

Nayeem Ahmad Khan vs National Investigation Agency on 9 April, 2025

Author: Navin Chawla

Bench: Navin Chawla

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 13.01.2025
Pronounced on: 09.04.2025

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CRL. A. 118/2023
NAYEEM AHMAD KHAN

.....Appellant

Through:

Ms. Tara Narula, Ms. Tamanna
Pankaj and Mr. Anurudh
Ramanathan, Advs

versus

NATIONAL INVESTIGATION AGENCYRespondent

Through: Mr. Sidharth Luthra, Sr. Adv.
with Mr. Akshai Malik, SPP,
Mr. Ayush Agarwal, Mr. Karl P
Rustom Khan, Mr. Suhail
Ahmed, Mr. Khawar Saleem
and Mr. Yatharth Sharma,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

SHALINDER KAUR, J.

1. The present Criminal Appeal has been filed under Section 21(4) of the National Investigation Agency (NIA) Act, 2008, assailing the Order dated 03.12.2022 (Impugned Order) passed by the learned Additional Special Judge - 03, Patiala House Courts, Delhi, (ASJ) in case bearing no. NIA RC No. RC-10/2017/NIA/DLI titled NIA vs Hafiz Muhammad Saeed & Ors., whereby the first bail application filed by the Appellant seeking regular bail was dismissed. The Appellant has prayed for setting aside of the Impugned Order and granting of regular bail to him in the aforementioned registered NIA case.

FACTUAL BACKGROUND:

2. Briefly, the present matter is, allegedly, a case of conspiracy pertaining to organized, funded and orchestrated terrorism by the Intelligence Agencies of Pakistan, through creation of several terrorist organizations which compose of strategists, planners, fund-raisers, financial conduits, executors,

etc., who devise organization of bandhs, forcible closure of roads and Government establishments, instigating general public to violence, arson, mass unlawful attacks against the Security Forces, etc, thus, creating surcharged atmosphere and circumstances where human lives are lost and the sentiments attached to such deaths are exploited to their advantage. It has been alleged that these violent activities for over two and a half decades have led to massive loss of life and injuries to thousands of innocent persons, which are perpetrated by various proscribed terrorist organizations, namely Lashkar-e-Toiba (LeT), Hizb-ul-Mujahideen (HM), Jammu and Kashmir Liberation Front (JKLF), etc,

3. Further, it is alleged that the ultimate goal of these organizations is to achieve secession of the erstwhile State of Jammu and Kashmir from the Union of India and to that effect, they are also imparting and equipping a large number of youth from the Kashmir Valley with sophisticated weaponry, etc, and as such are waging a war against the Government of India by resorting to strategized stone pelting, repeated attacks on the Security Forces, government establishments, public property, etc, thereby threatening the sovereignty, integrity and unity of India.

4. It was further alleged that these terrorist organizations also rely upon the regular flow of funds obtained by them from the domestic and international unlawful channels such as hawala networks, etc, which have continuously fuelled the violence in the Kashmir Valley despite the huge deployment of the Security Forces by the Government of India to neutralise the terrorist and secessionist activities.

5. In relation to this, the Central Government received a credible information that an individual named Hafiz Muhammad Saeed, in connivance with the active militants of proscribed terrorist organizations and leaders of Hurriyat Conference, is raising funds through various illegal channels and as such they have entered into a larger conspiracy to cause the said disruption of peace, and instigate violence in Kashmir. The NIA, was, accordingly, directed by the Ministry of Home Affairs to launch an investigation into the matter. Consequently, the case was registered, bearing no. RC-10/2017/NIA/DLI, under Sections 120B, 121 and 121A of the Indian Penal Code, 1860 (IPC) and Sections 13, 16, 17, 18, 20, 38, 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 and the investigation, thus, ensued.

6. The Prosecution alleges that the investigation uncovered that apart from these terrorist organizations, a political conglomerate of various organizations, i.e., the All Parties Hurriyat Conference (APHC) was formed in 1993, disguised to mask the secessionist activities to claim the erstwhile State of Jammu and Kashmir. It is alleged that the investigation unravelled that several individuals, including the Appellant, were part of the APHC/Hurriyat Conference either by being a member/officer bearer or by way of being an active supporter/worker. In 2008, the APHC was split into three factions of which, one APHC(G) was headed by Syed Ali Shah Geelani/SAS Geelani, and the Appellant, amongst other persons, is associated with it. It is alleged by the prosecution that APHC entered into a criminal conspiracy and their modus operandi was to instigate the general public, especially the youth, to observe strikes and hold Anti-India protests, demonstrations, etc., using public platforms such as press releases, newspapers, social media and others, thereby, creating an atmosphere which is conducive for propagation of their secessionist goals. It is alleged

that all the Hurriyat leaders are guided by the ideology of „freedom which is the secession of the erstwhile State of Jammu and Kashmir from the Union of India.

7. The Prosecution also alleged that during the investigation, it was found that these protests and demonstrations were not spontaneous or random, rather were happening as per the „calendar of protests prepared by SAS Geelani and others, which contain detailed instructions on holding and carrying them out.

8. In course of the investigation, the NIA sent the Appellant summons under Section 43F of Unlawful Activities (Prevention) Act, 1967 [UA(P) Act] on various dates in June-July, 2017 to join the investigation. Upon receipt thereof, the Appellant appeared before the NIA / Respondent and was interrogated for several days, eventually, leading up to his arrest on 24.07.2017 by the NIA, and he presently remains in the judicial custody.

9. Subsequently, the Appellant was arrayed as the Accused No. 5 in the Chargesheet filed by the NIA on 18.01.2018, which included other 11 accused persons (including two absconders) namely:

Hafiz Muhammad Saeed (A-1),
Mohd. Yusuf Shah @ Salahuddin (A-2),
Aftab Ahmad Shah @ Shahid-ul-Islam (A-3),
Altaf Ahmad Shah @ Fantoosh (A-4),
Nayeem Ahmad Khan (A-5),
Farooq Ahmad Dar @ Bitta Karate (A-6),
Mohammad Akbar Khanday (A-7),
Raja Mehrajuddin Kalwal (A-8),
Bashir Ahmad Bhat @ Peer Saifullah (A-9),
Zahoor Ahmad Shah Watali (A-10),
Kamran Yusuf (A-11) and;
Javed Ahmad Bhatt (A-12).

10. The case of the Prosecution against the Appellant (A-5) is that he is one of the main strategists and planners of the criminal conspiracy entered into with other leaders of Hurriyat Conference in connivance with Hafiz Muhammad Saeed and other terrorist organizations to propagate secessionist and separatist ideology in the Jammu and Kashmir. The Appellant is also stated to be the Chairman of Jammu and Kashmir National Front (JKNF) having the primary membership of APHC(G), the focus of which organization is Right to self-determination of Kashmir and holding protests to boycott elections in the State.

11. The investigation seized two letters dated 10.03.2006 and 17.03.2006, allegedly written by Mujahideen Area Commander (Local Amir) of Hizb-ul-Mujahideen, a banned terrorist organization, requesting financial assistance from the Appellant. 21 blank letter heads in the name of Lashker-e-Toiba (LeT), a banned terrorist organization, were also seized, through which the Prosecution sought to establish that the Appellant has close relations with the proscribed terrorist organizations.

12. It was also alleged that a video, procured by the Prosecution from an open source (YouTube), shows the Appellant visiting the area where three terrorists were killed on 11.07.2017 at Budgam, Srinagar, with the supporters of ISIS, a proscribed terrorist organization under UA(P) Act. It is alleged that the Appellant, with these terrorist organizations is in unison in the act of waging war against the Indian Government.

13. Further, a Sting Operation was carried out by India Today, a T.V. News Channel. It is alleged that certain admissions were made by the Appellant in the un-edited version of the Audio / Video of the same furnished by the Office of India Today, that the terrorists and separatists had received financial support from Pakistan to the tune of 200 crores to organize Anti-India protests and agitations after the killing of Burhan Wani, the then Commander of Hizb-ul-Mujahiddin, and the Appellant also confirmed the receipt of funds from Saudi Arabia / Dubai through hawala channels and the role played by the Pakistan High Commission. Moreover, it was alleged that the Appellant admitted that he would be able to fuel unrest at any time, provided he is funded. Further, it has been alleged that during the investigation, the voice specimen samples of the Appellant and other accused persons were taken and those matched with the voice samples of the Audio in the Sting Operation, as per the CFSL report.

14. That apart, the Prosecution alleged that the investigation unearthed that there is a nexus between the terrorists, Hurriyat leaders, and the Pakistan s Establishment as they are favoring the Students of Kashmir who would become the future doctors and technocrats and will lean to favour Pakistan. A set of letters were allegedly seized from the house of the Appellant, wherein he recommended Students for admission in a Medical College in Pakistan, as the Student s family had remained committed to the freedom struggle through thick and thin. The Prosecution alleged that, as per the investigation, the Students recommended were either relatives of ex-militants or relatives of families of active militants who were involved in various Anti-National activities or were known to several Hurriyat leaders. It was also alleged that various letters seized by the Prosecution establish that commissions were earned by helping these Students secure an admission in MBBS Colleges in Pakistan, which funded the terrorist activities.

15. The Prosecution further alleged that in the course of investigation, it was revealed that the accused A-3 to A-10, including the Appellant (A-5), are a part of the APHC/Hurriyat conference, either by way of being a member/officer bearer or by way of being an active supporter/worker. The accused A-4 to A-9 are alleged to be associated with the faction APHC(G), headed by Syed Ali Shah Geelani. The Call Detail Records (CDR) analysis allegedly shows that the Appellant was telephonically connected with other co-accused persons, including Zahoor Ahmad Shah Watali (A-10) and a militant of LeT. It is also alleged that the accused A-3 to A-12, including the Appellant (A-5), were in contact with each other, directly or indirectly, wherefrom the Prosecution sought to establish that there is meeting of minds in furtherance of a conspiracy to wage a war against the Government of India.

16. The documents and digital devices collected during the investigation are alleged to be incriminating material against A-3 to A-12 stating that they are a part of a gang who, with the help of A-1 and A2 and others, coordinated to form strategies and action plan for organizing bandhs,

strikes, violent protests etc. These documents and digital evidences allegedly indicate existence of an action plan for instigating general public to follow their lead in observing unlawful activities, which have led to grave loss of life and property. The alleged connection of A1 and A2 with A3 to A12 is established via a network of directions circulated through e-mails, SMSs, Whatsapp, Videos and other forms of communication.

17. As far as the past conduct of the Appellant is concerned, the Appellant is alleged to be a former militant with various cases of terrorism against him and other accused persons. Further, they had allegedly been detained under the Public Safety Act on various occasions.

18. During the course of proceedings before the learned ASJ, the Appellant, since his arrest, had preferred two interim bail applications, both of which were dismissed by the learned ASJ vide Orders dated 24.10.2017 and 18.11.2019.

19. Vide Order dated 16.03.2022, the Charges had been framed against the Appellant and other accused persons, and he was charged under Section 120B, 121, 121A of the IPC and under Section 13, 15, 17, 18, 20, 39 and 40 of the UA(P) Act. The said Order has been challenged before this Court and is currently pending adjudication in Criminal Appeal No. 379/2023 titled Nayeem Ahmad Khan v. State (Through NIA).

20. The Appellant applied for regular bail vide application dated 09.11.2022 before the learned Special Court.

21. Vide the Impugned Order dated 03.12.2022, the said bail application was dismissed by the learned ASJ. Being aggrieved, the Appellant has approached this Court praying that the Impugned Order be set aside and the Appellant be granted regular bail in the registered NIA case.

SUBMISSIONS ON BEHALF OF THE APPELLANT

22. The learned counsel for the Appellant, Ms. Tara Narula, advertent to one of the allegations of the Prosecution against the Appellant that the Appellant, on the directions of the involved proscribed terrorist organizations, has conspired with the members of the Hurriyat Conference in order to create unrest in the Kashmir Valley through various unlawful activities, submitted that, if the statements of Protected Witnesses, Alpha, Gamma, John, Jack, Pi, Golf, D-284 are to be believed, then these Witnesses were themselves a part of the meetings and discussions where the conspiracy is alleged to be hatched, and therefore, these Witnesses had similar or even a graver role than the Appellant. She submitted that, therefore, these statements should be read as „confessions , and the said statements are required to be corroborated by evidence. Also, the statements of these Witnesses could not have been recorded without pardoning them first.

23. Further, it was contended that the only evidence that the NIA has, except for these statements, is the CDR to show linkage of the Appellant with the co-accused persons and none of these phone calls alone have been alleged to be incriminating by the Prosecution, therefore, it cannot be construed that the Appellant was a part of the larger conspiracy. Moreover, no documentary evidence has been

brought forth in order to implicate the money transactions of the Appellant with any other Hurriyat leader or any member of a proscribed terrorist organization. She submitted that though the Appellant was associated with APHC and the JKNF, however, JKNF was declared as an unlawful association only in 2024, which is six years post the Appellant's arrest. Moreover, the Prosecution has failed to show that the association of the Appellant with these banned organisations was in support of their terrorist and secessionist activities.

24. The learned counsel submitted that the NIA has, relying upon a video downloaded from an open source, i.e. YouTube, alleged that the Appellant attended the pro-ISIS rally and visited the areas of Kashmir where three terrorists were killed at Budgam, Srinagar, and more specifically, where the alleged ISIS flag was shown and slogans in that regard were raised. However, the images shown by the Prosecution are of „islamic flags“ instead, which are commonly used, not just in Kashmir but in other parts of India, as well. She submitted that the same has been wilfully and negligently misidentified as the „ISIS Flag“, in order for the Prosecution to wrongly implicate and rope in the Appellant as having attended a rally supporting ISIS. Moreover, the NIA has relied upon the transcript on record i.e. Document D127 which contains the contents of the reporting by the TV News Channel, however, no independent investigation with respect to the said allegation has been conducted by the agency.

25. As far as the alleged chanting of slogans are concerned, learned counsel submitted that the video relied upon is inaudible and the transcript records the same to this extent and thus, the Prosecution has not been able to show that the chants were made by the crowd or the Appellant for Zakir Musa or for ISIS. Moreover, the claim of the Prosecution that the Appellant attended a pro-ISIS rally where the terrorists were killed, however, to what effect, the same has not been ascertained, no justification as to how this conclusion has been derived by the Prosecution that the same was a pro-ISIS rally has not been discerned.

26. It was contended that another video relied upon by the NIA that is also transcribed in D-127 document, is a press conference by the Appellant, same being available in the public domain, however, no FIR was registered in Kashmir or in any other place with respect to the same. Moreover, the said conference can, at best, be construed to be an opinion of the Appellant with respect to Kashmir conflict and would not tantamount to any terror or criminal activity by the Appellant.

27. The learned counsel submitted that the Prosecution has also relied upon D-7(a) which consists of two letters on the letter head of Hizb-ul-Mujahideen dated 10.03.2006 and 17.03.2006 and the recovery of 21 blank letter heads of LeT, allegedly seized from the Appellant, to build a case against the Appellant. It was submitted that the letters are dated 11 years before the registration of the present case and moreover, in between 2006-2017, no FIR had been registered against the Appellant on the allegation of funding provided to any of the proscribed terrorist organization. A mere recovery of the same do not tantamount to any criminal offence, let alone anything amounting to „unlawful activity“ or a „terrorist act“ under the UA(P) Act, specifically where the Prosecution has miserably failed to bring forth any material evidence to show direct involvement of the Appellant with the Hizb-ul-Mujahideen or any banned organisation in the Kashmir Valley.

Moreover, the letter heads allegedly recovered from the Appellant, how they came into existence and printed, were not at all investigated by the NIA.

28. The learned counsel further submitted that as far as the allegation of the Prosecution that the Appellant had been endorsing / recommending Students for admissions into Medical Colleges in Pakistan is concerned, there is nothing unlawful about this act as the Appellant had only recommended the young and bright Students to pursue the field of medicine which was a part of confidence building measure that commenced in 2002 and was in alignment with the South Asian Association for Regional Cooperation (SAARC) agreement on Student Exchange with an active support from the Government of India. Moreover, it was contended that the recommendations made by the Appellant to the Students from the families who were involved in Kashmir movement or freedom movement, does not in any manner amount to a terrorist act, thus, as such, this allegation of the Prosecution falls flat on its face and holds no water.

29. Turning to the next allegation that is with regard to the unedited version of the Audio / Video furnished by India Today of the Sting Operation so conducted, wherein the Appellant, allegedly, is said to have admitted to certain receipt of funds from Pakistan and other individuals / terrorists, it was submitted that the Prosecution has placed reliance on the document D-70, which is the transcripts of the said Sting Operation, however, a bare perusal of the same would make it evident that the NIA has concealed to certain portions of it, redaction by upto 1 hour of transcript, which are exculpatory in nature or which present the background of the conversation between the reporter and the Appellant. The raw footage, when perused, would show that the Sting Operation, was in fact, a case of entrapment by the reporters who enticed the Appellant by offering funds to use and establish his own faction as is evident from the statements of X-4 and X-5. These statements, she submitted, are all prospective and it is not the case that the Appellant has caused unrest, the same does not even qualify as an Extra-Judicial confession.

30. The learned counsel submitted that the Prosecution has failed to bring on record any documentary evidence showing that the Appellant has received any of the funds from Pakistan. Moreover, two out of the three persons, namely S.A.S. Geelani and Mirwaiz Umar Farooq, against whom the Appellant has allegedly stated to be receiving terror funds from, were neither arrested nor were made accused nor Charge- sheeted in the present case and only Yasin Malik has pleaded guilty and has been sentenced by the learned ASJ vide Order dated 25.05.2022. She submitted that the reporter / individual conducting the so-called Sting Operation is himself in the commission of a crime as he is seen offering funds purportedly to create unrest.

31. It was further contended that the Sting was recorded using an Apple iPhone 4 mobile device and was crafted into a TV New Channel programme which is in contravention of the Codes of Ethics and Broadcasting Standards as well as guidelines of this Court in Court On Its Own Motion Vs. State 2007:DHC:8887-DB, on which count, the Sting Operation is inadmissible and cannot be considered while making a prima facie opinion on the Appellant's case for grant of bail. Moreover, in light of the dictum in the aforesaid, the case of the Appellant falls under inducement given to a person to commit an offence which otherwise would not have been likely committed. All in all, the learned counsel submitted, the Sting Operation shows no overt act done on the part of Appellant especially

in absence of any material to corroborate the allegations against the Appellant vis a vis the Sting Operation. The value of this evidence, can be at the maximum be considered to be a corroborative piece of evidence and not a substantive evidence, reliance to this effect was placed on *Zakia Ahsan Jafri vs State of Gujarat & Anr. (2022) 6 SCR 1*.

32. It was also contended that the bank account records will make it evident that the Appellant had no history whatsoever with any of the transaction with Pakistan or any member of the banned terrorist organizations in respect of the agitations and protests in Kashmir. In view of the matter, the learned ASJ declined to take cognizance against the Appellant vide Order dated 06.02.2021 in a PMLA complaint against the accused persons in the present case on account of lack of sufficient material implicating them, including the Appellant.

33. On the point of law, the learned counsel submitted that the Supreme Court in *Vernon vs State of Maharashtra & Anr. (2023) INSC 655; (2023) SCC Online 885*) has interpreted the applicability of Section 43-D(5) to be only towards offences under Chapter IV and VI of the UA(P) Act for grant of bail to an accused.

34. She further submitted that it is settled law that the threshold consideration of question of framing of Charge is different from consideration of application for bail, since the Fundamental Right of an accused to Liberty is at stake. For consideration of bail under UA(P) Act, the learned counsel placed reliance on *Thwaha Fasal Vs. Union of India, (2021) SCC OnLine 1000*. Moreover, it was submitted that mere framing of Charges would not be an impediment in granting of bail to an accused, even where offences alleged fall under Chapter IV and VI of the UA(P) Act, and the Court can very well consider the bail application of an accused. Moreso, she submitted that the proviso to Section 43D (5) merely provides another possible ground to refuse bail. Reliance in support of these contentions were placed on *NIA Vs. Zahoor Ahmad Shah Watali (2019) 5 SCC 1*, the decision of the Punjab and Haryana High Court in *Chandeep Singh Vs. NIA (CRA-D 148/2023, decided on 06.09.2023)* as well as decision of this Court in *Ammar Abdul Rahiman Vs. National Investigation Agency 2024:DHC:3637*.

35. It was submitted that the Appellant was willing to admit to certain documents, however, due to non-concurrence of the co- accused, the same could not have been achieved. The burden, she submitted, is on the Prosecution to prove their case and all the documents have been filed by them, therefore, the burden to admit or deny documents collected by them does not fall on the Appellant.

36. In this background, the learned counsel contended that the learned ASJ erroneously rejected to grant bail to the Appellant on the premise that the framing of Charge in itself is indicative of existence of reasonable grounds to believe the allegations against the Appellant to be prima facie true. She submitted that the learned ASJ wrongly re- appreciated the material already considered at the stage of framing of Charges while denying him bail. Therefore, the prima facie test contained in the said proviso will not be satisfied unless there is at least surface-analysis of the probative value of evidence at the stage of examining the question of granting bail.

37. The learned counsel submitted that in *Union of India vs. K.A. Najeeb*, (2021) 3 SCC 713, the Respondent/accused had undergone incarceration of nearly 5 years and trial was yet to commence. The NIA had proposed to examine 276 Witnesses and to complete the trial within 1 year. It was held that once it was clear that the trial will not be concluded in near future, the Courts would ordinarily consider to enlarge the accused on bail, keeping in view the right of an undertrial to a speedy trial.

38. It was further contended that the Supreme Court in *Vernon* (supra), relying on *K.A. Najeeb* (supra), held that merely because the allegations levelled against an accused are serious would not be a sole ground to deny bail, and thus, it granted bail to the Appellants therein who were incarcerated for over 5 years and on the basis of prima facie view, did not justify their continued detention. She contended that in *Vernon* (supra), it was also observed that mere possession / holding of literature propagating violence and promoting the overthrowing of elected government through armed struggle, is not an offence and would not in itself attract provisions under Section 15 of the UA(P) Act.

39. The learned counsel, strenuously arguing on the delay, submitted that the Appellant has been under incarceration since 24.07.2017, which is more than 7 years as on date and is currently aged 59 years, suffering from various health ailments such as hyperuricaemia and rheumatoid arthritis. She further submitted that it is important to note that the Appellant had joined the investigation on 5 occasions pre-arrest. The evidence of Prosecution had started only on 02.11.2022 and the Prosecution intends to examine 340 Witnesses and out of which, only 20-21 have been examined so far, and 228 Witnesses remain to be examined. The Charges were framed after 5 years in 2022 and moreso, only 6 Witnesses have been examined by the NIA in the past 1 year, as well as the fact that the board of the learned ASJ is also overburdened as is evident from the letter submitted by the NIA Court before the Supreme Court, thus, there seems no likelihood of the conclusion of trial in the foreseeable future. Furthermore, no overt act of terrorism or of sedition or even of conspiracy has been shown.

40. It was contended that the Prosecution has deliberately made the present case excessively voluminous and there being hours of digital data, the Prosecution can very well curtail the prolonged trial if they drop some of the Prosecution Witnesses and documents relied upon by them.

41. The learned counsel further placed reliance on the recent decision of the Supreme Court in *Tapas Kumar Palit vs. State of Chhattisgarh*, 2025 SCC OnLine SC 322, prayed that the Appellant be granted regular bail in the present NIA case in light of the prevailing circumstances enumerated above.

42. In addition to the aforementioned, learned counsel, in support of her contentions, also relied upon the following decisions:

Shaheen Welfare Association vs UOI and Ors. (1996) 2 SCC 616 *State of Kerela vs Raneef* (2011) 1 SCC 784 *Angela Harish Sontakke vs State of Maharashtra* (2021) 3 SCC 723 *Hussain vs Union of India* (2017) 5 SCC 702 *Iqbal Ahmed Kabir Ahmed vs State of Maharashtra* (2021) SCC OnLine Bom 1805 *Jahir Hak vs State of*

Rajasthan (2022) SCC Online SC 441 Union Territory of J&K vs Javed Ahmad Shah and Ors. CrI. A(D) No. 35/2022 dated 01.09.2022, passed by the High Court of J&K.

Ashim @ Asim Kumar Haranath Bhattacharya vs NIA (2022) 1 SCC Shoma Kanti Sen vs State of Maharashtra (2024) INSC 269 Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari vs State of Uttar Pradesh 2023 INSC 534 Manish Sisodia vs Directorate of Enforcement 2024 INSC 595 Jalaluddin Khan vs Union of India 2024 INSC 604 SUBMISSIONS ON BEHALF OF THE RESPONDENT

43. The learned Senior Counsel, Mr. Sidharth Luthra, appearing on behalf of the NIA, sought for dismissal of the Appeal by contending that the learned ASJ has already framed the Charges against the Appellant for offences under Section 120B, 121, 121A IPC, Section 17 UA(P) Act read with Section 120B IPC, Section 18, 20, 39 and 40 of UA(P) Act, thus, the rigours that have to be met while consideration of bail are much higher and Section 43D (5) of UA(P) Act is attracted. Though, the Appellant has challenged the Order on Charge before this Court in Criminal Appeal bearing no. 379/2023 nonetheless, there is sufficient material to sustain the Charges framed vide Order dated 16.03.2022 and the Order on Charge has not been stayed by this Court.

44. The learned Senior Counsel, drawing our attention to document D-70, which is the transcript of India Today's Sting Operation, submitted that the Appellant demonstrates therein as to how he was involved in financing terrorism. Moreover, he contended, the Sting Operation is corroborated by the statements of the employees / officials of India Today who carried out the said operation. Adverting to the documents D-92 and D-127, he submitted that these show the Appellant addressing a pro-ISIS rally as also the Video shows how the Appellant was leading a rally while visiting the areas where the terrorists were killed.

45. It was further submitted that the Appellant was involved in fomenting unrest and terrorist activities in Jammu and Kashmir. He submitted that the letters written by the Appellant were with an intention to instigate the people of Jammu and Kashmir against the Union of India. Reference in this regard was made to documents D- 273/243, 244, 261 and 264.

46. It was also contended that the investigation revealed how the funds were arranged for fuelling the terrorist activities in the valley by the separatist leaders who collected money from the parents of the Students to get their children admitted in the Medical Colleges in Pakistan. Drawing reference to the letters/documents D7g/7, 8, 9, 16, 17 & 22, he submitted, the same establish the link of the Appellant with the act of getting the Students admitted for MBBS courses in Pakistan, fact which has been corroborated by the statement of Protected Witness „Jerry , which is the document AW-147. Moreover, the statements of AW-69, Alpha (D-279), W-74, recorded during the course of investigation would show that the terrorist activities are being funded, amongst other sources, by earning commission through getting Students admitted in MBBS colleges in Pakistan.

47. The learned Senior Counsel submitted that the investigation revealed the modus operandi of the Hurriyat leaders to generate funds was also through earning commissions by recommending Students for admission in Medical Colleges through the High Commission of Pakistan, New Delhi. These funds were then utilized for secessionist activities and to wage a war against India. This is

corroborated by document at D-9(e) wherein a blank letter head of APHC addressed to the High Commission of Pakistan, New Delhi was seized from Accused No. 3 vide seizure memo dated 03.06.2017.

48. The learned Senior Counsel submitted that the Appellant was in continuous touch with Hizb-ul Mujahideen, a terrorist organization, which was active in the valley. The letter, D-7a/1, is addressed by a Commander, namely Burhan Wani, of the said organization, to the Appellant wherein Appellant's help was sought on the instructions of his leader Yousuf Shah @ Salahuddin (A-2) stating that in case of any help, they should approach the Appellant who would provide them with funds.

49. It was also submitted that the Protected Witness Alpha (D-279) has been associated with the All Party Hurriyat Conference and had attended several meetings of the said conference which were held at the house of SAS Geelani where Appellant was also present and the statement of John (AW-62/AD-125) would show that the Appellant was there to decide the protest calendar. Through these meetings, directions were disseminated to organize rallies, Anti-India demonstrations and with instructions that Anti-India and Anti- National speeches should be made and slogans should be raised against India, all in guise of peaceful protests on paper but actually cloaked with an intention to divide India and wage war against it.

50. Further, he submitted, the statement of John revealed that the accused persons went on jalsa juloos to various districts where people were incited to seek independence from India and that they organized „hartals“ and encouraged stone pelting.

51. The learned Senior Counsel submitted that the Protected Witness Gamma (D-280) vide statement dated 08.09.2017, stated that the Appellant along with SAS Geelani, Yasin Malik (A-14) and others encouraged leaders of Hurriyat to organize protests and demonstrations against India and its Security Forces, to burn down government buildings, etc., and separatist leaders encouraged local residents to pelt stones at the Security Forces to aid the terrorists and instructions were given on how these acts should be carried out.

52. Reference was also made to the letter D-7a/2 (translation, D- 273/241) which is written by the Commander of Hizb-ul Mujahideen to the Appellant, wherein he thanks the Appellant for the help provided by him. The Commander had further raised a demand of Rs. 7,000 - 10,000 and asked for a mobile phone through which they can stay connected.

53. The learned Senior Counsel submitted that the statement of Jack (AD-101) dated 02.08.2019, under Section 164 of the Cr.PC would show that a mega-meeting was held at the residence of SAS Geelani in 2016 calling for a shutdown in the valley pursuant to killing of Burhan Wani. A Calendar (D-6), was also issued in the same meeting outlining protests and unrests in Jammu and Kashmir. The Appellant, he submitted, had attended the said meeting as per this Witness.

54. The learned Senior counsel submitted that the JKNF organization, of which the Appellant is the Chairman, was declared an unlawful association vide Gazette Notification dated 12.03.2024 and the

same had been confirmed by the UA(P) Tribunal vide Order dated 06.09.2024.

55. It was also contended that the Supreme Court had rejected the plea of bail of the co-accused Zahoor Ahmad Shah Watali (A-10) setting aside the Order of High Court which had allowed the said co-accused to be enlarged on bail. Moreover, the Supreme Court in paragraph 39 noted how the Appellant and other accused are linked with the larger conspiracy in question. Reference was made to Zahoor Ahmad Shah Watali (supra).

56. Thus, he submitted, the material placed on record is sufficient to establish the close nexus of the Appellant with the terrorist organizations and the existence of a deep-rooted conspiracy to further the terrorist activities and secession of Jammu and Kashmir from the Union of India. The evidence, as collected by the NIA, makes out a prima facie case against the Appellant under the IPC and the UA(P) Act as held in the Charge Order.

57. The learned Senior Counsel further contended that the Appellant along with co-accused person did not cooperate at the admission/denial stage so as to enable the trial to be expedited. However, despite the non-cooperation, there is no delay in the trial. He submitted that two affidavits, filed on 30.04.2024 and 16.11.2024, wherein a tabular chart mentions of the details of the trial court proceedings after the framing of Charges and till date. However, he admitted that as one of the co-accused Abdul Rashid Sheikh has been elected as an MP, an issue has crept up before the learned Trial Court as to whether his trial will proceed before the Special Judge, NIA or before the Special Court for MP/MLAs, for which further directions are awaited. He submitted that apart from this, the learned ASJ has been expeditiously proceeding with the Trial.

58. It was submitted that as far as the Appellant's health ailments are concerned, appropriate medical treatment, being the Right of the Appellant, has to be provided to the Appellant by the Jail Hospital or at an appropriate Government Hospital in terms of the Jail Manual.

Further, the medical situation is not emergent or grave so as to entitle the Appellant to seek interim bail, let alone regular bail.

59. It was contended that the Charges against the Appellant have been framed after a careful scrutiny of the documents by the learned ASJ and it rightly concluded that there is sufficient oral and documentary evidence to believe the accusations against the Appellant to be true. Thus, a prima facie case being made out against the Appellant and Section 43D (5) UA(P) Act attracting the statutory bar to grant of bail and nonetheless, the test has not been met by the Appellant.

60. The learned Senior Counsel submitted that the degree of satisfaction to be recorded by the Court for opining reasonable grounds for believing the accusation against an accused to be prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application on framing of Charges in relation to offences under the UA(P) Act. Reliance to this effect was placed on Zahoor Ahmad Shah Watali (supra).

61. Learned Senior Counsel submitted that decision in *Gurwinder Singh vs. State of Punjab & Anr.*, (2024) 5 SCC 403 squarely applies to the present case, as the Charges are framed, there is no delay attributable on behalf of the Prosecution, which is only earnestly trying to curtail the number of Witnesses, having 92 of them already dropped. He further submitted that none of the judgements of the Supreme Court have declared *Gurwinder* (supra) to be a bad law. Other cases relied upon by the Appellant are distinguishable on facts as in some of them, there was no progress in the trial and Charges in some of them had not been framed, unlike the present case.

62. Further, placing reliance on *Gurwinder* (supra), the learned Senior counsel submitted that Section 43D(6) lays down that the restrictions in sub-section (5) are in addition to the restrictions under Cr.PC or any other law for time being in force on grant of bail, therefore, the bail must be rejected as a rule. Moreover, this decision had distinguished the application of *K.A. Najeeb* (supra).

63. In support of the contentions, the learned Senior counsel also drew sustenance from the following decisions:

Ghulam Mohd. Bhatt vs NIA (2019) SCC Online Del 9431 Syed Mohd. Zishan Ali v State (NCT of Delhi) (2019) SCC Online Del 8396 Umar Khalid vs State NCT of Delhi (2022) SCC Online Del 3423 Puran v Rambilas and Anr (2001) 6 SCC 338 State of Orissa vs Mahimanda (2018) 10 SCC 516 Parsanta Kumar Sarkar v Ashish Chatterjee & Anr. (2010) 14 SCC Union of India vs Rajesh Ranjhan (2004) 7 SCC 539 Suhail Ahmed Bhat vs NIA 2022:PHHC:168946-DB Deepak Dwarkasad Patel & Anr vs State of Gujarat (1980) Cri LJ 2 PG Peraisany & Anr. vs Inspector of Police, Pennagaram PS (1984) Cri LJ 239 Madhusudan Mukherjee & Anr. vs State of Bihar and Anr. (2009) Cri LJ 4691 Union of India vs Prafulla Samal (1979) 3 SCC 4 SUBMISSIONS IN REJOINDER BY THE LEARNED COUNSEL FOR THE APPELLANT

64. In rebuttal, the learned counsel for the Appellant submitted that the reliance placed by the Prosecution on *Gurwinder* (supra) is misplaced as the same is distinguishable on facts. Further, mere framing of Charge does not dis-entitle the Appellant to grant of bail as has been settled by the Supreme Court in catena of its decisions. On facts, in the said case, out of 106 Witnesses, only 19 had been examined in the preceding 5 years. In the present case, there are more than double, which is 228 Witnesses, remained to be examined and the trial cannot be expedited to conclude in the foreseeable future. The Supreme Court, in the decision of *Zahoor Ahmad Shah Watali* (supra), overturned the Order of the High Court as it had conducted a mini-trial at a Pre-Charge stage and had not considered the allegations of threat or inducements made to the Witnesses when the Respondent / accused was on bail. It was contended that there are no such allegations or apprehensions vis a vis the Appellant in the present case, as the Appellant had been in continuous and prolonged incarceration since 2017.

65. The learned counsel submitted that the Appellant also satisfies the triple test as he resides in Kashmir and has deep roots in the society and undertakes to appear before the learned ASJ on each and every date of hearing, personally or through his counsels, therefore does not pose a flight risk as

such. On account of prolonged incarceration, she submitted, the Appellant does not possess the wherewithal to influence any Witness and even otherwise undertakes to not make any contact or influence them. Since, the investigation is complete and the Charges already framed, there is no scope of the Appellant tampering with the evidence.

66. She further rebutted by contending that in K.A. Najeeb (supra), which is a decision of the 3 judge bench being a major point of distinction in itself, the co-accused had been sentenced to 8 years of imprisonment, however, the dictum of law laid down is that Section 43D (5) of the UA(P) Act per se will not bar the Constitutional Courts to grant bail when the Fundamental Rights of the accused are infringed.

67. Even otherwise, she submitted that the Appellant, as well as the other co-accused persons, have already challenged the Order on Charge before this Court in Criminal Appeal bearing no. 379/2023, Nayeem Ahmad Khan vs State (Through National Investigation Agency) which is at the stage of maintainability of the said Appeal, however, the pendency of same, cannot be to the prejudice of the Appellant.

68. The learned counsel for the Appellant submitted that even though the Prosecution has alleged that the Appellant was a senior member of the Hurriyat Conference, however, the same was not a proscribed terrorist organization at that time. The incidents of stone pelting, incitement of violence has been cited by the Prosecution, however, there is nothing on record to bring forth any linkages between these incidents and the Appellant.

69. Furthermore, it was contended that as the investigation is complete, Charges having been framed, trial being underway, there can be no reasonable apprehension that the Appellant will tamper with evidence in any manner and the Appellant is ready and willing to abide by any conditions imposed by this Court. In these circumstances, the Appellant be released on regular bail, subject to terms put to him by this Court.

DISCUSSION & ANALYSIS

70. We have carefully considered the submissions advanced by both the parties at the bar and have thoroughly perused the record as well as the relevant excerpts of the statements of the Protected Witnesses, produced before us in the sealed cover along with the transcripts of Video Tapes of the Sting Operation, with the assistance of the learned Senior Counsel appearing on behalf of the Respondent.

71. At the outset, we must clarify that as Appellant's appeal challenging the Order of framing of Charges is pending adjudication, any observation made by us hereinbelow should not be read as an opinion on the merits of the said appeal. We have considered the material placed before us only to examine if the Appellant defences to be released on bail at this stage of the trial.

72. In the present case, the Appellant was arrested on 24.07.2017 and the Charges have been framed by the learned ASJ against him under Sections 120, 121, 121A of IPC, Sections 13 15, 17 of the UA(P)

Act, all read with Section 120B of IPC, and Sections 18, 20, 39 & 40 of the UA(P) Act, although the Appellant has challenged the Order on Charge before this Court, which is currently pending adjudication on the aspect of its maintainability, there is no stay on the same by this Court.

73. At this stage, it would be appropriate to note that Section 43D(5) & (6) of the UA(P) Act puts a limitation on the Court's discretion to grant bail. The proviso to the same stipulates that the accused shall „not be released on bail, if it is in the opinion of the Court that there are reasonable grounds to believe the accusations against an accused to be prima facie true keeping into consideration the case diary or the final report submitted by the investigation agency.

74. It would also be apposite to note that this Court in its recent decision in Alemla Jamir Vs. National Investigation Agency: (2025) SCC OnLine Del 89, had an occasion to examine the provision under 43(D) of the UA(P) Act and various decisions of the Supreme Court in Sheikh Javed Iqbal (supra), Javed Gulam Nabi Sheikh (supra), Shaheen Welfare Association (supra), Angela Harish Sontakke (supra), Zahoor Ahmad Shah Watali (supra), Gurwinder Singh (supra) as well as of this Court and after a scrupulous analysis of the same observed as under:

"63. Thus, what emerges from the aforesaid decisions is that the Right to life and personal liberty under Article 21 of the Constitution is paramount. If the Court finds that the rights of the accused have been infringed under Article 21 of the Constitution, it is not deprived of the power to grant Bail. However, in the given facts of a particular case, a Constitutional Court may decline to grant Bail. Moreso, the position of law is also well settled that the accused shall not be released on bail if the allegations are prima facie true. The onus being stricter on the Appellant when the Charges have already been framed in a given case. The Supreme Court has also laid down the „twin-prong test wherein the first test pertains to whether the test for rejection for bail are sufficient and whether the test for rejection was satisfied. Thereafter, the other prong requires to apply the „tripod test considering the parameters of flight risk, influencing of witnesses and tampering of evidence"

75. Mr. Luthra brought our attention to Document D253 as well as relevant portions of the statements of the Protected Witnesses and other various documents, elaborated in the succeeding paragraphs, to contend that the Appellant was one of the main links and that there was a deep rooted conspiracy which has been unearthed by the NIA, which links the accused persons with each other to carry out unlawful activities punishable under the UA(P) Act.

76. The learned Senior Counsel submitted that the activities of the accused persons were collectively done to bring about the secession of the erstwhile State of Jammu and Kashmir from the Union of India for which repeated protests marches, inflammatory speeches etc., were made. Moreso, the said unlawful activities were terrorist activities which were intended to threaten the unity and integrity of India by means of arson & stone pelting and it led to destruction of public property in a systematic manner. These activities, he submitted, resulted in deaths of many people and brought disruption of peace in the Kashmir valley and caused destruction of Hospitals and Schools.

77. He submitted that the Appellant was one of the major links in the said conspiracy. For the sake of brevity, we may only note the broad allegations against the Appellant which are enumerated in crux, as under:

A. One Of The Main Strategists And Planners: The Appellant is alleged to be one of the main strategists and planners in the conspiracy with various leaders of Hurriyat Conference as well as numerous banned terrorist organizations, in furtherance of planning and organizing secessionist and terrorist activities such as organization of violent protests apart from stone pelting, destruction of government properties, arson, waging war against the Government of India, etc. The unlawful protests were held as per the „Calendar of Protests" prepared by SAS Geelani in one of the meetings to decide the same, which is stated to have been attended by the Appellant as per the statement of Protected Witnesses. Through these meetings, directions were disseminated to organize Anti-India activities and to wage war against India.

B. Part Of Hurriyat Leadership & Chairman of JKNF:

The Appellant is the Chairman of JKNF, which has been declared to be an unlawful association under the UA(P) Act in 2024. The Appellant has been alleged to be a part of the faction APHC(G) which is headed by SAS Geelani and his primary membership in the said faction is by way of his Chairmanship in JKNF thereby him being a part of Hurriyat Leadership. Their ideology being one of „freedom , that is, secession of Jammu and Kashmir from the Union of India.

C. Admissions Made by Appellant in Sting Operation: In the Sting Operation conducted by the TV News Channel, India Today, pertaining to various terrorists and separatists leaders / members, the Appellant confessed of having received crores of funds from Pakistan for organizing unlawful Anti-India activities in Jammu and Kashmir. Further, he is alleged to have admitted to creating unrest in the Kashmir Valley at any time provided he is funded. Prosecution has also sent the voice samples for analysis which matched with the Appellant s voice. D. Recommending Students for studies in Medical Colleges in Pakistan: The Students whose parents were involved in Anti-India activities, termed as Freedom struggle were recommended by the Appellant for studies in Medical Colleges. The Protected Witnesses have deposed that commissions were earned by helping such Students to secure admissions and the commissions so earned were used to fund the terrorist activities.

E. Participant of ISIS Rally: A video procured by the Prosecution wherein the Appellant is shown to be attending a Pro-ISIS rally, where flags and slogans of the said association were raised, thereby intending to establish that the Appellant was acting in unison with terrorist organizations to wage war against Government of India. F. Seizure of letters: Two letters dated 10.03.2006 & 17.03.2006 from Mujahideen Area Commander of Hizb-ul-

Mujahideen and 21 blank letter heads of Lashker-e-Toiba, both being banned terrorist organizations are recovered from the Appellant thereby, alleging that the Appellant is connected with these terrorist organizations in terms of extending financial help to fund terrorist activities. G. Past History: Appellant has been alleged to be a former militant and have been detained under Public Safety Act on various occasions.

78. With respect to the allegations against the Appellant, the learned Senior Counsel for the Respondent had drawn our attention to the Document D70 which is the transcript of the Sting Operation of India Today wherein, there are alleged admissions made by the Appellant with respect to his involvement in terror funding and other. Witnesses of the said operation are Tata, X-5 and X-6. The transcript reveals that Appellant, along with Hurriyat members, was engaged in fuelling unrest in the Jammu and Kashmir, and the real intention is of perpetrating violence by way of stone pelting, arson etc, which has been cloaked in the guise of peaceful protests and strikes. Appellant has also stated that stone pelting could be ordered from where he was sitting during the interview and it would be more than just an aggressive stone-pelting. It is also stated, in reference to whether burning of Schools was part of the movement, that one needs chaos and irrespective of what station is burned, police or railway, or panchayat and thus, something had to be done. He also stated in the Sting Operation that burning the houses of the politicians would create a strong political pressure.

79. The learned counsel for the Appellant pointed out that the Sting Operation is a case of entrapment and various portions of it have been concealed by the NIA in the transcript, which are exculpatory in nature or which present the background of the conversation between the alleged reporters and the Appellant. She submitted in this precarious background, such a piece of evidence cannot be relied upon to curb the liberty of the Appellant. The admissibility of this document was also questioned by the Appellant.

80. We find that at this stage, prima facie this piece of evidence cannot be ignored. Notably, for the consideration of bail, this Court is not required to adjudge the admissibility or credibility of the evidence collected by the Investigation Agency, the evidence has to be taken as it is. This Court, at this stage, cannot hold a mini-trial while the trial is underway before the learned ASJ. Furthermore, it is no longer res integra that evidence even if obtained unlawfully, would be admissible so long it is relevant and genuine, amongst other considerations. The Apex Court has considered the same in its decision in *Umesh Kumar vs State of Andhra Pradesh and Another* (2013) 10 SCC 591, the relevant extract thereof reads as under:

"35. It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained. However, as a matter of caution, the court in exercise of its discretion may disallow certain evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. More so, the court must conclude that it is genuine and free from tampering or mutilation. This Court repelled the contention that obtaining evidence illegally by using tape recordings or photographs offends Articles 20(3) and 21 of the Constitution of India as acquiring the evidence by such methods was not the

procedure established by law. [Vide Yusufalli Esmail Nagree v. State of Maharashtra [AIR 1968 SC 147 : 1968 Cri LJ 103] , Magraj Patodia v. R.K. Birla [(1970) 2 SCC 888] , R.M. Malkani v. State of Maharashtra [(1973) 1 SCC 471 :

1973 SCC (Cri) 399 : AIR 1973 SC 157] , Pooran Mal v. Director of Inspection (Investigation) [(1974) 1 SCC 345 : 1974 SCC (Tax) 114 : AIR 1974 SC 348] and State (NCT of Delhi) v. Navjot Sandhu [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] .]"

81. Now, we may proceed to deal with the present case. The learned Senior Counsel for the Respondent strenuously submitted that D92 and D127 are the evidence of open source videos downloaded from You [tube against the Appellant, wherein he is alleged to be leading a pro-ISIS rally and visiting areas where terrorists were killed. It was contended on behalf of the Appellant that this evidence is unbelievable and cannot be considered as a piece of evidence against the Appellant on the basis of two contentions, first, the Prosecution has misidentified the „Islamic Flags as the ISIS Flags, which are common in various places in India and second, the video to which the Prosecution has referred to is inaudible inasmuch as the alleged slogans/chants to have been raised in support of Zakir Musa or ISIS.

82. We find that, though the Appellant has raised this plea, in this Video, the Appellant is leading a pro-ISIS rally and slogans of Zakir Musa are heard being chanted, moreover, whether the flags are Islamic or pertain to being of ISIS Flags, will be a matter of trial. The Court, at this stage, is not required to hold a detailed analysis of the evidence.

83. Attention was also drawn to letters at D7a/1, D273/243, 244, 261 and 264 which are from Hizb-ul Mujahideen asking the Appellant for money. Further, the Document D-7a/2 is a letter from Area Commander, Hizb-ul Mujahideen thanking the Appellant for providing financial assistance. The learned counsel for the Appellant took an objection to these documents submitting that the same are a decade old, and even if the same are admitted to have been in possession of the Appellant, the Prosecution has failed to explain as to why any action was not taken for such a long time. On the other hand, the learned Senior Counsel submitted that a prior action not being taken by the Prosecution would in no manner dilute the fact that the Appellant was in possession of these letter heads which are incriminating in nature. Moreover, these documents may have been in the possession of the Appellant but were uncovered/seized by the Investigation Agency only during the investigation of the present case. It is important to note that the Appellant will have to explain the possession of these documents which is again a matter of trial and the Appellant will also have sufficient opportunity during the trial to rebut these documents.

84. The reliance placed by the learned counsel on behalf of the Appellant on the decision of Vernon (supra) does not come to her aid, as the same stands on a slightly different factual footing. In Vernon (supra), the letters showing association with terrorist organization had not been recovered from the Appellant therein but were seized from the co-accused and the NIA therein had not taken a plea that the literature so found in the said case were proscribed so as to constitute an offence just by being in its possession, thus, had weak probative value, being hearsay evidence recovered from the co-accused. In the present case, not only the NIA has taken a strong objection against these

letters, but also the letters recovered by the NIA were addressed to the Appellant and were directly recovered from his possession, unlike in Vernon (*supra*).

85. Further reference was made to the letters (D7g, 8, 9, 16, 17 and

22) which show the Appellant getting Students admitted for MBBS courses in Pakistan. Thus, we find merit in the submission of the learned Senior counsel, who drew our attention to the statements of Protected Witnesses that are, AW79, AW69, Alpha (D279), W74, W57 and W65, to contend that the funding of terrorist activities was being done by earning commission by getting admission of the Students in MBBS/Medical Colleges in Pakistan and rightly so, submitted so that the entire chain is part of circumstances that can be unfolded during the trial through the sufficient evidence available on record.

86. The Protected Witness Jack has stated about meeting held at the House of SAS Geelani in November, 2016, which meeting has been stated by this Witness to have been attended by the Appellant along with Yasin Malik, amongst other accused persons and various leaders of Hurriyat. This Witness himself was present during the meeting wherein it was decided that mass protests would be organized and directions given in protest calendars are to be followed strictly. Directions were not limited to peaceful protest, directions were also provided to give all logistical help to pellet gun victims. This statement was also supported by the Statement of Witness AW-64. The presence of the Appellant has been corroborated by this Witness as well. Statements of AW-69 and AW-70 also mention about the meeting taking place at the house of SAS Geelani.

87. Referring to statement of Alpha, it was contended by the learned Senior Counsel that this Witness himself has heard the inflammatory speeches given by the Appellant and has attended various meetings of the Hurriyat Conference held at the house of SAS Geelani and has corroborated the instructions/directions disseminated for conducting Anti-National activities and slogans to be raised in that regard. This Witness has also stated as to raising of funds through the LOC trade from Pakistan establishment and ISIS by facilitating the admissions for professional courses in Pakistan, on the recommendations of Hurriyat leaders to be used for funding such terrorist activities in the Kashmir valley.

88. Attention was next drawn to the statement of Protected Witness Gamma who stated that he was a part of the Hurriyat and had attended various such protests and demonstrations. He further stated that the Appellant and other individuals instigated them to organize these protests against India and to take part in the acts of burning government properties and to pelt stones on the Security Forces so deployed so as to help the terrorists.

89. We may note that this Court is required to see the evidence as *prima facie* that exists. Pertinently, the Order on Charge, though has been challenged, this Court has not stayed the proceedings before the learned ASJ. The Appeal is stated to be currently pending adjudication on the aspect of its maintainability. The case at hand rests on the investigation conducted by the NIA which unravelled a high level conspiracy hatched in the dark by the accused persons to indulge in terrorist and secessionist activities so as to separate the erstwhile State of Jammu and Kashmir from

the Union of India, thereby threatening its unity and integrity.

90. At this stage, it would also be apposite to note that this Court while rejecting the bail to Naval Kishore Kapoor who is a co-accused in the present case, had opined that in cases of conspiracy, it is the circumstances that unfold the evidence. The relevant extract of Naval Kishore Kapoor vs National Investigation Agency 2025 SCC OnLine Del 1561 is as under:

"It is also relevant to note that this Court, at this stage, is not required to hold a detailed analysis of the evidence, and the case is to be considered on the broad probabilities. The present is a case of a conspiracy, therefore, it is the circumstances that unfold the evidence, from which it has emerged that there is a larger conspiracy entered between various terrorist organizations with the assistance from funding raised by them through illegal means for furthering terrorist and secessionist activities in Jammu and Kashmir. The Appellant has been accused of channelling funds to the Accused No. 10, who would further remit these funds to be utilized by the terrorist organizations for wreaking havoc by way of stone pelting, burning of schools, etc. in the Kashmir valley. The above discussion prima facie reveals that (i) money of terror funding was sent from and by Pakistan and its agencies and (ii) that Accused No. 10 was one of the main conduits for flow of this terror funding, and (iii) the Appellant had played an active part in facilitating it."

91. From the evidence, it can prima facie be gathered that the Appellant was leading the pro-ISIS rally and had attended the Hurriyat meetings wherein directions were given to organize rallies and Anti- India demonstrations, to make Anti-National speeches and slogans. The Protected Witnesses also bring out the nexus between the Hurriyat and the Appellant as well as Pakistan establishment and the fundings received from Pakistan for organizing secessionist activities. The main purpose of the Appellant was to engage himself to create unrest in Jammu and Kashmir. Notably, the nexus of the Appellant and the other co-accused also finds mention in the decision of the Supreme Court in Zahoor Ahmad Shah Watali (supra), reading as below:

"43. The Prosecution case is that the Respondent (Accused 10) was in constant touch with the said ex-militant Aftab Hilali Shah alias Shahid-ul-Islam (A-3), as noticed from the inter-linkage chart depicted above. That fact is backed by the CDR analysis report, also part of the charge-sheet. The charge-sheet also contains Document No. D-185/10, which is a contact list of accused Nayeem Khan (A-5) retrieved through forensic analysis, having mobile numbers of persons associated with Hurriyat party; and of one Mudasir Cheema Pak who is none other than the First Secretary of the Pakistan High Commission. His name also figures in Document No. D- 132(a)/23."

92. Furthermore, the above discussion reflects that the evidence prima facie connects almost all the accused persons with each other and to a common objective of seeking secession of the Jammu and Kashmir from the Union of India. It further provides in detail, the agreement about the means to be explored for achieving the said objective through violent protests, pelting of stones, damaging and burning the public properties in the Jammu and Kashmir which are per se illegal. Particularly, the

Appellant has been charged under Sections 120, 121, 121A of IPC, Sections 13, 15, 17 of the UA(P) Act, all read with Section 120B of IPC, and Sections 18, 20, 39 & 40 of the UA(P) Act vide a detailed Order dated 16.03.2022 passed by the learned ASJ.

93. Pertinently, the Supreme Court in Zahoor Ahmad Shah Watali (supra), while rejecting bail to co-Accused No. 10 Zahoor Ahmad Shah Watali and after scrutinizing the evidence as well as the redacted statements of the Witnesses and the material with the Chargesheet, had observed that the NIA had shown the linkage of this Accused A- 10 with the Appellant (A-5) and other co-accused persons:

"34. After having analysed the documents and the statements forming part of the charge-sheet as well as the redacted statements now taken on record, we disagree with the conclusion recorded by the High Court. In our opinion, taking into account the totality of the report made under Section 173 of the Code and the accompanying documents and the evidence/material already presented to the Court, including the redacted statements of the protected witnesses recorded under Section 164 of the Code, there are reasonable grounds to believe that the accusations made against the Respondent are prima facie true. Be it noted, further investigation is in progress.

35. We may observe that since the prayer for bail is to be rejected, it may not be appropriate for us to dilate on matters which may eventually prejudice the Respondent (Accused 10) in any manner in the course of the trial. Suffice it to observe that the material produced by the investigating agency thus far (pending further investigation) shows the linkage of the Respondent (Accused

10) with A-3, A-4, A-5 and A-6 and, likewise, linkages between the Respondent (Accused 10) and A-3 to A-

12, as revealed from the CDR analysis....."

(Emphasis supplied)

94. In view of the above, the evidence in form of documentary evidence, Statements of Witnesses including the Protected Witnesses and other material found by the Prosecution, there are reasonable grounds to believe the accusations against the Appellant to be true. The evidence prima facie show that the Appellant was a member of the Hurriyat and the Chairman of JKNF and a part of the conspiracy. The Appellant was raising funds for terrorist organization for secessionist activities by means of earning commission by getting the Students admitted to Medical Colleges in Pakistan. The Appellant was leading a rally where slogans of „Zakir Musa were raised. The alleged admissions made by him in the Sting Operation pertaining to financial assistance received from Pakistan for fuelling the Anti-National activities in the Kashmir valley and the role of the Appellant at this stage cannot simply be brushed aside. The admissibility of the evidence is also not to be tested, and this Court cannot hold a mini- trial at the time of consideration of bail as per the settled law laid down by the Supreme Court in its recent decisions.

95. Furthermore, the Supreme Court in catena of decisions, also relied upon by the Appellant, has held that in cases where the trial is not likely to conclude in the near future and to balance the period of custody undergone by an undertrial with his Fundamental Right to Liberty would entitle him to be enlarged on bail.

96. There is no doubt that the Appellant has been in custody for long, however, the Charges have been framed and the trial is already underway. Moreover, a perusal of the statement of witnesses, including protected witnesses, present a grave picture of a larger conspiracy threatening the unity and integrity of our Nation, thus, the grant of bail to the Appellant would be detrimental to the security and safety of the public at large and the same cannot be simply ignored by this Court. While we are aware that the right of an undertrial to a speedy trial is of paramount consideration, however, in cases involving terrorist activities which have Nation-wide implications and where there is an intention to destabilize the unity of the Union of India and to disrupt its law and order, moreso, to create terror in the minds of general public, which are also factors that weigh in, long period of incarceration would not, in itself, be ground enough to enlarge an accused on bail. In the present case, prima facie, the objective sought to be achieved by the accused persons, including the Appellant, is of secession of Jammu and Kashmir from the Union of India through terrorist activities, already elaborated in our discussion, which threatens the unity, integrity and security of the Nation.

97. It is also trite in law that ratio in any decision has to be seen in its overall facts and circumstances and even a slight variation in the facts can have substantial difference in its precedential value and cannot be applied to the other without considering the specific facts and circumstances that have unfolded in the case at hand.

98. In Jahir Hak (supra), the decision of the Supreme Court was premised on the evidence that had already been collated and recorded from which nothing had been found against the accused therein and keeping his period of incarceration, had granted bail to the accused/applicant. In Shoma Kanti (supra) the allegations against the accused were found to not be prima facie true, similar was the position in Jalaluddin Khan (supra), wherein the Supreme Court did not find reasonable grounds to believe the accusation against the said accused to be prima facie true and his co-accused had been granted bail hence, the bail was admitted to the said accused/applicant also. In Ashim (supra), the Charges were framed in the case belatedly after filing of the Chargesheet and moreover, examination of PW1 was yet to be concluded.

99. In Tapas Kumar Palit (supra), the accused/applicant was arrested and the panch Witnesses to the recovery panchama had turned hostile; articles which were recovered from the possession of the Appellant alleged to be used in Naxalite Activities, thus, this case also stands on a different factual matrix.

100. In Manish Sisodia (supra), the Charges levelled against the accused/applicant were not serious as to warrant further incarceration and were under the Prevention of Corruption Act, 1988, offences whereunder are comparatively less serious than in UA(P) Act. Other decision relied upon by the Appellant also do not help him and are not being discussed in detail for want of brevity.

101. In the present case, number of accused persons have been Charge sheeted and the Prosecution endeavours to prove the Charges against them through oral and documentary evidence. The learned Senior Counsel for the Respondent had also drawn our attention to the two affidavits dated 30.04.2024 and 16.11.2024 filed by the NIA and submitted that there is no delay in proceeding with the trial on the Prosecution's end and the trial is now being fast tracked. Moreover, the Prosecution is also conscious of the Fundamental Right of the Appellant to Liberty and they have also made efforts to expedite the trial by dropping 92 Witnesses. A trial hurried is also detrimental to the accused persons. Nonetheless, the present is not a case where the Appellant is in custody where either the Charges have not been framed or that the Witnesses are not being examined at regular intervals.

102. Also, keeping in view that a number of Protected Witnesses and other Witnesses that have been cited by the Prosecution to prove the conspiracy during trial through their respective depositions, the possibility of the Appellant to influence the Witnesses and to tamper with the evidence, cannot be ruled out. Moreover, when many of the Witnesses, including a confessional statement of one of the accused, who have agreed to depose against the accused persons have expressed apprehension of threat to life to them and their family members by the persons accused in the present case, including the Appellant.

103. Accordingly, we find no merit in the present Appeal, which is hereby dismissed. Pending applications if any, also stand disposed of.

SHALINDER KAUR, J.

NAVIN CHAWLA, J.

APRIL 09, 2025 KM/SU