

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

CRA No.28/2018, MP No.01/2018

Date of order: 31.05.2018

State of J&K through Additional SP Anantnag Vs. Mst. Asia Indrabi and Ors.

Coram:

Hon'ble Mr. Justice Alok Aradhe, Acting Chief Justice
Hon'ble Mr. Justice M K Hanjura, Judge

Appearing counsel:

For Petitioner/Appellant(s) : Mr B A Dar, Senior Additional Advocate General.
For respondent (s) : Mr. M A Qayoom, Advocate.

i/	Whether to be reported in Press/Media	:	Yes/No
ii/	Whether to be reported in Digest/Journal	:	Yes/No

Per-Alok Aradhe,J:

The appeal is admitted for hearing and with consent of the learned counsel for the parties, the appeal is heard finally.

2. In this appeal preferred under Section 21 (wrongly described in the memo of appeal as Section 22) of the National Investigation Agency Act, 2008 (hereinafter called as 'the Act'), the appellant has assailed the validity of the order dated 18.05.2018 passed by Additional Sessions Judge, Anantnag by which she has admitted the respondents to bail, against whom FIR No.60/2018 in connection with offences under Sections 147/148/149/336/341/427/307, 120-B of the Ranbir Penal Code and Sections 3/4 of the Jammu and Kashmir Public Property (Prevention of Damages) Act, 1985 and under Sections 18/20/38 of Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as 'the 1967 Act'), was registered in Police Station, Anantnag.

3. Facts leading to the filing of this appeal briefly stated are that on the basis of the credible information received on 18.04.2018 at 7:45 a.m. that at K P Road near Shahi Bakery, Anantnag, that a mob of about one thousand persons in the form of unlawful assembly started pelting stones on the vehicles, by which damage was caused to the public property. On the basis of the aforesaid information, first information report was lodged for offences under sections 147/148/149/336/341/427/307/120-B, RPC and 3/4 of PPPD Act and 18/20/38 of the 1967 Act. During the course of the investigation, the statements of some of the witnesses were recorded on 18.04.2018 and some persons were arrested from the spot. On 20.04.2018, the respondents were arrested and were remanded to the judicial custody. During the investigation, the three mobile phones were recovered from the custody of accused persons, namely, Aasiya Indrabi, Mst. Nahida, Sofi Fahmeeda. It is the case of the prosecution that objectionable material was recovered from the aforesaid persons, which is a threat to the security of the State and reveals the nexus of the aforesaid persons with the terrorist organizations across the border. During the course of the preliminary investigation, reports were received that youths were being instigated by aforesaid accused Aasiya Indrabi, Chairperson of Dukhtraan-e-Millat and her associates. The reports also suggested the presence of said Aasiya Indrabi and her associates in Anantnag District and for planning to worsen the law and order situation by propagating the idea of allegedly banned terrorist organization under 'the 1967 Act'. The report also revealed that the aforesaid ladies were staying in the adjacent areas of Women Degree College, Anantnag and were hatching a criminal conspiracy by provoking students of Women Degree College, Anantnag and adjoining private coaching centers to resort to the violence in the garb of protest. On the basis of this specific information and during the course of the investigation, the respondents were arrested on 20.04.2018. During the inspection of the cell phones, incriminating material was found, which sufficiently suggested that

the respondents belong to the banned terrorist organization, namely, Dukhtraan-e-Millat and the aforesaid persons were in active contact with leaders of terrorist organizations across the border. It is the case of the prosecution that respondent No.1 is the Chairperson of the banned militant organization, whereas the respondent No.3 is the General Secretary of the aforesaid banned organization and whereas respondents 2, 4 and 5 are active workers of the aforesaid organization. On 21.04.2018, the respondents were produced before the Court and were remanded to the judicial custody and subsequently, lodged in Central Jail, Srinagar (Women Cell) up to 28.04.2018. Their judicial custody was further extended up to 16.05.2018.

4. The respondents filed an application for grant of bail which was duly opposed by the appellant. The Additional Sessions Judge, Anantnag vide impugned order dated 18.05.2018, admitted the respondents to bail and inter alia held that the first information report is silent with regard to the presence of the ladies in the mob, which had pelted stones on 18.04.2018. It was further held that statements of the witnesses recorded by the police under Section 161 of the Code of Criminal Procedure were not forwarded to the Magistrate forthwith and the case diary nowhere reveals that these statements have been forwarded to the Magistrate, therefore, the statements cannot be treated to be trustworthy. It was also noted by the Trial Court that the respondents were arrested on 20.04.2018 and in case they were present on the spot and would have been leading the procession, they would have been arrested from the spot itself on 18.04.2018. It was also held that the respondents were not involved in any terrorist act and mere membership of a terrorist organization cannot be treated as an offence under Sections 18/20/38 of the 1967 Act. It was further submitted that some whatsapp messages were found from the mobile phones of respondents 1 and 3, which came from across the border. However, the same cannot be treated as a terrorist act. At the most, the same would tantamount to offence under

Section 10 of the 1967 Act. It was also held that the grant of bail is rule and refusal is an exception. Accordingly, the respondents were admitted to bail. In the aforesaid factual background, this appeal has been filed.

5. Learned Senior Additional Advocate General for the appellant submitted that the Trial Court ought to have appreciated that the respondents No.1 and 3 were the Chairperson and Secretary, whereas the remaining respondents were active members of declared banned terrorist organization. It is further submitted that in view of bar contained in Section 43-D(5) of the 1967 Act, it was not open to the Trial Court to grant the bail. It was further submitted that even otherwise, the prosecution had brought the material on record to show that the accusations made against the respondents were prima facie true, as the respondents were found involved in inciting people for stone pelting, therefore, in view of Section 43-D(5) of the 1967 Act, the bail ought not to have been granted. It is further argued that while granting the bail, the Court need not ascertain whether there would be sufficient evidence against the accused to convict him/her after the trial. It is also submitted that while dealing with the prayer for bail, the Court should not be meticulous in examining the evidence on record and in an appeal filed against the order granting bail, this Court can certainly examine whether there is any material on record to come to the conclusion that there is a prima facie case made out against the respondents, which disentitles them to grant of bail and in case the Court comes to such a conclusion, then the bail has to be cancelled. In support of aforesaid submissions, learned Senior Additional Advocate General has relied on decision of the Supreme Court in the case of **State of Maharashtra and ors. v. Dhanendra Shriram Bhurle and ors, (2009) 3 SCC (Cri) 1480** and decisions rendered by the Andhra Pradesh High Court in the cases of **National Investigating Agency v. Mohmed Anwar Shak and anr. Decided on 21.12.2012, National Investigation Agency v. Devendra Gupta and anr, decided on**

18.04.2013 and Devendra Gupta And Another v. National Investigating Agency, decided on 12.03.2014.

6. On the other hand, learned counsel for the respondents, while inviting the attention of this Court to Section 43-D(5) of the 1967 Act, submitted that the aforesaid provision does not per se bar the grant of bail. It is submitted that Court while dealing with prayer for bail is to afford an opportunity of hearing to the public prosecutor and to form an opinion that there are reasonable grounds for believing that the accusation against the accused is prima facie true. It is also pointed out that the challan in the case has not been filed and on perusal of the case diary produced by the prosecution, the Trial Court has recorded the finding that there are reasonable grounds for believing that the accusations against the respondents are not prima facie true. It is further submitted that from the material produced by the prosecution, it is evident that the respondents were not present on the spot and were not part of the mob and in the 'First Information Report', there is no mention about the ladies. It is also submitted that the respondents are not involved in any terrorist act and only three mobile phones have been recovered from their possession. It is also submitted that there is no material on record that the respondents were in contact with the mob, which was pelting stones and no particulars of the terrorist organization have been given by the prosecution, which operates from across the border and with which the respondents were allegedly in contact. It is argued that the prosecution has miserably failed to demonstrate that the respondents were involved in any terrorist act, as mentioned in Section 15 of the 1967 Act. It is further submitted that the object of grant of bail is to secure the appearance of the respondents on their trial and the same is neither punitive nor preventive and the deprivation of the liberty must be considered as punishment. In support of the aforesaid submissions, learned counsel for the respondents has commended us to decisions of the Supreme Court in the case of **Sanjay Chandra v. Central Bureau of Investigation, AIR**

2012 SC 830 and decisions of the Supreme Court in **Criminal Appeal No.1448 of 2017 dated 21.08.2017, titled Lt. Col. Shrikant Purohit v. State of Maharashtra** as well as decisions of Andhra Pradesh, Bombay and Gauhati High Courts in the cases of **National Investigation Agency, NIA, Hyderabad v. Devendra Gupta And Another, (2013) 17 RCR**

(Criminal) 773, Ms. Jyoti Babasaheb Chorge v. State of Maharashtra, (2013) 4 MhLJ (CrI) 448 and M. Londhoni Devi v. National Investigation Agency, (2011) 3 GLD 685, as well as decisions of this Court in the cases of **Manzoor Ahmed Bhat v. State of J&K through SHO, Police Station D H Pora, Kulgam decided on 01.03.2018 in BA No.8/2018 and Farooq Ahmad Sheikh v. State of J&K through P/S D H Pora decided on 25.09.2017 in BA No.70/2017 c/w BA No.64/2017.**

7. We have considered the submissions made by the learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of the relevant extract of the provisions of the 1967 Act.

“15. Terrorist act- [(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [economic security] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause,-

- (i) death of, or injuries to, any person or persons; or
- (ii) loss of, or damage to, or destruction of, property; or
- (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country;”

18. Punishment for conspiracy, etc.- Whoever conspires or attempts to commit, or advocates, abets, advises or [incites, directs or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.”

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

(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code, and “cognizance case” as defined in that clause shall be construed accordingly.”

.....
(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.

8. The Supreme Court in the case of **Kartar Singh v. State of Punjab, (1994) 3 SCC 569** has held as under:

“The country has been in the firm grip of spiraling terrorist violence and is caught between deadly pangs of disruptive activities. Apart from many skirmishes in various parts of the country, there were countless serious and horrendous events engulfing many cities with blood bath, firing, looting, mad killing even without sparing women and children and reducing those areas into a graveyard, which brutal atrocities have rocked and shocked the whole nation. Deplorably determined youth, lured by hard-core criminals and underground extremists and attracted by the ideology of terrorism are indulging in committing serious crimes against the humanity.”

In **Mohammad Navas vs. SHO, (2009 (3) KHC 545**, this Court held as under:

“Terrorism is an evil affecting the life and liberty of peace loving people. Terrorism has no barriers, it may strike anybody anytime, any amount of precautionary measures and security arrangements may prove futile to combat terrorism. Fundamental rights to individual liberty is certainly valuable. But when it is pitted against

the life and liberty of the people at large, it becomes insignificant. Terrorism effects the growth of the nation. The resources of the nation have to be utilized to combat terrorism: it could be utilized in better ways for the betterment of the people. Offences against individuals are to be distinguished from offences affecting nation and people at large. Parameters to be adopted in the matter of considering the pleas of bail would also be different in these cases. A strict approach in the latter category of cases is justified. Sympathy has no rule in dealing with such cases.”

In the case of **Lt. Col. Prasad Shrikant Purohit v. State of Maharashtra (supra)**, the Supreme Court by an order dated 21.08.2017 passed in Criminal Appeal No.1448 of 2017 held as under:

21. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious crime. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider, among other circumstances, the following factors also before granting bail; they are:

- (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
- (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
- (c) Prima facie satisfaction of the court in support of the charge.”

9. In the backdrop of the aforesaid well settled legal position, the facts of the case may be seen. The police report indicates that on 18.04.2018 at about 7.45 a.m., the police authorities of Police Station, Anantnag, came to know from reliable sources that a violent mob pelted stones on the vehicles at KP Road, Anantnag near Shahi Bakery, as a consequence of which, these got damaged. On this information, a case bearing FIR No.60/2018 for the commission of offences under Sections 147,148, 149, 336, 341, 427, 307, 120-B RPC, 3/4 PPPD Act, was registered at Police Station, Anantnag, with which the investigation ensued. During the course of the investigation

of the case, site plan was prepared; some cell phones were seized; the statements of the witnesses conversant with the facts of the case were recorded and it was found that Tawheed Ahmad Rather, Showkat Ahmad Bhat, Tawheed Ahmad Shah, Junaid Sikander Malik, Ashfaq Ahmad Bhat, Suhail Ahmad Dar, Shakir Ashraf Illahi, Muneeb Ahmad Khan, Liyakat Ahmad Dar and Shahid Ahmad Khanday, who were incited by the respondents were heading the mob.

10. It is further stated in the report that the respondents were arrested on 20.04.2018 in connection with the commission of offences aforesaid. The police report further reveals that three cell phones were recovered from the petitioners namely Asia Indrabi, Sofi Fehmida and Mst. Nahida on the search of their person. On a cursory glance of these phones, it was found that these were carrying the photographs of the leaders of some militants' organizations living across the border. It was also found that the respondents Asia Indrabi is in close contact with the leaders of the militants' organizations living across the border. It is further stated that these phones have been sent to FSL and the report is still awaited. It was also found that it was at the behest and asking of the respondents that the violent mob pelted stones on the moving vehicles on 18.04.2018. It is further stated that the respondents, namely, Asia Indrabi is the Chairperson of "Dukhtaran-i-Milat", which is a terrorist organization. It is also stated that the investigation of the case is in progress and the respondents have to be interrogated for their involvement in the commission of offences under Sections 147, 148, 149, 336, 341, 427, 307, 120-B RPC, 3 / 4 of the Jammu and Kashmir Public Property (Prevention of Damages) Act, 1985 and 18/20/38 of the 1967 Act.
11. Thus from the perusal of the police report which is referred to in preceding paragraph, in our considered opinion, the action of the respondents would fall within the purview of Section 15(1)(a)(ii) read with Section 18 of the

1967 Act. From further perusal of the report, it is also axiomatic that there are reasonable grounds for believing that accusations against the respondents are prima facie true. It is also noteworthy that the investigation in the case is in progress and the respondents have to be interrogated for their involvement in the commission of the offences. In view of the provisions contained in the 1967 Act, which is a special provision, the age old maxim that grant of bail is the rule and the refusal is an exception does not hold good in a case like the present one provided the Court comes to the conclusion that there are reasonable grounds to believe that the accusations levelled against the accused persons are prima facie true. In view of Sections 15, 18, 43-D(5) of the 1967 Act and the material available in the police report, in our considered opinion, the Trial Court has exercised the discretion to grant the bail in an erroneous manner.

12. So far as the decision relied upon by the learned Counsel for the respondents in the case of **Manzoor Ahmad Bhat (supra)** is concerned, the same has no application to the fact situation of the case, as the offences in the aforesaid case were prima facie made under Section 19 of the 1967 Act. Similarly, the Division Bench decision of the Andhra Pradesh High Court in the case of **National Investigation Agency NIA, Hyderabad v. Devendra Gupta And Another, (2013) 17 RCR (Criminal) 773**, is an authority for the proposition that Section 43-D(5) of the 1967 Act does not bar grant of bail to the accused persons. We are in agreement with the aforesaid view taken by the Andhra Pradesh High Court in the case of **Devendra Gupta and another (supra)**. Similarly, the decisions rendered by Bombay High Court and Gauhati High Court in the cases of **Ms. Jyoti Babasaheb Chorge v. State of Maharashtra, (2013) 4 MhLJ (Crl) 448** and **M. Londhoni Devi v. National Investigation Agency, (2011) 3 GLD 685** are not applicable to the fact situation of the case, as the facts in this case are different.

13. In view of preceding analysis, the impugned order granting bail to the respondents is hereby quashed. In the result, the appeal is allowed.

Disposed of, as above along with connected MP.

(M K Hanjura)
Judge

(Alok Aradhe)
Acting Chief Justice

Srinagar
31.05.2018
Raj Kumar

