

Mohammed Asarudeen

v.

Union of India & Ors.

(Criminal Appeal No. 2443 of 2025)

06 May 2025

[Abhay S. Oka* and Ujjal Bhuyan, JJ.]

Issue for Consideration

Whether the Special Court while dealing with an application under sub-section 2 of s.44 of Unlawful Activities (Prevention) Act, 1967 made in respect of a large number of witnesses, recorded the satisfaction which is required to be recorded in terms of sub-section 2 of s.44 of UAPA. Whether the satisfaction as required by sub-section 2 of s.44 of UAPA was recorded *qua* an individual witness.

Headnotes[†]

Unlawful Activities (Prevention) Act, 1967 – Sub-section 2 of s.44 – National Investigation Agency Act, 2008 – s.17 – Code of Criminal Procedure, 1973 – s.173(6) – Appellant was tried by the Special Court for the National Investigation Agency cases – Charge-sheet was filed – An application was made by the Special Public Prosecutor of the NIA, invoking powers of the Special Court u/s.44 of the UAPA, r/w. s.17 of the NIA Act, 2008 r/w. s.173(6) of CrPC, for the protection of witnesses, which was allowed – The order of the Special Court was challenged before the High Court – The result of the impugned order passed by the High Court is that, in relation to the witnesses mentioned in clause 1 of paragraph 6 of the order of the Special Court, the accused will not be entitled to the copies of the statements of such witnesses recorded u/s.161 of the CrPC even after examination-in-chief of the said witnesses is recorded – Correctness:

Held: On plain reading of sub-section 2 of s.44 of the UAPA, the Court has to apply its mind in relation to danger to a particular witness – An omnibus application cannot be made by the Special Public Prosecutor for the grant of protection under sub-section 2 of s.44 for all witnesses or a number of witnesses – Even if an application is made in respect of more than one witness,

* Author

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specific averments in relation to every witness must be made in the application – In view of this Court, sub-section 2 of s.44 of the UAPA (sub-section 2 of s.17 of NIA) must be strictly complied with, as the exercise of the power may affect the right of the accused to defend – On facts, the Special Court was dealing with an application where the prayer under sub-section 2 of s.44 of UAPA was made in respect of a large number of witnesses – The Special Court has not considered the case of each witness separately regarding the possible dangers to their lives – The Court has also not recorded satisfaction based on material that the life of a particular witness is in danger – A very general observation has been made that, in the interests of justice, the Court feels that the identity of the witnesses can be hidden till the examination in chief of the witnesses is recorded – The order of the Special Court cannot be sustained – The first satisfaction, which is required to be recorded in terms of sub-section 2 of s.44 of UAPA, has not been recorded – Similarly, the observation of the High Court completely ignores the second part of sub-section 2 of s.44 of the UAPA – Both the Courts have lost sight of the fact that the satisfaction as required by sub-section 2 of s.44 of UAPA has to be recorded *qua* an individual witness – Therefore, both the orders are set aside. [Paras 11, 12, 14]

Unlawful Activities (Prevention) Act, 1967 – Sub-section 2 of s.44 – Recording of satisfaction:

Held: The first condition precedent for the exercise of powers under sub-section 2 of s.44 of UAPA is the recording of the satisfaction by the Special Court that the life of the concerned witness is in danger – This satisfaction must be recorded based on the material available before the Special Court – The extent and the nature of the material required to record such satisfaction will depend upon the facts and circumstances of each case – Since sub-section 2 of s.44 of the UAPA is an exception to the general rule, the condition precedent for the exercise of power of recording a clear satisfaction based on material as stated must be complied with – After recording the satisfaction, the second stage comes into play – It is not that in every case that after such satisfaction is recorded, the Court can pass an order prohibiting the prosecution from providing a copy of the entire statement of the prosecution witnesses till the conclusion of the trial – The Court has to apply its mind considering the material on record, what kind of measures should be adopted for keeping the identity and address of such

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a witness, secret – While deciding what kind of measures should be adopted, the Court must record brief reasons. [Paras 9, 10]

Unlawful Activities (Prevention) Act, 1967 – ss.44 – National Investigation Agency Act, 2008 – s.17 – Witness Protection Scheme, 2018 – cl.2(c) – It was contended by the State that when application under sub-section 2 of s.44 of the UAPA or sub-section 2 of s.17 of NIA is heard by the Special Court, the accused have no right of hearing – Correctness:

Held: On the face of it, sub-section 2 of s.44 of UAPA and sub-section 2 of s.17 of the NIA Act does not exclude the principles of natural justice – The accused has a right of hearing on the application under sub-section 2 of s.44 of the UAPA, but obviously, till orders are passed by the Court on the application and subject to such orders, the accused is not entitled to know the identity of the witnesses in respect of whom the application is made – If, during the pendency of the application, the identity of the witness is disclosed in any manner, the very purpose of the power conferred on sub-section 2 of s.44 of the UAPA will be lost. [Para 21]

Case Law Cited

Mahender Chawla & Ors. v. Union of India & Ors. [2018] 14 SCR 627 : (2019) 14 SCC 615 – referred to.

List of Acts

Unlawful Activities (Prevention) Act, 1967; National Investigation Agency Act, 2008; Witness Protection Scheme, 2018.

List of Keywords

Protection of Witness; Principles of Natural Justice; Right of hearing; Material produced regarding the threat perception; Sub-section 2 of Section 44 of UAPA; Omnibus application; Right of accuse to defend.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2443 of 2025

From the Judgment and Order dated 21.10.2024 of the High Court of Judicature at Madras in CRLOP No. 2872 of 2024

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Appearances for Parties

Advs. for the Appellant:

Shoeb Alam, Sr. Adv., D. Kumanan, Sheikh F. Kalia, A. Noufal.

Advs. for the Respondents:

Suryaprakash V. Raju, A.S.G., Zoheb Hussain, Annam Venkatesh, Arkaj Kumar, Aaditya Shankar Dixit, Arvind Kumar Sharma, B. Mohan, Gaurav Sarkar.

Judgment / Order of the Supreme Court

Judgment

Abhay. S. Oka, J.

1. Leave granted.
2. Heard learned senior counsel appearing for the appellant and learned Additional Solicitor General appearing for the first respondent. The appellant is accused No. 1. The appellant is being tried by the Special Court for the National Investigation Agency (hereinafter referred to as 'the NIA') cases in Chennai. Initially, an offence was registered under Sections 341, 294(b) and 307 of the Indian Penal Code, 1860 (for short, 'the IPC'). Subsequently, Sections 120B, 143, 147, 148, 302 read with 149 of the IPC and Section 15 read with Sections 16, 18, 18B, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 (for short, 'the UAPA') were added. Upon completion of investigation/ filing of charge-sheet, an application was made by the Special Public Prosecutor of the NIA, invoking powers of the Special Court under Section 44 of the UAPA, read with Section 17 of the National Investigation Agency Act, 2008 (for short, 'NIA Act') read with Section 173(6) of Cr.P.C., for the protection of witnesses. The provisions of Section 44 of the UAPA, as well as Section 17 of the NIA Act, are *pari materia*. In this case, we are concerned with sub-section 2 of Section 44 of the UAPA. Section 44 of the UAPA reads thus:

“4. Protection of witnesses.—

(1)Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the court so desires.

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(2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include—

(a) the holding of the proceedings at a place to be decided by the court;

(b) the avoiding of the mention of the name and address of the witness in its orders or judgments or in any records of the case accessible to public;

(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;

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

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

3. Sub-section 2 of Section 17 of the NIA Act is identical. The prayer made by the Special Public Prosecutor in the application reads thus:

“(1) to issue necessary order or orders for not supplying of copies of the statement recorded under Section 161 of Cr.P.C. in respect of Protected Witnesses to the accused persons or their advocate/legal counsel under the provisions of section 17 of the NIA Act, 2008 and section 44 of the UA(P) Act, 1967 r/w 173(6) Cr.P.C., in view of safety and security of the witnesses, until such time this Hon’ble Court deems fit; and to provide copy of statements of those witnesses, who are not treated protected witnesses to the accused person or their advocate/legal aid;”

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4. By the order dated 21st August, 2019, the application was allowed by the Special Court by passing the following order:

“6. In the result, this petition is allowed and ordered as under:

(1) The petitioner/prosecuting agency is permitted to hide the identity and address of the witnesses, namely L.W. 10, L.W. 11, L.W.12, L.W.19, L.W.20, L.W.21, L.W.22, L.W.34, L.W.35, L.W.36, L.W.37, L.W.38, L.W.39, L.W.40 and L.W.70 mentioned in Annexure-A to the charge sheet and in the statements of the said witnesses recorded u/s 161 of Cr.P.C. in the copies to be furnished to the accused persons.

(2) The petitioner is directed to submit one separate set of true copy of such hidid copy of statements of those witnesses and the Annexure-A to the charge-sheet, to the Court, along with the copies to be supplied to the accused persons, to keep with the case-records. Upon such submission, the office of this Court is directed to keep the original of Annexure-A to the charge-sheet, and the statements u/s 161 of Cr.P.C. of the said witnesses in a sealed cover separately under safe custody of this Court.

(3) The original statements u/s 161 of Cr.P.C. in respect of those witnesses will be opened from the sealed cover on the date of examination of the concerned witness and after examination-in-chief is over, the statement of such witness shall be supplied to the accused immediately.”

5. The order of the Special Court was challenged by the first respondent through the NIA before the High Court. By the impugned judgment, the High Court held that clauses (1) and (2) of paragraph 6 of the order of the Special Court needs no interference. However, the High Court interfered with clause (3) of paragraph 6 by setting it aside. The result of the impugned order is that, in relation to the witnesses mentioned in clause 1 of paragraph 6 of the order of the Special Court, the accused will not be entitled to the copies of the statements of such witnesses recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, ‘the Cr.P.C.’) even after examination-in-chief of the said witnesses is recorded.

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6. The submission of the learned senior counsel appearing for the appellant is that the satisfaction which is required to be recorded in terms of sub-section 2 of Section 44 of UAPA and sub-section 2 of Section 17 of the NIA Act, has not been recorded by the Special Court. He submitted that, notwithstanding the failure of the Special Court to record the satisfaction, as clause (3) of paragraph 6 of the order of the Special Court protected the appellant, he did not challenge the order.
7. Learned ASG submitted that the satisfaction required to be recorded in terms of sub-section 2 of Section 44 of the UAPA and sub-section 2 of Section 17 of the NIA Act has been clearly recorded in paragraph 5 of the order of the Special Court. It is submitted that in any case, the appellant accepted the order of the Special Court as he did not challenge the same. He submitted that the Special Court could have always directed that the copies of the statements of the protected witnesses should not be given to the accused even after the examination-in-chief of the said witnesses is over.
8. We have considered the submissions. The normal rule is that the accused is entitled to the copies of the statements of witnesses recorded by the police during the investigation unless the concerned Court exercises the power under sub-section 6 of Section 173 of the Cr.P.C. read with first proviso of Section 207 of the Cr.P.C. We have already quoted Section 44 of the UAPA. Sub-section 1 of Section 44 of the UAPA starts with a non-obstante clause which permits the Court to conduct the trial *in camera* for reasons to be recorded. The same is the provision of sub-section 1 of Section 17 of the NIA Act. It is pertinent to note that out of four sub-sections of Section 44 (Section 17 of the NIA), only sub-section 1 starts with a non-obstante clause.
9. Sub-section 2 of Section 44 of the UAPA can be invoked by a prosecution witness or by the Public Prosecutor. In a given case, even the Special Court can exercise this power suo motu. The first condition precedent for the exercise of powers under sub-section 2 of Section 44 of UAPA is the recording of the satisfaction by the Special Court that the life of the concerned witness is in danger. Obviously, this satisfaction must be recorded based on the material available before the Special Court. The extent and the nature of the material required to record such satisfaction will depend upon the facts and

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circumstances of each case. Since sub-section 2 of Section 44 of the UAPA is an exception to the general rule, the condition precedent for the exercise of power of recording a clear satisfaction based on material as stated above must be complied with.

10. After recording the satisfaction, the second stage comes into play. It is not that in every case that after such satisfaction is recorded, the Court can pass an order prohibiting the prosecution from providing a copy of the entire statement of the prosecution witnesses till the conclusion of the trial. The Court has to apply its mind considering the material on record, what kind of measures should be adopted for keeping the identity and address of such a witness, secret. While deciding what kind of measures should be adopted, the Court must record brief reasons.
11. On plain reading of sub-section 2 of Section 44 of the UAPA, the Court has to apply its mind in relation to danger to a particular witness. An omnibus application cannot be made by the Special Public Prosecutor for the grant of protection under sub-section 2 of Section 44 for all witnesses or a number of witnesses. Even if an application is made in respect of more than one witness, specific averments in relation to every witness must be made in the application. In our view, sub-section 2 of Section 44 of the UAPA (sub-section 2 of Section 17 of NIA) must be strictly complied with, as the exercise of the power may affect the right of the accused to defend.
12. In the facts of this case, we find that the Special Court was dealing with an application where the prayer under sub-section 2 of Section 44 of UAPA was made in respect of a large number of witnesses. The Special Court has not considered the case of each witness separately regarding the possible dangers to their lives. The Court has also not recorded satisfaction based on material that the life of a particular witness is in danger. A very general observation has been made in paragraph 5 that, in the interests of justice, the Court feels that the identity of the witnesses can be hidden till the examination in chief of the witnesses is recorded. According to us, the order of the Special Court cannot be sustained as even the first satisfaction, which is required to be recorded in terms of sub-section 2 of Section 44 of UAPA, has not been recorded.
13. Now we come to the impugned judgment of the High Court. The relevant part of paragraph 21 of the said order reads thus:

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“21. Once the Court formed an opinion that the witnesses are to be protected, the said protection must be in complete form and it cannot be diluted at any circumstances. Once the statement under Section 161 Cr.P.C. in respect of those protected witnesses are kept in a sealed cover, it cannot be opened after examination of the concerned witnesses and after examination in chief is over. It cannot be opened for the purpose of handing over to the accused persons. It is to be opened only for the purpose of- dealing with the case by the court and for disposal of the case.”

14. This observation of the High Court completely ignores the second part of sub-section 2 of Section 44 of the UAPA. Even assuming that a satisfaction was recorded that there was a danger to the life of a witness, the Court was required to apply its mind to decide what measures should be taken to protect the witness as regards his identity, address and name, etc. The Court must apply its mind to decide what measures should be taken and record brief reasons for taking such measures. Therefore, in every case where the first part of satisfaction under sub-section 2 of Section 44 is recorded, the Court cannot pass a blanket order as suggested by the High Court in paragraph 21. The Special Court must be conscious of the fact that sub-section 2 of Section 44 of UAPA is an exception to the normal rule. Therefore, we disapprove the findings recorded by the Special Court and the High Court to that extent.
15. In any case, both the Courts have lost sight of the fact that the satisfaction as required by sub-section 2 of Section 44 of UAPA has to be recorded *qua* an individual witness. We, therefore, set aside both the orders and dispose of the application made by NIA on 2nd August, 2019 (Annexure - 'P-3').
16. This order will not preclude either the prosecution witnesses or the Special Public Prosecutor from invoking the powers of the Special Court under sub-section 2 of Section 44 of the UAPA and sub-section 2 of Section 17 of the NIA Act. If such applications are made, the Court will decide the same in accordance with law in the light of what we have held in this judgment.
17. As far as the material produced regarding the threat perception is concerned, it is for the Court to decide whether such material should be disclosed to the accused. In a given case, the Court may decline to disclose the material to the accused.

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18. We grant time of eight weeks to the Special Public Prosecutor to file a proper application to invoke provisions of Section 44(2) and Section 17(2).
19. If such applications are made in relation to particular witnesses within eight weeks from today, till the disposal of the applications, subject to the orders which may be passed by the Special Court on the applications, the identity of the witnesses shall not be disclosed in any manner.
20. It is obvious that we have made no adjudication on the factual controversy, as the Special Court itself has not made any adjudication about the existence of threat perception in relation to the witnesses mentioned in the application.
21. At this stage, learned ASG submitted that when application under sub-section 2 of Section 44 of the UAPA or sub-section 2 of Section 17 of NIA is heard by the Special Court, the accused have no right of hearing. He placed reliance on the Witness Protection Scheme, 2018, (for short, 'the Scheme') which has been approved by this Court in the case of *Mahender Chawla & Ors. vs. Union of India & Ors.*¹. He also drew our attention to the fact that this Court has given its imprimatur to the scheme, as stated in paragraph 36 of the said judgment. We have perused the entire scheme. The Scheme does not deal with the powers of the Court at all. The scheme creates a machinery in the form of a competent authority as defined in clause 2(c), which is the Standing Committee in each district, chaired by the District and Sessions Judge, with the head of the police in the district as a member and the head of the prosecution in the district as its Member Secretary. Clause 9 contemplates the competent authority examining the request for seeking identity protection of a witness. Clause 9 itself contemplates a hearing of the application. However, this hearing is conducted by the competent authority and not by the Court. On the face of it, we do not find that sub-section 2 of Section 44 of UAPA and sub-section 2 of Section 17 of the NIA Act exclude the principles of natural justice. As observed earlier, it is for the Court to decide whether the nature of the material regarding the threat perception relied upon, should be disclosed to the accused.

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The Court has a power to direct that the material should not be disclosed to the accused. The accused has a right of hearing on the application under sub-section 2 of Section 44 of the UAPA, but obviously, till orders are passed by the Court on the application and subject to such orders, the accused is not entitled to know the identity of the witnesses in respect of whom the application is made. If, during the pendency of the application, the identity of the witness is disclosed in any manner, the very purpose of the power conferred on sub-section 2 of Section 44 of the UAPA will be lost. Subject to what we have observed above, we reject the submission of the learned ASG.

22. The appeal is accordingly allowed on the above terms.
23. Pending application(s), if any, shall stand disposed of.

Result of the case: Appeal allowed.

[†]Headnotes prepared by: Ankit Gyan