb-ul Mujahideen and started arranging logistics for him and other cadres of the proscribed terror outfit. Investigation has clearly established that he was actively involved in harbouring the cadres of banned terrorist outfits in his house as well as with the help of his associates in the fields of his known persons.**

*** **

17.96. CDR Interconnectivity amongst accused persons A-1 to A-27/ suspects established association based on the evidence emerged:

During the course of investigation it has been established that most of the times accused persons were associated through various medium i.e VOIP medium and calls but they all are connected through various phone numbers. The **retrived chats/ VOIP calls/ GSM calls/lawful intercepted calls clearly indicates about their associations. All the accused persons ‘were using secure communication methods to avoid detection.**

17.97. The evidence emerged during investigation in the form statements, CDR data, Chats retrieved through seized mobile phones shows that **all the accused persons are associated with each other and entered into conspiracy both physically as well as in cyber space in order to undertake targeted attacks in the valley for furtherance of operation of proscribed terrorist outfits operating under the names of various frontal organizations like TRF, ULF J&K, Kashmir Fight, Kashmir janbaaz Force (KJF) etc.**



31. In the abovementioned Charge Sheet, the investigating agency, has scrutinized and succinctly outlined the role of the appellant, specifically within paragraph 17.121, which is reproduced hereinbelow for the sake of convenience: -



17.121. Role and activities of / offences established against Suhail Ahmed Thokar (A-25)

Accused Suhail Ahmed Thokar (A-25) knowingly entered into a conspiracy hatched by terrorist commander based across the border as well as active terrorist commanders in the valley along with other co-accused persons to commit multiple terrorist attacks in the valley. The accused Suhail Ahmed Thokar (A-25) was actively working for the ideology of terrorist organisation/ terror gangs as per the directions of the commanders of the various terrorist outfits and attempts/advocates/ the ideology of newly formed terror gangs and also involved in providing shelter to the active cadres. Therefore, as per the averments made hereinabove/ in the pre-paragraphs, it is established that the accused Suhail Ahmed Thokar (A-25) criminally conspired with co-accused persons and others and in pursuance of the said conspiracy. Suhail Ahmed Thokar (A-25) indulged himself in the criminal conspiracy hatched by the terrorist organisations to create unrest and strike terror in the Kashmir valley and in others parts of the country.

32. Furthermore as per the material in the charge sheet as articulated during the course of the arguments, the attention of this Court is invited to several pieces of evidence procured during the course of investigation that suggest the appellant's significant involvement in the larger conspiracy and activities related to militancy and terrorism, which require to be carefully considered to determine whether there are reasonable grounds to substantiate a *prima facie* case against the appellant. The same are extracted herein below:-

- **Seizure of Mobile Phones and SIM Card**: At the time of the



appellant's arrest on 20.10.2021, two mobile phones, specifically the Redmi Note 9 Pro/Intel with distinct IMEI numbers (IMEI 1: 865715048075094, IMEI 2: 865715048075102), connected to the JIO network mobile number +919682652007, and an 'Iitel' mobile phone with IMEIs: 353091114521802 and 353091114521810, along with a BSNL 3G SIM card bearing number 8991627058113882149, were seized from the appellant's possession.

- **Digital Data Analysis**: An analysis report of the digital data obtained from the seized mobile phones (IMEI numbers ending with 5094 and 5102) conducted by Cert-In revealed the presence of images related to deceased militants and terrorist organizations. The appellant has acknowledged sharing these images with individuals with the intent of radicalization within the Kashmir Valley. Relevant extract of the forensic data retrieved from the seized digital devices from the possession of the appellant is reproduced herein below:-



EXPLANATION MEMORANDUM
FORENSIC DATA RETRIEVED FROM THE SEIZED DIGITAL DEVICES FROM THE
POSSESSION OF ARRESTED ACCUSED SUHAIL AHMAD THOKER SON OF ABDUL
RASHID THOKAR RESIDENCE OF HADIGAM, KULGAM, UT OF J&K.

1. Reference Case No. RC-29/2021/NIA/DLI dated 10.10.2021 u/s 18, 18A, 18B, 20, 38 & 39 of the UA (P) Act, 1967 and U/s 120B, 121A, 122 and 123 of IPC.
2. Date and Time **15.03.2022 - From 1350 hours to 1420 hours**
3. Place of Disclosure **Central Jail, Tihar Complex (Jail No. 05), New Delhi.**
4. Name of the NIA Team Members. Afsar Khan, Inspector, NIA Hqrs., New Delhi
Monish Kumar, Inspector, NIA Hqrs., New Delhi.
5. In Presence Sh. Kulwant Lal Khatri Son of Saran Dass
Executive Magistrate (Tehsildar)
Rajouri Garden, Delhi

After due permission given by the Hon'ble Special (NIA) Court, P H Court, for Judicial Examination of the arrested accused vide Order dated 10.03.2022, today, i.e. on 15.03.2022, arrested accused Suhail Ahmad Thoker son of Abdul Rashid Thokar Residence Of Hadigam, Kulgam, UT OF J&K. was introduced to the Independent witness (es) by the undersigned at the Tihar Jail Complex, New Delhi. After this the arrested accused Suhail Ahmad Thoker, presently under Judicial Custody, was confronted from the digital data retrieved by Cert-In from the seized devices from his possession or his premises search. He voluntarily disclosed under mentioned facts, in the presence of aforementioned Executive Magistrate and the NIA team members. His version is reduced to writing in Hindi/English language in **column no. (4)**, as detailed below, -



Accused *Suhail*
Suhail Ahmad Thoker
Monish Kumar, Insp/NIA

In presence *15/3/22*
Sh. Kulwant Lal Khatri, Executive Magistrate Insp/NIA
KULWANT LAL KHATRI
Executive Magistrate / Tehsildar
Rajouri Garden, Distt. West

Afsar Khan
Afsar Khan

Images- In 'thumbnails' folder and 'Image' folder, large number of incriminating photos were found. The details of photos are as under:

Path - RC-20-2021-nia-dl \ V10-M08 \ 2022-01-18.09-43-09 \ EvidenceCollection \ thumbnails

S. No.	Location	Content	Observations
1.	21fb64b6dcbbc85eae1c4667b7e1e3818c86d1dd866549a8cb0c74954fc949e3_thumb.jpg		I was the active member of various groups on various social media platforms. In these groups many post related to Kashmir separation and other ideology like TRF, ISIS etc were shared by users of these groups. Further, I used to share all these images to various individuals.
2.	1684070734.cache_embedded_1_thumb.jpg		

Accused

In presence

Afsar Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA

Monish Kumar, Insp/NIA

3.	- 193908916 3_thumb.jp pg		In this photo slain militant Abid is showing. He was killed an encounter with security forces in the year 2021. I know very well his cousin brother Aizz Chopan r/o Paddarpora, Shopian, J&K. I used to share these images to various individuals for radicalization.
4.	- 199151912 1.cache_e mbedded_ 1_thumb.j pg		In this photo slain militant Burhan Wani is showing. He was killed an encounter with security forces in the year 2016. I used to share these images to various individuals.
5.	CLTYK2Vd Zj9OeVcZI S9- ClOpYBQ_t humb.jpg		In this photo slain militant Rouf Dar is showing. He was killed an encounter with security forces in the year 2021. I used to share these images to various individuals for radicalization.

Accused

In presence

Afsar Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA

Monish Kumar, Insp/NIA

6.			<p>I get this photo from social media platform. Further, I used to share this image to various individuals for radicalization.</p>
<p>Path - RC-29-2021-nia-dli ▶ V16-MOB ▶ 2022-01-18.09-43-09 ▶ EvidenceCollection ▶ files ▶ Image.</p>			
7.	50324526.jpg		<p>In these screenshots, there are Moulana Masood Azhar propaganda audios. That I had downloaded from social media platform channels and groups.</p> <p>I Had saved these screenshot / photos of audios for sharing in other groups and channels.</p>
8.	323077391.cache_em bedded_1.jpg		

Accused

In presence

Afsar Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA

Monish Kumar, Insp/NIA

<p>9.</p>	<p>- 405832427 .jpg</p>		
<p>10.</p>	<p>- 442832712 .jpg</p>		
<p>11.</p>	<p>648544194 .jpg</p>		<p>This is a screenshot of provoking videos related to Jihad. I had saved this screenshot/photos of videos for sharing in other groups and channels.</p>

Accused

In presence

Afsar Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA

Monish Kumar, Insp/NIA

12.	- 124904928 .cache_em bedded_1.j pg		In these photo slain militant Walidare showing. He was killed an encounter with other militant namely Rouf Dar with security forces in the year 2021. I used to share these images to various individuals for radicalization.
13.	- 169328768 .cache_em bedded_1. png		
14.	- 311283932 .cache_em bedded_1.j pg		In this photo slain militant Burhan Wani is showing with other militant. He was killed an encounter with security forces in the year 2016. I used to share these images to various individuals.

Accused

In presence

Afsar Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA

Monish Kumar, Insp/NIA

15.	- 547646386 .jpg		In this photo militant Rouf Dar is showing. He was killed an encounter with security forces in the year 2021. I used to share these images to various individuals for radicalization.
16.	617907178 .cache_em bedded_1.j pg		In this photo slain militant Rouf Dar is showing. He was killed an encounter with security forces. I used to share these images to various individuals for radicalization.
17.	- 871072863 .jpg		I get this photo from social media platform. Further, I used to share this image to various individuals for radicalization.
18.	143447211 7.cache_e mbedded_ 1.jpg		I get this photo from social media platform. Further, I used to share this images to various individuals for radicalization.

Accused

In presence

After Khan

Suhail Ahmad Thoker

Sh Kulwant Lal Khatri, Executive Magistrate

Insp/NIA



Monish Kumar, Insp/NIA



19.	177760932 1.cache_e mbedded_ 1.png		In this photo slain militant Waid is showing. He was killed an encounter with other militant namely Rouf Dar with security forces in the year 2021. I used to share these images to various individuals for radicalization.
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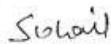

In 'Video' folder, twonumber of videos were found incriminating. They are mentioned as

under:Path RC-29-2021-nia-dli > V8-MOB > V8-MOB > EvidenceCollection > files > Video

Sl. No.	Video files		Remarks
1.	c4133c5963f84a959891c0a5e923f0ad.mp4	 c4133c5963f84a959891c0a5e923f0ad.mp4	This video is showing to glorify of ISIS. I had saved this video for sharing in other groups and channels.
2.	19196ae6f4714e0a857eed11eec3872c.mp4	 19196ae6f4714e0a857eed11eec3872c.mp4	This is Yaver brother's video. who showing weapon. This video I was received from social media platform. His brother was studying with me from 10 to 12th class.

A memorandum to this effect was prepared. All the signatories, including the arrested accused in Judicial Custody, had put their signatures on each page of the said Explanation Memorandum dated 15.03.2022, after fully understanding its contents.

Accused
Suhail Ahmad Thoker
Monish Kumar, Insp/NIA

In presence 

Sh. Kulwant Lal Khatri, Executive Magistrate


Afsar Khan

Insp/NIA

KULWANT LAL KHATRI
Executive Magistrate / Tehsildar
Rajouri Garden, Distt. West

- **Disclosure Statement:** The appellant in his disclosure statement recorded on 26.10.2021, affirmed that he had a prior school association with the militant Rouf Dar. He also



disclosed that he had assisted militants Rouf Dar and Walid in arranging accommodation in his hometown and guided them to Fayaz Ganie's residence, where they stayed for two days. Relevant extract from the disclosure statement of the appellant is reproduced herein below:-

S/P-7

D-96/1

Case RC-29/2021/NIA/DLI

Disclosure Statement of accused Suhail Ahmad Thoker (age 20 yrs) S/o Abdul Rashid Thoker r/o H. NO. 55-A Village Hadigam, PS Kulgam, Dist. Kulgam, J&K.

Case No. : RC-29/2021/NIA/DLI dt. 10.10.2021 u/s 120B, 121A, 122 & 123 IPC and 18, 18A, 18B, 20, 38 & 39 UA(P) Act.

Date & Time : 26.10.2021 from 1215 hrs. to 1340 hrs.

Place : NIA Hqr, New Delhi

Name and address of witnesses :

1. Sh. Satpal Singh, Asstt. Manager, SBI Bank, DAO-2, Parliament Street, New Delhi.
2. Sh. Vijay Sharma, Deputy Manager, SBI Bank, RACPC, Noida, Sector- 55.

Accused Suhail Ahmad Thoker (age 20 yrs) S/o Abdul Rashid R/o Village Hadigam, PS Kulgam, Dist. Kulgam, J&K, presently under police remand, voluntarily disclosed before the undersigned in presence of the aforesaid two independent witnesses, the following without any pressure in full senses :-

"I am as above and state that, I was born on 08.08.2001 at Kulgam. I have studied upto 12th standard from Govt. higher secondary school at Arreh. I has one younger brother and one sister namely Ubaid Rashid (age 14 years), Insha Rashid (age 18 years). My brother is studying in 10th class and sister in B.A. 1st year. My father is running 'Ghosht' (Meat) shop at village Arreh and mother is a house wife. I help the father in meat shop.

JeM terrorist Rouf Dar r/o Awhatto, Kulgam was my school mate at Kulgam. In the year 2017 Rouf Dar shifted to a Madarsa, Khandipora, Kulgam for study purpose. Rouf Dar was also in contact with one Zubair r/o Awhatto, Kulgam, a JeM terrorist. Zubair and one of his associate namely Shahid and another terrorist r/o Shopian killed in an encounter in 2018. After the death of Zubair, Rouf Dar became active in militancy.

In the month of January 2020, one day Rouf Dar possessing a Pistol and his associate Walid (Pak militant) possessing AK-47 rifle met me near my village. One day Rouf Dar called me on my whatsapp number 6006650760 from Pakistani unknown number and asked to arrange for their stay in my village. After 10 days both terrorist came to my village and asked about my co-villager namely Fayaz Ganie (50 years) s/o Ghulam Ahmad Ganie. Fayaz Ganie was a contractor and was doing business of Apple. Then I took them to the home of Fayaz Ganie where they stayed for 2 days. Thereafter, Rouf Dar asked me on whatsapp to take them to the house of another co-villager namely Mohammad Abdullah (45 years). After 2 days they again

S. Suhail



10/10/23

D-96/2

asked me to shift them to the house of another co-villager Janhangir Mir (35 years) s/o Abdul Rahman Mir. They kept on staying in the above said houses time to time. Both the said terrorists had also visited other villages Bumbrath, Okai, Kachawallam, Arerh for hiding themselves to escape from Kulgam Police. In the month of October 2020 JeM terrorists Rouf Dar and Walid (Pak militant) were killed in an encounter in Kulgam.

In the month of July 2021, Uzair a JeM terrorist, native of village Mirhama, Kulgam called me on my above mentioned whatsapp number from Pakistani unknown mobile number and asked me to arrange for his safe stay in my village. But they didn't come. My mobile number was shared with Uzair by Rouf Dar before his killing. One Pakistani militant namely Mohammad @ Ahmad) of JeM is also roaming in jungles around the area of Kulgam, with Uzair.

I came to know from my villagers during last 4-5 months that (1) Smeeraz Molvi s/o not known r/o Shouch, Kulgam, (2) Mushtaq Itoo s/o not known r/o Mohammadpora, Kulgam, (3) Shakir s/o not known r/o not known and (4) Farooq s/o not known r/o not known have joined terrorist ranks in HM.

My Facebook account ID is suhailthoker378@gmail.com. My Telegram ID is 'Suhail Ahmad Thoker' which was used on my mobile number 9797292652 in the year 2020. Earlier I was using android mobile phone Redmi Note 9 Pro during November/December 2020, which later was used by my sister Insha for her online class."

Read over in Hindi, English, Urdu (Hindustani) languages to the said accused and witnesses and accepted to be correct.

Suhail
(Suhail Ahmad Thoker)
(Accused in Police custody)

Ajay Kumar
26/10/2023
(Ajay Kumar)
Insp & AIO,
NIA HQr, New Delhi.

Satpal Singh
Witness-1 (Satpal Singh)

Ujay Shah
Witness-2 (Ujay Shah)



- **Witness Testimonies:** Uzair Ahmad Ganie (PW-271) spoke about the appellant's affiliation with multiple insurgents and asserted that the deceased militant Rouf Dar had an acquaintance with the appellant. Relevant portion from the statement of Uzair Ahmad Ganie (PW-271), is reproduced herein below:-

PW-271

RC-29/2021/NIA/DLI

Dated 31.03.2022

Statement of Uzair ahmad Ganie (Aged 21 yrs) s/o Fayaz Ahmad Ganie r/o Hadigam, Kulgam, Srinagar recorded on 31.03.2022 under section 161 CrPC at NIA BO Srinagar in NIA Case RC- 29/2021/NIA/DLI

My name and address are correctly stated above. I state that I am presently living at above address with my parents. I have three sisters. Presently I am running a business of fruits with my father. My mother is a house wife. I completed 10th class.

On being asked about Suhail Ahmad Thokar, I state that Suhail Ahmad Thokar has been my classmate in class 9th & 10th and friend as well. Suhail Ahmad Thoker used to go with stone pelters for stone pelting on Army and had connection with various militant. One militant namely Rouf Dar r/o Awhatto, Kulgam, who had been killed during encounter, was also friend of Suhail Ahmad Thokar. Owing to his activities my uncle used to bar me to meet with Suhail Ahmad Thokar. I got de-friended from Suhail Ahmad Thokar from last 2 years.

My above statement has been recorded in English as stated by me and the same has been read and explained to me in simple Hindi/Urdu and I have understood the contents of my statement and the same has been written in verbatim as stated by me.

ROAC

Recorded by,


31/3/22
Ram Narayan
Insp/AIO



- **Additionally, Fayaz Ahmad Ganie (PW 272) also confirmed the appellant's association with insurgents and his role in harboring two militants at his residence. Relevant portion from the statement of Fayaz Ahmad Ganie (PW 272), is reproduced herein below:-**

PW-272

RC-29/2021/NIA/DLI

Dated 28.03.2022

Statement of Fayaz Ahmad Ganie (Aged 52 yrs) s/o Sh Ghulam Ahmad Ganie r/o Hadigam, Kulgam, Srinagar recorded on 28.03.2022 under section 161 CrPC at NIA BO Srinagar in NIA Case RC- 29/2021/NIA/DLI

.....
My name and address are correctly stated above. I state that I am presently living at above address. I have three daughters and one son namely Ujjair Ahmad Ganie (aged 21 yrs) who assists me to run my business. My wife Himat is a house wife. I am running fruits business. I have four brothers namely Abdul Hameed Ganie, Mohd Amin Ganie, Mohd Yaqub Ganie & Sabzar Ahmad Ganie.

On being asked, I state that I know Suhail Ahmad Thokar s/o Abdul Rashid Thokar, who belongs to my village. He has been friend of my son as well. Suhail Ahmad Thokar has linkages with militant and stone palters. He along with 100 boys of my villagers went to Chawal Gaon for stone pelting on Army. From where, one Rouf Dar r/o Awhatto, Kulgam (classmate of Suhail) & Suhail Ahmad Thokar brought a gun. Then after, Rouf Dar had gone with some militant group. Owing to activities of Suhail Ahmad Thokar, all villagers were very disturbed. In the year 2020, Suhail Ahmad Thokar came at my home with two militant for staying but I refused to stay. Occasionally, I used to go out from Kashmir for business purpose.

My above statement has been recorded in English as stated by me and the same has been read and explained to me in simple Hindi/Urdu and I have understood the contents of my statement and the same has been written in verbatim as stated by me.

ROAC

Recorded by,


28.3.22
Ram Narayan
Insp/AIO



33. During the course of arguments, learned counsel appearing on behalf of the Appellant has placed strong reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Thwaha Fasal v Union of India* reported as **2021 SCC OnLine 1000**, to contend that mere association or support of a terrorist organization is not sufficient to attract the offence under Sections 38 and 39 of the UAPA Act. It was further contended that in order to establish the offences under Sections 38 and 39 of the UAPA Act, the association or support must be with the specific intent and this intent can only be inferred from the overt acts or active participation in the activities of the terrorist organization, as demonstrated from the materials presented in the charge sheet. In essence, the argument put forth by learned counsel appearing on behalf of the appellant suggests that a mere passive association or sympathetic support, without evidence of active involvement or intent to promote the organization's activities, may not be enough to establish guilt under Sections 38 and 39 of the UAPA Act. This interpretation underscores the importance of establishing a direct link between an individual's actions and the promotion or furtherance of terrorist activities.

34. At this stage, it is crucial to reiterate that the UAPA Act



requires and warrants active measures against organizations that pose a threat to national security. The UAPA Act outlines specific procedures for imposing sanctions on such organizations and once an organization is designated as unlawful under the UAPA Act, any individual affiliated with it can be prosecuted for the offences specified within the Act, in addition to any other relevant penal statutes. The relevant sections of the UAPA Act, along with the list of banned terrorist organizations specified in the First Schedule thereof, are crucial for understanding the legal context in light of the factual matrix of the instant case. The relevant sections of the UAPA Act are extracted herein below for the sake of facility:-

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

m) “terrorist organisation” means an organisation listed in the schedule or an organisation operating under the same name as an organisation so listed;

Section 35. Amendment of Schedule, etc.—

(1) The Central Government may, by [notification], in the Official Gazette,—

(a) add an organisation to the [First Schedule];

(b) add also an organisation to the [First Schedule], which is identified as a terrorist organisation in a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, to combat international terrorism;

(c) remove an organisation from the 3 [First Schedule];

(d) amend the [First Schedule] in some other way.

(2) The Central Government shall exercise its power



under clause (a) of sub-section (1) in respect of an organisation only if it believes that it is involved in terrorism.

(3) For the purposes of sub-section (2), an organisation shall be deemed to be involved in terrorism if it—

- (a) commits or participates in acts of terrorism, or**
- (b) prepares for terrorism, or**
- (c) promotes or encourages terrorism, or**
- (d) is otherwise involved in terrorism.**

(4) The Central Government may, by notification in the Official Gazette, add to or remove or amend the Second Schedule or Third Schedule and thereupon the Second Schedule or the Third Schedule, as the case may be, shall be deemed to have been amended accordingly.

(5) Every notification issued under sub-section (1) or sub-section (4) shall, as soon as may be after it is issued, be laid before Parliament.]”

35. Section 2(m) of the UAPA Act defines a “terrorist organization” as an organization listed in the First Schedule or an organization operating under the same name as an organization listed in the First Schedule. This definition is fundamental in identifying and categorizing organizations engaged in terrorism. Section 35 provides the legal framework for the Central Government to make amendments to the schedules of banned organizations under the UAPA Act, particularly the First Schedule, taking into account the organizations involved in terrorism and various international resolutions. This section ensures that the government can respond to evolving threats and international developments related to terrorism.

36. The First Schedule of the UAPA Act provides a comprehensive



list of terrorist organizations, as defined by the Act. These organizations are considered threats to national security and are subject to legal measures outlined in the UAPA Act. Here is the list of terrorist organizations included in the First Schedule:

1. Babbar Khalsa International.
2. Khalistan Commando Force.
3. Khalistan Zindabad Force.
4. International Sikh Youth Federation.
5. Lashkar-E-Taiba/Pasban-E-Ahle Hadis.
6. **Jaish-E-Mohammed**/Tahrik-E-Furqan.
7. Harkat-UI-Mujahideen/Harkat-UI-Ansar/Harkat-UI-Jehad-E-Islami.
8. Hizb-UI-Mujahideen/Hizb-UI-Mujahideen Pir Panjal Regiment.
9. Al-Umar-Mujahideen.
10. Jammu And Kashmir Islamic Front.
11. United Liberation Front Of Assam (ULFA).
12. National Democratic Front Of Bodoland (NDFB).
13. People's Liberation Army (PLA).
14. United National Liberation Front (UNLF).
15. People's Revolutionary Party Of Kangleipak (PREPAK).
16. Kangleipak Communist Party (KCP).
17. Kanglei Yaol Kanba Lup (KYKL).
18. Manipur People's Liberation Front (MPLF).
19. All Tripura Tiger Force.
20. National Liberation Front Of Tripura.
21. Liberation Tigers Of Tamil Eelam (LTTE).
22. Students Islamic Movement Of India.
23. Deendar Anjuman.
24. Communist Party Of India (Marxist-Leninist) People's War, All Its Formations And Front Organisations.
25. Maoist Communist Centre (MCC), All Its Formations And Front Organisations.
26. Al Badr.
27. Jamiat-UI-Mujahidden.
28. Al-Qaida.



29. Dukhtaran-E-Millat (DEM).
30. Tamil Nadu Liberation Army (TNLA).
31. Tamil National Retrieval Troops (TNRT).
32. Akhil Bharat Nepali Ekta Samaj (ABNES).

37. The abovementioned organizations are considered to be involved in terrorism activities that threaten the sovereignty and integrity of India and these organizations and the individuals associated with them are liable to be prosecuted under the UAPA Act. As per the case of the prosecution, it has come on record in the chargesheet that the appellant attempted to arrange shelter for two militants associated with Jaish-e-Mohammed (JeM), a banned terrorist organization listed in the First Schedule of the UAPA Act.

38. At this juncture, it is also relevant to consider the recent decision of the Full Bench of the Hon'ble Apex Court in the case of **Arup Bhuyan versus State of Assam and Anr.** reported as **2023 SCC OnLine SC 338 (decided on 24-03-2023)**; where it has upheld the Constitutional validity of Section 10(a)(i) of the UAPA Act and further opined that mere membership of a banned organization constitutes an offence under the UAPA Act. The relevant portion of the judgment is extracted herein below for the sake of facility :

“8. While appreciating the submissions on behalf of the respective parties on the aforesaid issues, the relevant provisions



of the UAPA, 1967 are required to be referred to which are as under:

“Section 2 - Definitions:

- (1) In this Act, unless the context otherwise requires—,
- (a) association means any combination or body of individuals;
 - (k) terrorist act has the meaning assigned to it in section 15, and the expressions terrorism and terrorist shall be construed accordingly;
 - (l) terrorist gang means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;
 - (m) **terrorist organisation means an organisation listed in the [First Schedule] or an organisation operating under the same name as an organisation so listed:**
 - (o) unlawful activity, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise)—,.....

*** **

18. Now so far as reading down Section 3(5) of Terrorist and Disruptive Activities (Prevention) Act, 1987, which is *pari materia* to Section 10(a)(i) of UAPA Act, 1967 and reading down the said provision to the extent by observing that mere membership of a banned organization will not make a person guilty unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence and that mere membership of a banned organization will not incriminate a person is concerned, it is vehemently submitted by Shri Tushar Mehta, learned Solicitor General that as such in absence of challenge to the relevant provisions, more particularly Section 10(a)(i) of the UAPA, 1967, such a reading down was not permissible. It is submitted



that as such in the case of *Raneef* (supra), which has been subsequently followed in the cases of *Arup Bhuyan* (supra) and *Indra Das v. State of Assam*, (2011) 3 SCC 380, this Court was considering the bail application and the constitutional validity of Section 10(a)(i) of the UAPA Act was not under challenge.

*** **

25. Making above submissions and relying upon the above decisions, Shri Tushar Mehta, learned Solicitor General and Shri Vinay Navare, learned Senior Counsel appearing on behalf of the State of Assam have prayed to hold that the observations/decisions of this Court in the cases of *Raneef* (supra), *Arup Bhuyan* (supra) and *Indra Das* (supra) taking the view that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence or does an act intending to create disorder or disturbance of public peace by resort to violence is not a good law, in view of the specific provision under Section 10(a)(i) of the UAPA Act, 1967, the constitutionality of which is not under challenge and even otherwise on merits also looking to the object and purpose of enacting the UAPA Act, 1967.

*** **

52. Now so far as the reliance placed upon the decision of *Thawaha Fasal v. Union of India*, 2021 SCC OnLine SC 1000 by Shri Parikh, learned Senior Counsel, it is vehemently submitted by Shri Mehta, learned Solicitor General that the said decision shall not be applicable while considering the offence under Section 10(a)(i) of UAPA, 1967. It is submitted that in the said judgment this Court was dealing with the offence under Section 38 of UAPA, 1967 and was not dealing with the provisions concerning membership. Sections 38 and 39 of the UAPA, 1967 are worded completely differently as compared to the provisions concerning criminalization of



membership of a banned organization. It is submitted that therefore any observations made while considering the different provision/offence may not be *stricto sensu* applicable while considering Section 10(a)(i) of the UAPA, 1967.

*** **

55. At the outset, it is required to be noted that pursuant to the order passed by this Court reported in the case of *Arup Bhuyan v. State of Assam*, (2015) 12 SCC 702, the present reference is before the larger Bench. The present reference to the larger Bench is made on the request made on behalf of the Union of India and the State of Assam doubting the correctness of the decisions of this Court in the case of *Raneef* (supra) and *Arup Bhuyan* (supra) taking the view on reading down Section 10(a)(i) that mere membership of a banned organization will not make a person a criminal/guilty unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

*** **

82. Now the next question which is posed for consideration before this Court is whether Section 10(a)(i) is required to be read down so as to save the said provision from being declared unconstitutional and is required to be read down as had been done in the case of *Arup Bhuyan* (supra) and *Raneef* (supra) that mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence meaning thereby over and above the membership of a banned organization there must be a *mens rea* required to be established and proved and/or there must be a further overt act? While deciding this issue elaborate submissions have been made by Shri Tushar Mehta, learned Solicitor General, Shri Vinay Navare, learned Senior



Counsel appearing for the State of Assam and Shri Sanjay Parikh, learned Senior Counsel appearing on behalf of the appellants/interveners.

*** **

87. The UAPA, 1967 has been enacted in exercise of powers conferred under Article 19(2) & (4) of the Constitution of India. At this stage, it is required to be noted that exceptions to the freedom to form associations under Article 19(1) was inserted in the form of sovereignty and integrity of India under Article 19(4), after the National Integration Council (NIC) appointed a Committee on National Integration and Regionalisation. The said Committee was to look into the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the acceptance of the recommendations of the said Committee, the Constitution (Sixteenth Amendment) Act, 1963 came to be enacted to impose by law, reasonable restrictions in the interests of sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament. The main objective of the UAPA is to make powers available for dealing with activities directed against the integrity and sovereignty of India. It is also required to be noted that pursuant to the recommendation of the Committee on National Integration and Regionalisation appointed by the National Integration Council Act on whose recommendation the Constitution (Sixteenth Amendment) Act, 1963 was enacted, UAPA has been enacted. It appears that National Integration Council appointed a Committee on National Integration and Regionalisation to look into, *inter alia*, the aspect of putting reasonable restrictions in the interests of sovereignty and integrity of India and thereafter the UAPA has been enacted. Therefore, the UAPA has been enacted to make powers available for dealing with the activities directed against integrity and sovereignty of India.

88. Now let us consider the Preamble of the UAPA, 1967. As per Preamble, UAPA has been enacted to provide for the more



effective **prevention** of certain unlawful activities of individuals and associations and dealing with terrorist activities and for matters connected therewith. **Therefore the aim and object of enactment of UAPA is also to provide for more effective prevention of certain unlawful activities.** That is why and to achieve the said object and purpose of effective prevention of certain unlawful activities the Parliament in its wisdom has provided that where an association is declared unlawful by a notification issued under Section 3, a person, who is and continues to be a member of such association shall be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine. Therefore, the Parliament in its wisdom had thought it fit that once an association is declared unlawful after following due procedure as required under Section 3 and subject to the approval by the Tribunal still a person continues to be a member of such association is liable to be punished/penalized.

*** **

98. In view of the above and for the reasons stated above we hold that the view taken by this Court in the cases of *State of Kerala v. Raneef*, (2011) 1 SCC 784; *Arup Bhuyan v. Union of India*, (2011) 3 SCC 377 and *Sri Indra Das v. State of Assam*, (2011) 3 SCC 380 taking the view that under Section 3(5) of Terrorists and Disruptive Activities (Prevention) Act, 1987 and Section 10(a)(i) of the Unlawful Activities (Prevention) Act, 1967 mere membership of a banned organization will not incriminate a person unless he resorts to violence or incites people to violence and does an act intended to create disorder or disturbance of public peace by resort to violence and reading down the said provisions to mean that over and above the membership of a banned organization there must be an overt act and/or further criminal activities and adding the element of *mens rea* are held to be not a good law. It is observed and held that when an association is declared unlawful by notification issued under Section 3 which has become effective of sub-section 3 of that Section, a person who is and continues to be a **member of such**



association is liable to be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine under Section 10(a)(i) of the UAPA, 1967.

99. Any other decisions of the High Court taking a contrary view are held to be not a good law and are specifically overruled by this Judgment.

100. Reference is answered accordingly. Consequently, the Review applications filed by the Union of India and the State of Assam are hereby allowed.

101. Now the main appeals/SLPs be placed before the concerned Bench for taking of such matters after obtaining the appropriate order from Hon'ble the Chief Justice.”

(Emphasis Supplied)

39. Furthermore, it will also be beneficial at this stage to recapitulate the principles that the Court must bear in mind while deciding an application for grant of bail. The Hon'ble Apex Court has, in a catena of judgments, outlined the considerations on the basis of which discretion under Section 439 Cr.P.C. has to be exercised while granting bail. The Hon'ble Apex Court in the case of **Prasanta Kumar Sarkar v. Ashis Chatterjee & Anr.** reported as **(2010) 14 SCC 496**, after taking into account several precedents, elucidated the following:

“9...However, it is equally incumbent upon the **High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles** laid down in a plethora of decisions of this Court on **the point. It is well settled that, among other circumstances**, the factors to be borne in mind while considering an application for bail are:



- (i) **whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;**
- (ii) **nature and gravity of the accusation;**
- (iii) **severity of the punishment in the event of conviction;**
- (iv) **danger of the accused absconding or fleeing, if released on bail;**
- (v) **character, behaviour, means, position and standing of the accused;**
- (vi) **likelihood of the offence being repeated;**
- (vii) **reasonable apprehension of the witnesses being influenced; and**
- (viii) **danger, of course, of justice being thwarted by grant of bail.”**

40. These principles underscore that courts must strike a balance while dealing with the bail applications. The decision rendered by the Hon’ble Apex Court in *Prasanta Kumar Sarkar (Supra)* provides a pivotal reference point in the jurisprudence of bail, ensuring that the principles of natural justice and liberty of an individual is protected while safeguarding the interests of society.

41. Resultantly, after due consideration of the provisions of the UAPA Act, along with an assessment of the material appended in the subject charge-sheet; the collective evidence; as well as surface analysis of its probative value, in our considered view *prima facie* there exist reasonable grounds to believe that the accusations against the appellant are true. Consequently, the conditions in Section 43



D(5) of the UAPA Act stand satisfied.

42. The present appeal is accordingly dismissed.

43. Before we part with the judgment, it is incumbent upon us to point out that we have not expressed any opinion on the merits of the present case.

44. A copy of this judgment be provided to the learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court *forthwith*.

**SIDDHARTH MRIDUL
(JUDGE)**

**ANISH DAYAL
(JUDGE)**

SEPTEMBER 22, 2023

*dn/DA**