

# National Investigation Agency vs Owais Ahmad Dar & Ors on 24 March, 2022

**Author: Yogesh Khanna**

**Bench: Yogesh Khanna**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI  
+ CRL.M.C. 3493/2021, CRL.M.A.20845/2021  
NATIONAL INVESTIGATION AGENCY

Through: Mr.Gautam Narayan and Ms.A  
Singh, Advocates.

versus

OWAIS AHMAD DAR & ORS.

Through: Ms.Sowjhanya

Mr.Siddharth Satija and M  
Sekhri, Advocate for R-1.  
Mr.Simon Benjamin, Mr.M.P  
and Mr.Surbhit Nandan, Ad  
for R-3.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA  
ORDER

% 24.03.2022

1. The petitioner herein approached this Court being aggrieved of an order dated 27.11.2021 passed by the learned Principal District and Session's Judge/Special Court (NIA), Patiala House Court whereby the Special Judge rejected the application filed by the petitioner seeking police custody in respect of certain accused person on the ground of second proviso of Section 43D(2)(b) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred as UAPA). The accused has already been sent to police remand once and thirty days from the said first remand had since expired. Indisputably, the police custody has been granted for a period of less than maximum period of thirty days as permitted under UAPA.

2. It is the submission of the learned counsel for the petitioner the order is contrary to legislative intent of Section 43D(2)(b) of UAPA which unequivocally allows the police to seeks remand of the accused for the purposes of investigation, till the upper limit is reached with intervals in between till the time accused remains in custody in terms of the provision.

3. It is argued the impugned order is contrary to the law laid down in Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat, (2004) 6 SCC 672 in the context of Section 49(2)(b) of Prevention of Terrorism Act, 2002 (POTA) which is pari materia to Section 43D(2)(b) of UAPA where the Hon'ble Supreme Court has rejected the conclusion of the learned Single Judge.

4. It is submitted the interpretation as adopted by the learned Trial Court would render the second proviso of Section 43D(2)(b) of UAPA as redundant and otiose and hamper a full and fair investigation into terrorist offences, the planning and perpetration of which are extremely complex in nature.

5. In the backdrop of the recent spurt in the terrorist attacks in Jammu and Kashmir a complaint was registered by the petitioner on the basis of an order dated 10.10.2021 issued by the Ministry of Home Affairs, Govt. of India pertaining to a large scale conspiracy funded and controlled by international terror groups and their affiliates in India to spread terror in Jammu and Kashmir. The requests for police custody was made for three person who have been initially arrested and till date total twenty eight persons have been arrested.

6. It is argued a plain and clear reading of Section 43D(2)(b) of UAPA places no restriction on the power of investigating agency to seek police custody and the only fatter is the total period for which an accused is remanded cannot exceed thirty days.

7. Two issues have been raised by the learned counsel for the respondent viz. a) the maintainability of the petition and b) the order of the learned Special Judge is fully justified in view of Gautam Navlakha vs. NIA, 2021 SCC OnLine SC 382.

8. Heard.

9. Let me first take an issue of maintainability. I may refer to Section 21 of the National Investigation Agency Act, 2008 which runs as under:

□21. Appeals.--(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from: Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days: Provided further that

no appeal shall be entertained after the expiry of period of ninety days.

10. In *Gautam Navlakha vs. NIA*, 2021 SCC OnLine SC 382 the Court held as under:

¶63. Thus, an order under Section 167 is purely an interlocutory order. No revision is maintainable. A petition under Section 482 cannot be ruled out. Now at this juncture we must notice the following dimension. When a person arrested in a non-bailable offence is in custody, subject to the restrictions, contained therein, a court other than High Court or Court of Session, before whom he is brought inter alia, can release him on bail under Section 437 of the Cr.P.C. Section 439 of the Cr.P.C. deals with special powers of High Court and court of session to grant bail to a person in custody. The said courts may also set aside or modify any condition in an order by a Magistrate.

11. Now the question before me is if an order of rejecting remand is a final order or an interlocutory order. It is important as the impugned order dated 27.11.2021 has been passed by the learned Special Court under the NIA Act under Section 11 of the NIA Act and per Section 21 and 22(2) it confer sole and exclusive jurisdiction of the Hon'ble Division Bench of this Court to hear appeal against all orders, sentence and judgments of the Special Judge, which are not interlocutory. The extraordinary jurisdiction under Section 482 Cr.P.C. is specifically ousted.

12. The order rejecting a plea of remand is necessarily a final order and not an interlocutory order since it decides with finality, the ability of the investigating agency to get custodial interrogation of an accused person. It has a vital bearing on the decision/inquiry and trial proceedings before the learned Trial Court.

13. Admittedly the repeated applications seeking police custody remand cannot be made and it may be granted only in the first thirty days in the cases of UAPA and once rejected the order becomes final and seeking police custody for the period of investigation, discovery, recovery etc. even in the cases where the alleged offences is serious, is hampered.

14. In *Kandhal Sarman Jadeja vs. State of Gujarat* 2012 SCC OnLine Guj 3104, it was held:

¶7. In light of the aforesaid discussion, our final conclusion may be summarized thus:

(I) An order refusing to grant remand has direct bearing on the proceedings of the trial itself and in a given case will definitely have effect on the ultimate decision of the case.

(II) An order refusing to grant remand may affect the progress of the trial or its decision in any manner If Investigating Agency Is deprived of having custodial interrogation of the accused so as to effectively Investigate the offence and gather necessary evidence and material to put the accused to trial.

(III) An order refusing to grant police remand would be a final order and a revision under Section 397 read with Section 401 of the Code would be maintainable.

Reference is accordingly answered. Registry shall place the matter once again before the Hon'ble Chief Justice for appropriate orders so that the main matter can be placed before the appropriate Court taking up such matter.

15. Further in Ambarish Rangshahi Patnigere vs. State of Maharashtra 2010 SCC OnLine Bom 1968, it was held:

□9. It will be seen that having regard to this view taken by the Supreme Court, In fact In Madhu Limaye's case, (1977) 4 SCC 551 : AIR 1978 SC 47; (1978 Cri U 465), the largest Bench of the Supreme Court has expressed an opinion that the broad statement of law contacted in Amar Nath's case needed certain modification. However, the Supreme Court re-affirmed the decision in Amar Nath's case and held that the order releasing some of the accused on perusal of the police report and subsequently summoning them was not an interlocutory order but was a final order. To my mind, reading the two cases together Amar Nath's case and Madhu Limaye's case, no doubt is left about the legal position, namely, that an order rejecting the Department's application for remand of the accused to judicial custody is a final order and not an Interlocutory order." The learned Judge of this Court In R. Shakuntala (1985 CrI LJ 68), finally came to conclusion that an order rejecting application for remand of the accused to judicial custody is a final order and not an interlocutory order. This will be applicable with equal force to the refusal of request for police custody also. As such, the order passed by the Magistrate rejecting request for police custody cannot be treated as interlocutory order because the police cannot repeat and make applications again and again for police custody after the application for police custody had been rejected once and particularly in view of the limitation under Section 167, Cr. P.C. that the police custody may be granted only during first 15 days after the arrest or detention and not thereafter. If such application for police custody is rejected, that order becomes final and the Investigating Officer is permanently deprived of seeking police custody of that accused for the purpose of further investigation, discovery, etc. even though the offence may be very serious.

16. In Miss R.Shakuntala vs. Roshanlal Agarwal and Others 1984 SCC OnLine Bom 313, it was held as under:

□21. It will be seen that having regard to this view taken by the Supreme Court, in fact in Madhhu Limaye's case, (1977) 4 SCC 551 :

AIR 1978 SC 47 : (1978 Cri LJ 165), the larger Bench of the Supreme Court has expressed an opinion that the broad statement of law contained in Amar Nath's case needed certain modification. However, the Supreme Court reaffirmed the decision in Amar Nath's case and held that the order releasing some of the accused on perusal of

the police report and subsequently summoning them was not an interlocutory order but was a final order. To my mind, reading the two cases together Amar Nath's case and Madhu Limaye's case, no doubt is left about the legal position, namely, that an order rejecting the Department's application for remand of the accused to judicial custody is a final order and not an interlocutory order.

17. Thus, in view of the above, since an order rejecting remand is a final order, hence an appeal would only lie before the Hon'ble Division Bench. It is submitted the permission be accorded to treat this petition as an appeal and be placed before the Hon'ble Division Bench.

18. Subject to orders of Hon'ble the Acting Chief Justice, be placed before the Hon'ble Division Bench for directions on 25.03.2022.

YOGESH KHANNA, J.

MARCH 24, 2022 DU