

Mohamed Shariff vs National Investigating Agency on 30 March, 2022

Author: B. Veerappa

Bench: B. Veerappa

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF MARCH, 2022

PRESENT

THE HON'BLE MR. JUSTICE B. VEERAPPA
AND

THE HON'BLE MR. JUSTICE S. RACHAIAH

CRIMINAL APPEAL No.1448/2021

BETWEEN:

MOHAMED SHARIFF,
S/O AHAMED SHARIFF,
AGED ABOUT 38 YEARS,
R/O NO.58/2, 3RD MAIN,
2ND STAGE, TIPPU SULTAN ROAD,
M. S. PALYA, VIDYARAYANPURA,
BENGALURU-560097.

... APPELLANT

(BY SRI C.V. NAGESH, SENIOR COUNSEL FOR
SRI MOHAMMED TAHIR, ADVOCATE)

AND:

NATIONAL INVESTIGATING AGENCY,
MINISTRY OF HOME AFFAIRS GOI,
BRANCH OFFICE HYDERABAD,
REP BY SPL. PUBLIC PROSECUTOR,
OFFICE AT HIGH COURT COMPLEX,
OPP. TO VIDHAN SOUDHA,
BANGALORE-560001.

... RESPONDENT

(BY SRI P. PRASANNA KUMAR, SPECIAL PUBLIC
PROSECUTOR FOR NIA)

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 21(4) OF
NATIONAL INVESTIGATION AGENCY ACT, 2008, PRAYING TO SET

ASIDE THE IMPUGNED ORDER DATED 27.08.2021 AND GRANT REGULAR BAIL TO APPELLANT IN SPL.C.C.NO.141/2021 WHEREIN THIS APPELLANT IS ARRAYED AS ACCUSED No.25, PENDING ON THE FILE OF XLIX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AND SPECIAL COURT FOR NIA CASES, AT BENGALURU (CCH-50), IN THE INTEREST OF JUSTICE AND EQUITY.

THIS CRIMINAL APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, B.VEERAPPA J., DELIVERED THE FOLLOWING:

JUDGMENT

The present Criminal Appeal is filed by the appellant/accused No.25 under Section 21(4) of the National Investigation Agency Act, 2008 against the common orders dated 27.08.2021 made in Spl.C.C.No. 141/2021 on the file of the XLIX Additional City Civil and Sessions Judge (Spl. Court for trial of NIA Cases)(CCH-50), Bengaluru, rejecting the application filed by the Appellant/Accused No.25 and others under the provisions of Section 439 Code of Criminal Procedure.

I. FACTS OF THE CASE:

2. It is the case of the prosecution that on 11.08.2020, at about 11 pm, a group of people gathered in front of K.G.Halli Police Station demanding the arrest of one Mr.Naveen.P, nephew of R.Akhanda Srinivasamurthy, MLA of Indian National Congress from Pulakeshinagara, on the ground that the aforesaid Naveen had allegedly posted derogatory remarks against Prophet Mohammad in his face book account. It is further case of the prosecution that despite complaint and FIR registered against said Naveen, the mob gathered in front of K.G. Halli Police Station, did not disperse and police had to resort to lathi charge. The mob, however, started attacking the police and public properties on a larger scale and damaged several public and private properties. In spite of imposition of Section 144 of Code of Criminal Procedure in and around the police station, the violation escalated and the mob started pelting stones all around. The accused persons shouted slogans and attacked police station and police personnel who were on duty. It is further stated that the unruly mob started vandalizing and setting fire to the vehicles parked at K.G.Halli Police Station and nearby places. The accused persons were possessing iron rods, wooden sticks, inflammable substances, stones and other weapons. Despite the best efforts made by police, the mob refused to disperse and continued with the violent act and during the incident 12 vehicles were damaged. Thereby, the Police Inspector, K.G. Halli Police Station, lodged a complaint and First Information Report was registered in Crime No.229/2020 on 12.08.2020 against 14 accused persons and on 17.08.2020, after obtaining permission from the jurisdictional Court, the provisions of Sections 15, 16, 18 and 20 of Unlawful Activities (Prevention) Act, 1967 were invoked.

It is further case of prosecution that, taking into account the gravity of the matter, the Central Government by the Order dated 21.09.2020 handed over the investigation to National Investigation Agency. Accordingly, fresh First Information Report was registered on the same day under Sections 15, 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 and Sections 143, 147, 148, 353, 333, 332, 436, 437 r/w Section 149 of the Indian Penal Code and Section 4 of the Prevention of Damage to Public Property Act, 1984. After investigation, the Investigating Officer filed the charge sheet/final report under Section 173(2) Code of Criminal Procedure on 05.02.2021, wherein Appellant/Accused No.25 is also charge sheeted under the provisions of Section 120B read with Section 147 of the Indian Penal Code and Sections 16, 18 and 20 of Unlawful Activities (Prevention) Act, 1967. Thereafter, the appellant was arrested by National Investigation Agency and remanded was to judicial custody.

3. The appellant/Accused No.25 and other accused persons filed three bail applications under the provisions of Section 439 of the Code of Criminal Procedure before the learned Sessions Judge for release on bail, denying their involvement in the case and further contented that National Investigation Agency has deliberately concealed many important materials to develop false case and the police in Crime No.237/2020 have done comprehensive investigation. The said applications were opposed by the learned Special Public Prosecutor by filing objections. Based on the pleadings, the learned Sessions Judge framed a point for consideration, as under:

"Whether Accused No.25 and others have made out a case for grant of bail under Section 439 of Code of Criminal Procedure?"

4. The learned Sessions Judge, after considering the entire material on record, recorded a finding that Appellant/Accused No.25 and others are not entitled to bail, taking into consideration the gravity of the case, and on the ground that a careful perusal of the order sheet filed reveals that National Investigation Agency has attributed specific allegation against the accused persons based on the investigation. The allegations made against the appellant is that all the accused persons have entered into conspiracy in the meeting conducted by Appellant/Accused No.25 in order to commit violent acts and the accused persons conspired and decided to carry out violent acts by attacking Police Personnel and K.G. Halli Police Station as retaliation to the derogatory face book post by Naveen. There is specific allegation against Appellant/Accused No.25 that he having known the derogatory face book video posted by accused No.1-Firoz Pasha against Hindu gods, instigated Hindu community sentiments. Therefore, by the impugned order, dated 27.08.2021 rejected the bail, inter-alia on the ground that the allegations made against the present appellant are serious in nature and the overt act committed by him, prima facie, amounts to 'terrorist activity' as defined under Section 15 of the Unlawful Activities (Prevention) Act, 1967. Hence the present Appeal is filed.

5. We have heard the learned counsel for the parties. II. ARGUMENTS ADVANCED BY THE LEARNED SENIOR COUNSEL FOR THE APPELLANT/ACCUSED NO.25.

6. Sri C.V.Nagesh, learned Senior Counsel for the appellant/accused No.25 contended with vehemence that the impugned order passed by the Trial Court rejecting the application filed under Section 439 of the Code of Criminal Procedure is erroneous, contrary to the material on record,

cannot be sustained and is liable to be set-aside. He further contended that the jurisdiction of National Investigation Agency is to investigate the offences committed under the provisions of Unlawful Activities (Prevention) Act, 1967 and admittedly, in the present case, FIR was filed as per annexure-B only under the provisions of Indian Penal Code and Prevention of Damage to Public Property Act, 1984. Thereby, the very investigation conducted by the National Investigation Agency and filing of charge sheet cannot be sustained. He further contended that the trial court is not justified in not adverting to the final report filed under the provisions of Section 43-D(5) of the Unlawful Activities (Prevention) Act, 1967. He further contended that FIR is filed only under the provisions of the Indian Penal Code and not under the provisions of Unlawful Activities (Prevention) Act, 1967, and the name of the Appellant is not found in the FIR. Therefore, the trial court is not justified in rejecting the application for bail.

7. Learned Senior Counsel further contended that, under the provisions of Section 6 of the National Investigation Agency Act, 2008, investigation is only on the basis of the information under Section 154 of the Code of Criminal Procedure and where the report depicts schedule offence under schedule to the National Investigation Agency Act, 2008. He further contended that, the 'terrorist act' under Section 15 of Unlawful Activities (Prevention) Act, 1967 has three components and starts with intent and means and result, the intent and means is completely missing in it and as per the mandate under Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967, Courts are duty bound to look into the prima facie case under the Act, in other words, Courts are duty bound to examine the allegation in the context of 'terrorist act' as defined under Section 15 of Unlawful Activities (Prevention) Act, 1967. But the learned Sessions Judge completely lost sight of this aspect and thereby, erroneously rejected the application for bail.

8. It is further contended that the learned Sessions Judge has not appreciated the fact that the respondent-National Investigation Agency has built up a case of conspiracy with posting on face book by accused No.1 and alleged that it is a part of conspiracy with the connivance of Accused No.2 and appellant whereas, the record does not depicts any communication or meeting between Accused No.1, Accused No.2 and Appellant/Accused No.25. There is no material against appellant- Accused No.25. To substantiate the allegation regarding participation of attendees of meeting at the instance of appellant, the National Investigation Agency has not produced even a single piece of evidence in the charge sheet, except the fabricated 161 statements of the police witnesses which is contradictory to their own statements given before the State police in respect of the same incident. Thereby, the appellant is entitled to bail. It is further contended that National Investigation Agency admittedly does not have any photographs or CCTV footage to substantiate the allegation made in the charge sheet against appellant and his party members. Thereby the appellant is entitled to bail. The said aspect of the matter has not been considered by the trial court.

9. Learned Senior Counsel further contended that the complaint-Annexure-C under the provisions of Section 154 of the Code of Criminal Procedure is lodged after lapse of 1 month 10 days i.e., on 21.09.2020. The appellant/Accused No.25 is included in the charge sheet under the provisions of Section 120B r/w Section 149 of the Indian Penal Code and under Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967. In the FIR registered under Section 154 of the Code of Criminal Procedure, Sl.No.3(a) depicts that suspected offence is against Abbas, Fairouz and others

who attacked police officers, burnt K.G.Halli Police Station building and damaged the public property including government and private vehicles parked in the police station premises and outside, thus threatening the security and integrity of the Country. Subsequently, Sections 15, 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967 were added in the instant case, in the absence of any information under the provisions of 6(1) of National Investigation Agency Act, 2008.

10. Learned Senior Counsel further contended that, for investigation of the scheduled offences under Section 6 of the National Investigation Agency Act, 2008, on receipt of information thereof under Section 154 of the Code of Criminal Procedure relating to any schedule offence, the officer-in-charge of the police station shall forward the report to the State Government forthwith, and on receipt of report under sub section (1), the State Government shall forward the report to the Central Government as expeditiously as possible. Sub Section (3) envisages that, on receipt of the report from the State Government, the Central Government shall determine on the basis of information made available by State Government or received from other sources, within 15 days from the date of receipt of the report, whether the offence is scheduled offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency. Sub Section (4) of Section 6 prescribes that, where the Central Government is of the opinion that the offence is a scheduled offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence. Admittedly, before the matter was entrusted to the National Investigating Agency, the procedure as contemplated under National Investigation Agency Act, 2008, has not been complied. Thereby, the appellant is entitled to be released on bail.

11. Learned Senior Counsel further contended that only in the statements of Haji Mohammed, brother-in-law of Accused No.25, and Shankaraiah witness to panchanama, the name of the appellant is found. The charge sheet is without any basis. Thereby, the Appellant/accused No.25 is entitled to bail, since he is only a conspirator and the actual accused is on bail. He further contended that, proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967, clearly depicts that, on receipt of case diary or final report under Section 173 of the Code, the investigation authority can proceed. But, in the present case, either case diary or final report does not depict the involvement of the appellant. Thereby, the order passed by the learned Sessions Judge against the appellant is only on the basis of column No.7 of charge sheet without assigning any reasons. The learned sessions Judge has not considered either case diary or final report.

12. Lastly, learned Senior counsel contended that, in all, there are 198 accused persons and after investigation only against 138 accused persons charge sheet is filed and against 25 persons the provisions of Unlawful Activities (Prevention) Act, 1967 has been invoked and further investigation is pending against other accused persons. Absolutely there is no material against present appellant. Therefore appellant is entitled to bail under the discretionary power under Section 439 of Code of Criminal Procedure.

13. In support of his contentions, learned Senior Counsel relied upon the dictum of the Hon'ble supreme Court in the case of Thwaha Fasal vs. Union of India made in Crl.A.No.1302/2021 dated 28.10.2021, paragraphs 23, 24, 33 and 34 to the effect that stringent restrictions imposed by sub

section (5) of section 43D per se do not negate the power of Constitutional Court to grant bail keeping in mind violation of Part III of the Constitution. Mere association with terrorist organization is not sufficient to attract the provisions of Unlawful Activities (Prevention) Act, 1967. In the absence of any prima facie case, the bail cannot be rejected.

14. In the case of Parveen @ Sonu vs. State of Haryana made in Crl.A.No.1571/2021 dated 07.12.2021, the Hon'ble Supreme Court held that, except alleged confession statement of the co-accused and in the absence of corroborative evidence, it is not safe to maintain conviction and sentence imposed upon the appellant.

III. ARGUMENTS ADVANCED BY THE LEARNED SPECIAL PUBLIC PROSECUTOR

15. Per contra, Sri P.Prasanna Kumar, learned Special Public Prosecutor for National Investigation Agency while justifying the impugned order passed by the trial court rejecting the bail application filed under Section 439 Code of Criminal Procedure contended that, the Preamble to the National Investigation Agency Act, 2008, is to investigate and prosecute offences affecting the Sovereignty, Security and Integrity of India. In view of the provisions of sub Section (5) of Section 6 of the Act, if the Central Government is of the opinion that a scheduled offence has been committed which is required to be investigated under the Act, notwithstanding anything contained under Section 6 of the Act, it shall direct the agency to investigate the offence. The call details records of the appellant/accused No.25 clearly depicts that the appellant has contacted the Accused No.1 on 11.8.2020 at 19.31.52 hours, and contacted accused Nos.2, 8 to 25 during the period of offence and accused No.26 and others after commission of the offence and made conspiracy, caused damage to the public and private properties and burnt the police station. Thereby appellant has actively participated in the offence on that day along with others. Therefore, the trial court is justified in rejecting the bail application of the Appellant/accused No.25. The provisions of Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 clearly depicts that, notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter IV and VI of the Act shall, if in custody, be released on bail or on his own bond unless public prosecutor has been given an opportunity of being heard on the application for such release. Provided that, such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

16. Learned Special Public Prosecutor further contended that, admittedly, the final report clearly depicts that there are reasonable grounds to believe that accusation is made against the appellant. The accused persons whom the appellant contacted through mobile have not been granted bail and similarly situated persons already filed Criminal Appeal No.585/2021 and connected matters which came to be dismissed on 15.09.2021 and confirmed by Hon'ble Supreme Court in Spl. Leave to Appeal No.848/2021 dated 28.02.2022.

17. Learned Special Public Prosecutor further contended that the provisions of Section 18 of the Unlawful Activities (Prevention) Act, 1967 prescribes Punishment for Conspiracy i.e., Whoever conspires or attempts to commit, or advocates, abets, advises the commission of, a terrorist act or

any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine. The same is *pari materia* to the provisions of 120B of the Indian Penal Code. The material on record clearly depicts that Appellant/Accused No.25 has conspired to commit terrorist act and thereby he is not entitled to the discretionary relief of bail. The provisions of Section 20 of Unlawful Activities (Prevention) Act, 1967 prescribes punishment for being member of terrorist gang or organization, which prescribes that, any person who is a member of terrorist gang or a terrorist organization, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine. The list of terrorist organizations under the definition 'terrorist gang' and 'terrorist organisation' under Section 2(l)(m) and Section 35 is provided in the First Schedule of the Unlawful Activities (Prevention) Act, 1967.

18. Learned Special Public Prosecutor further contended that the term 'terrorist act' defined under Section 2(k) of the Unlawful Activities (Prevention) Act, 1967, has the meaning assigned to it in Section 15, and the expression 'terrorism' and 'terrorist' shall be construed accordingly. The 'terrorist gang' defined under Section 2(l) of the Unlawful Activities (Prevention) Act, 1967, means any association, other than terrorist organization, whether systematic or otherwise, which is concerned with, or involved in terrorist act. Thereby, the Appellant/Accused No.25 is not entitled to any relief.

19. Learned Special Public Prosecutor further contended that Accused No.8-Imran Ahmed @ Imran Khan, who burnt the vehicles, had filed Criminal Appeal No.1640/2021 challenging the dismissal of his bail application by the Trial Court and the said Appeal came to be dismissed by the coordinate Bench of this Court by the Order dated 22.12.2021.

20. In support of his contentions, learned Special Public Prosecutor relied upon the dictum of the Hon'ble Supreme Court in the case of Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) reported in (2010)6 SCC 1, wherein, at paragraph 226 it is held that, "the evidence of phone calls is a very relevant and admissible piece of evidence which shows that the accused were in touch with each other which resulted in destruction of evidence and harbouring. A close association is a very important piece of evidence in the case of circumstantial evidence. The evidence of phone calls is a very relevant and admissible piece of evidence." Thus the contention of the learned Senior counsel for the appellant that 'in the absence of what the accused stated to each other is of no help to the prosecution' if accepted, would be an incorrect appreciation of evidence on record.

21. Learned Special Public Prosecutor relied upon the dictum of the Hon'ble Supreme Court, in the case of State (NCT of Delhi) vs. Navjot Sandhu alias Afsan Guru reported in (2005)11 SCC 600 at paragraph 152, wherein it is held that, "the printouts pertaining to the call details exhibited by the prosecution are of such regularity and continuity that it would be legitimate to draw a presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the witness or not. We are therefore of the view that the call records are admissible and reliable and rightly made use of by the prosecution".

22. Learned Special Public Prosecutor further contended that the Hon'ble Supreme Court in the case of National Investigation Agency vs. Zahoor Ahmad Shah Watali reported in (2019)5 SCC 1 at paragraph 24, held that, "a priori, the exercise to be undertaken by the Court at this Stage- of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The court is merely expected to record finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise".

23. Learned Special Public Prosecutor further contended that the Hon'ble Supreme Court in the case of R.Venkatkrishnan vs. Central Bureau of Investigation reported in (2019)11 SCC 737, while considering Section 120B of the Indian Penal Code, held that Criminal Conspiracy in terms of Section 120-B of the Indian Penal Code is an independent offence. It is punishable separately. The prosecution, therefore, must prove the same by applying legal principles which are applicable for the purpose of proving a criminal misconduct on the part of the accused. The Courts, however, while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough.

24. Learned Special Public Prosecutor further contended that in the case of Suneel Roy vs. State of U.P. and others reported in 1998 SCC Online All 1178 at paragraph 17, it is held that, "if the police from whom the public at large expects protection and security is subjected to the treatment like in the present case, in our opinion, it is bound to disturb the even tempo of life and morale of the public at large. It is not a case of simple attack on an individual police officer or a group of them but it went much ahead of it. The authority of the police administration stood undermined to such an extent that it was bound to disturb the public order and tranquillity". Thereby he sought dismiss the appeal.

IV. POINTS FOR DETERMINATION

25. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the only point that would arise for our consideration is:

"Whether the Appellant/Accused No.25 has made out a case to interfere with the impugned order passed by the Trial Court rejecting his application filed under Section 439 of the Code of Criminal Procedure?"

V. CONSIDERATION

26. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and perused the entire material on record, carefully.

27. It is undisputed fact that the trial court rejected the application filed by Appellant/Accused No.25 under Section 439 of the Code of Criminal Procedure to release him on bail, holding that Accused No.25 has not made out any ground for grant of bail under the discretionary powers under Section 439 of Code of Criminal Procedure, inter alia on the ground that the allegation made against Accused No.25 are serious in nature and the overt act committed by the Accused No.25 clearly depicts that it amounts to 'terrorist act' as contemplated under the provisions of Sections 15 and 20 of the Unlawful Activities (Prevention) Act, 1967. The civil witness-Haji Mohammed(CW-39) deposed that he was with Accused No.25 at the time of his meeting with Muzammil Pasha-Accused No.2. He stated about the meeting between Accused No.25 and Accused No.2 on 11.08.2020 between 5.00 to 7.00 pm. The CDR of mobile number used by him will prove his contact with other accused persons and SDPI leaders during the incident and also prove his presence at the places of conspiracy meetings held on 11.08.2020. C.W.128-Shankaraiah has stated that Accused No.8 and Accused No.25 took the police personnel to the places where they had carried out conspiracy meetings to carry out the attack on 11.08.2020. Thereby, it is clear that prosecution made out a prima facie case against Appellant/Accused No.25. It is also not in dispute that the Investigating Officer after holding detailed enquiry filed the charge sheet against Accused No.25 on 05.02.2021 under Section 173(2) of the Code of Criminal Procedure for the offence punishable under Section 120B r/w Section 149 of the Indian Penal Code and Sections 16, 18 and 20 of Unlawful Activities (Prevention) Act, 1967.

28. The investigation depicts that Accused No.25 being the member of 'terrorist gang' and President of Social Democratic Party of India(SDPI), Bengaluru District, hatched a criminal conspiracy with Accused No.2-Mujamil Pasha and other SDPI leaders. In pursuance of the said conspiracy, on 11.08.2020 at about 13.05 hours, Fairoz Pasha posted a derogatory video/audio against Hindu gods on his face book account with an intention to promote enmity and disharmony between different religious groups. The SDPI associates intentionally posted the said derogatory video to instigate the members of other community members and to hurt their feelings and thereby created criminal disharmony in the society. The accused persons selected 11.08.2020 for their act, which was the day of Janmashtami i.e., Birthday of Lord Krishna, an auspicious day for Hindus. Appellant/Accused No.25 was aware of derogatory face book video posted by Accused No.1 against Hindu gods to instigate Hindu community sentiments and was expecting a response from them. Accordingly, on 11.8.2020 from 17.00 hours to 19.00 hours the Appellant/Accused No.25 had conspiracy with Accused No.2 at his office at HBR Layout, Bengaluru, for mobilizing their cadres and others for committing violent acts at K.G.Halli and D.J.Halli police stations and other places. He also went to attend SDPI, Thanisandra ward meeting at Hegde Layout and in the said meeting 17 SDPI ward members attended with Accused No.25. The meeting started at 19.40 hours and lasted till 20.20 hours and Accused No.25. After leaving the meeting, accused No.2 and Appellant/Accused No.25 were in constant touch over phone calls and whatsapp chat. All the accused persons who left

the meeting place, reached KG Halli Police Station for filing FIRs and mobilizing SDPI cadres and others for attacking police station and police officers.

29. The investigation also establishes that Accused No.25 was coordinating the movements and activities of accused persons including SDPI cadres during the offence at KG Halli and DJ Halli Police Stations. He was in regular contact with several SDPI and Popular Front of India (PFI) leaders for mobilizing their cadres including Muzammil Pasha/Accused No.2 and Ziya Ur Rehman/ Accused No.6. Thus, the acts of Mohamed Shariff/Accused No.25 has been established through prosecution witnesses, documentary evidence and call detail records of mobile numbers used by accused persons during relevant period of time.

30. Accused No.25 being member of 'terrorist gang' and in conspiracy with other accused persons for use of criminal force was involved in committing violent acts, and thereby, he is punishable under Section 120B r/w Section 147 of the Indian Penal Code and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967. Thereby, the overt act committed by Accused No.25 prima facie indicates that it amounts to 'terrorist act'.

31. At this stage, it is relevant to consider the provisions of Section 43D(5 to 7) of the Unlawful Activities (Prevention) Act, 1961, which reads as under:

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

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

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

(6) The restrictions on granting of bail specified in sub-

section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

32. A careful reading of the said provisions makes it clear that notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter IV and VI of the Unlawful Activities (Prevention) Act, 1967 shall, if in custody be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release, and the proviso depicts that, such accused person shall not be released on bail, if the Court, on perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Sub section (7) of Section 43D depicts that, notwithstanding anything contained in sub section (5) and (6), no bail shall be granted to a person accused of an offence punishable under the Act.

33. The Hon'ble Supreme Court while considering the said provisions held that, it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. It is further held that, by its very nature, the expression "prima facie true"

would mean that the materials/evidence collated by the investigating agency in reference to the accusation against accused concerned in the First Information Report, must prevail until contradicted and overcome or disproved by the other evidence.

Further held that, the averments made in the FIR should show the complicity of the accused in the commission of the offence.

34. Admittedly in the present case, the material evidence collected by Investigating Officer clearly depicts that Accused No.25 being member of 'terrorist gang' has made conspiracy with other accused persons for use of criminal force and involved in committing violent acts and thereby committed an offence punishable under Section 120B r/w 149 of the Indian Penal Code and Sections 16, 18 and 20 of the Unlawful Activities (Prevention) Act, 1967. Therefore, Appellant/Accused No.25 is not entitled to the discretionary relief of bail as there is prima facie material against the appellant. The Hon'ble Supreme Court in its latest Judgment in the case of Thwaha Fasal vs. Union of India reported in 2021 SCC online 1000 relying upon the aforesaid judgment in the case of National Investigation Agency vs. Zahoor Ahmed Shah Watali, at paragraph 20, held as under:

"The stringent conditions for grant of bail in sub- section (5) of Section 43D will apply only to the offences punishable only under Chapters IV and VI of the 1967 Act. The offence punishable under Section 13 being a part of Chapter III will not be covered by sub- section (5) of Section 43D and therefore, it will be governed by the normal provisions for grant of bail under the Criminal Procedure Code, 1973. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. The embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Thus, if after perusing the charge sheet, if the Court is unable to draw such a prima facie conclusion, the embargo created by the proviso will not apply."

35. The act committed by the Appellant/Accused No.25 along with other accused persons on 11.08.2020 as stated in the charge sheet filed by the Investigating Officer depicts the conspiracy to commit the aforesaid acts of violence and destruction of public properties and to create fear psychosis in the mind of law abiding citizens. There is no particular form or means by which a state of terror can be struck in the minds of people and the purpose of a terrorist act is to create fear psychosis in the minds of general public. Thereby, it is clear that the attempt of the Accused No.25 is to create fear and panic among general public which is impermissible law and punishable under Unlawful Activities (Prevention) Act, 1967.

36. The provisions of Section 15 and 16 of Unlawful Activities (Prevention) Act, 1967 clearly depicts that, whoever does any act with an intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India by usage of inflammable substances to cause death or injuries or damage to property with an intention to strike terror amounts to terrorist act. Section 18 of the Unlawful Activities (Prevention) Act, 1967 would take within its view the person who abet, incite, knowingly facilitates the commission of terrorist act and such person shall be punishable with imprisonment for not be less than 5 years and which may extend to life and shall also be liable to fine. Thereby the learned Sessions Judge is justified in rejecting the application filed by the appellant/accused No.25 for the relief of regular bail under the provisions of Section 439 of the Code of Criminal Procedure.

37. Though Sri C.V.Nagesh, learned Senior Counsel for the appellant/Accused No.25 contended that the National Investigation Agency has no jurisdiction to investigate under the provisions of Unlawful Activities (Prevention) Act, 1967 and, the trial court was not justified in not advertng to final report filed under Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967, the same cannot be considered at this stage, in view of the provisions of Section 6(5) of the National Investigation Agency Act, 2008 and Section 43D(5) of Unlawful Activities (Prevention) Act, 1967, already stated supra.

38. The Hon'ble Supreme Court in the case of Naser Bin Abu Bakr Yafai vs. State of Maharashtra and another reported in 2021 SCC Online SC 950, while considering the provisions of Unlawful Activities (Prevention) Act, 1967 and the powers of the Investigating Authority under Section 6 of the National Investigation Agency Act, 2008, at paragraphs 23 and 24 held as under:

"23. The controversy in the batch of appeals before this Court revolves substantially on the interpretation of Section 6 of the NIA Act. Section 6 is extracted below, as it stood before its amendment with effect from 2 August 2019:

"6. Investigation of Scheduled Offences.-(1) On receipt of information and recording thereof under Section 154 of the Code relating to any Scheduled Offence the officer-

in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts it is hereby declared that till the Agency takes up the investigation of the case it shall be the duty of the officer-in-charge of the police station to continue the investigation."

24. The salient aspects which emerge from the provisions of Section 6 need to be formulated at this stage. They are:

(i) On the receipt and recording of information under Section 154 of the CrPC relating to a scheduled offence under the NIA Act, a report must be forwarded to the State government by the officer in-charge of the police station (sub-

Section (1) of Section 6);

(ii) The State government on receipt of the report under sub-Section (1) must, as expeditiously as possible, forward it to the Central government (sub-Section (2) of Section 6);

(iii) The purpose of the first and second steps embodied in sub-Sections (1) and (2) of Section 6 is to enable the Central government to make a decision in terms of sub-Section (3);

(iv) Upon receiving a report from the State government, the Central government must determine within fifteen days, on the basis of the information made available by the State government or received from other sources, whether: (a) the offence is a scheduled offence; and (b) if it is fit case to be investigated by the NIA, having regard to the gravity of the offence and other relevant factors (sub-Section (3) of Section 6);

(v) If the Central government is of the opinion that the offence is a scheduled offence and it is a fit case to be investigated by the NIA, it shall direct the NIA to investigate the offence (sub- Section (4) of Section 6);

(vi) An overriding power is entrusted to the Central government (evident from the incorporation of a non-obstante provision in sub-Section (5)) to suo motu direct the NIA to investigate the offence if it is of the opinion that: (a) a scheduled offence has been committed under the NIA Act; and (b) that it is required to be investigated by the NIA (sub-

Section (5) of Section 6);

(vii) Upon the issuance of a direction by the Central government under sub-Sections (4) or (5) of Section 6, two consequences emanate under sub-Section (6) of Section 6 : (a) the State government and any police officer of the State government investigating the offence shall not proceed with the investigation; and

(b) the relevant documents and records must be transmitted to the NIA forthwith (sub-

Section (6) of Section 6);

(viii) By way of abundant caution ("for the removal of doubts"), sub-Section (7) of Section 6 contains a declaration that till the NIA "takes up the investigation of the case", it shall be the duty of the office in-charge of the police station to continue the investigation (sub-Section (7) of Section 6);

(ix) The provisions of sub-Sections (6) and (7) of Section 6 must be read together and in harmony in order to fulfill the purpose and intent of the Parliament in a holistic manner;

(x) The object and underlying purpose of sub-

Section (7) is to ensure that there is no hiatus in the course of the investigation. Hence, while sub-Section (6) stipulates a two-fold requirement, that upon the issuance of a direction under sub-Sections (4) or (5) of Section 6 neither the State government nor the police shall proceed with the investigation and must transmit the documents and records to the NIA forthwith, sub-Section (7) imposes a statutory obligation on the officer in-charge of the police station to continue the investigation till the NIA actually takes over; and

(xi) While enacting the provisions of sub-

Section (7) of Section 6, the Parliament was conscious of the fact that an interlude may occur between the date of the issuance of a direction and the actual taking up of the investigation by the NIA. However, between the issuance of a direction under sub-Sections (4) or (5) of Section 6 and the actual taking up of the investigation by the NIA, there should be no hiatus in the investigation to the detriment of the interests of national security involved in the enactment of the legislation."

39. The call details of Appellant/Accused No.25 during the hours of offence on the evening of 11.08.2020 received and made through his mobile No.9535235865 at Sl.No.8 with accused No.1, accused No.2, Accused No.6, Accused No.12, Accused No.6, brother of Accused No.6, Accused No.8, and Accused No.2 are as under:

Sl. No.	Caller No.	Time	Seconds	In/Out	Discussion
8	9741505664	19:31:52	70	Out	Number belongs Mujamil Pasha (A1 in DJ Halli & A2 in KG Halli). Call regarding Naveen Deliberated Post on FB.
10	9741505664	19:42:38	61	In	Number belongs Mujamil Pasha (A1 in DJ Halli & A2 in KG Halli). Call regarding Naveen Deliberated Post on FB.
11	9945582822	20:20:29	16	In	Number belongs Zia Ur Rehman (A6) (Nagawara ward Secretary) Call regarding Ward meeting in Nagawara
12	9741505664	20:21:08	61	Out	Number belongs Mujamil Pasha (A1 in DJ Halli & A2 in KG Halli). Call regarding Naveen Deliberated Post on FB.
16	9945582822	20:38:33	19	In	Number belongs Zia Ur Rehman (A6) (Nagawara ward Secretary) Call regarding remainder for meeting.
17	9686871337	20:40:13	59	In	Number belongs Shakeel Basha (Brother of A6 in DJ Halli - Suhail Basha) (SDPI ward president In Tanisandra) Call regarding Ward meeting in Tanisandra.
19	9900978967	22:00:53	8	out	Number belongs to Imran Ahmed (A8) made calls to take the ambulance for shifting body to Davanagere.

22	9900978967	22:05:55	87	In	Number belongs to Imran Ahmed (A8) made calls to take the ambulance for shifting body to Davanagere.
24	9741505664	22:08:41	8	Out	Number belongs Mujamil Pasha (A1 in DJ Halli & A2 in KG Halli). Call regarding to give complaint against Naveen in D J PS.
25	9741505664	22:16:36	10	In	Number belongs Mujamil Pasha (A1 in DJ Halli & A2 in KG Halli). Call regarding to give complaint against Naveen in D J PS.

The above call details clearly indicates that the appellant/Accused No.25 is involved in commission of the offence.

40. As already sated supra, the provisions of 43D(5) of the Unlawful Activities (Prevention) Act, 1967, mandates that, if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure is of the opinion that there are reasonable grounds for believing accusations made against such person, as regards commission of offence under chapter IV and/or chapter VI is prima facie true, , such accused person shall not be released on bail or on his own bond. The exercise of general power to grant bail under Unlawful Activities (Prevention) Act, 1967 is severely restrictive in scope. The words used under proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 "shall not be released" in contrast with the words found in Section 437(1) of the Code of Criminal Procedure "may be released" suggest or indicates the intention of the legislature is to take a departure from the general principle or in other words, to make the bail being exception and jail being the rule. "Justification" must be searched from the case diary and final report submitted before the special court. The legislature has prescribed a low "prima facie standard" as a measure of degree of satisfaction to be recorded by such court when scrutinizing the material on record for its justification. The standard can be contrasted with the standard of "strong suspicion" which is used by Courts while hearing the applications for bail. The Hon'ble Supreme Court, while considering provisions of 43D(5), 16, 18, 20 and 38 of Unlawful Activities (Prevention) Act, 1967 and other provisions, in the case of National Investigation Agency vs. Zahoor Ahmad Shah Watali reported in (2019)5 SCC 1, at paragraph 24 held as under:

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

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

41. A Division Bench of Allahabad High Court while considering the provisions of Section 3(3) of the National Security Act, 1980, in the case of Suneel Roy vs. State of U.P. and others reported in 1998 SCC Online All 1178 at paragraph 17 held as under:

"17. In the present case the allegation against the petitioner is that he hit the police inspector by a wooden rod who fell down and thereafter the entire police party present there was attacked by the petitioner and the co-accused. Several constables were injured and their fire-arms and ammunition were snatched and taken away. Thus the petitioner and his colleagues did not stop after causing injuries to the police officer and the constables but they acted further which caused all the difference. Had the attack been only to secure the release of the petitioner, there was no reason to further aggravate the situation by snatching the fire-arms and ammunition and talking away the same with them, all this happened at a public place police outpost in board day-night and in full view of the public watching it. One can well imagine the impact of such an incident on the general public watching it. Life of community has many shades and aspects. One of its important shades is the sense of security. This sense of security depends on the authority of the State through police. If the police from whom the public at large expects protection and security is subjected to the treatment like in the present case, in our opinion, it is bound to disturb the even tempo of life and morale of the public at large. It was not a case of hit and run to secure release of the petitioner. The incident continued for hours. It is also not a case of simple attack on an individual police officer or a group of them but it went much ahead of it. The authority of the police administration stood undermined to such an extent that it was bound to disturb the public order and tranquillity. The incident was reported in leading newspapers, copies of which were supplied to the petitioner. In our opinion, the act of the petitioner, who was mainly responsible to initiate the trouble, was an act which definitely disturbed the public order and respondent no. 2 had sufficient material to have subjective satisfaction that detention of the petitioner was necessary to maintain public order and even tempo of life of the community:"

42. The Hon'ble Supreme Court while considering the provisions of Sections 302, 201 and 120B of the Indian Penal Code, in the case of Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) reported in (2010) 6 SCC 1, at paragraph 226 held as under:

"226. The above phone call details show that the accused were in touch with each other which resulted in destruction of evidence and harbouring. Thus the finding of the trial court that in the absence of what they stated to each other is of no help to the prosecution is an incorrect appreciation of evidence on record. A close association is a very important piece of evidence in the case of circumstantial evidence. The evidence of phone calls is a very relevant and admissible piece of evidence. The

details of the calls made by the various accused to one another are available in Exts. PW 66-B, PW 66-D and PW 66-C."

43. The Hon'ble Supreme Court while considering the provisions of Section 121, 121A of the Indian Penal Code, in the case of State of State (NCT of Delhi vs. Navjot Sandhu alias Afsan Guru) reported in (2005)11 SCC 600 at paragraph 152, held as under:

"152. Although necessary suggestions were not put forward to the witnesses so as to discredit the correctness/genuineness of the call records produced, we would prefer to examine the points made out by the learned counsel for the accused independently. As already noted, one such contention was about the presence of duplicate entries in Exts. 36/2 and 36/3. We feel that an innocuous error in the computer recording is being magnified to discredit the entire document containing the details without any warrant. As explained by the learned counsel for the State, the computer, at the first instance, instead of recording the IMEI number of the mobile instrument, had recorded the IMEI and cell ID (location) of the person calling/called by the subscriber. The computer rectified this obvious error immediately and modified the record to show the correct details viz. the IMEI and the cell ID of the subscriber only. The document is self-explanatory of the error. A perusal of both the call records with reference to the call at 11 : 19 : 14 hours exchanged between 9811489429 (Afzal's) and 9811573506 (Shaukat's) shows that the said call was recorded twice in the call records. The fact that the same call has been recorded twice in the call records of the calling and called party simultaneously demonstrates beyond doubt that the correctness or genuineness of the call is beyond doubt. Further, on a comparative perusal of the two call records, the details of the cell ID and the IMEI of the two numbers are also recorded. Thus, as rightly pointed out by the counsel for the State Mr Gopal Subramaniam, the same call has been recorded two times, first with the cell ID and IMEI number of the calling number (9811489429). The same explanation holds good for the call at 11 : 32 : 40 hours. Far from supporting the contention of the defence, the above facts, evident from the perusal of the call records, would clearly show that the system was working satisfactorily and it promptly checked and rectified the mistake that occurred. As already noticed, it was not suggested nor could it be suggested that there was any manipulation or material deficiency in the computer on account of these two errors. Above all, the printouts pertaining to the call details exhibited by the prosecution are of such regularity and continuity that it would be legitimate to draw a presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the witness or not. We are therefore of the view that the call records are admissible and reliable and rightly made use of by the prosecution."

44. Sri C.V.Nagesh, learned Senior Counsel for the Appellant/Accused No.25 relied upon the judgment of the Hon'ble Supreme Court in the case of Parveen @ Sonu vs. The State of Haryana made in Criminal Appeal No.1571/2021 dated 07.12.2021, wherein, it is held that, "except the

alleged confessional statements of the co-accused and in the absence of any other corroborative evidence, it is not safe to maintain the conviction and sentence imposed upon the appellant". The said case was decided on merits. The facts of the said case has no application to the facts of the present case. Admittedly in the present case, after investigation the Investigating Officer filed the charge sheet which discloses prima facie case against the Appellant/accused No.25.

45. The learned Senior Counsel for the Appellant/accused No.25, relied upon another judgment of the Hon'ble Supreme Court in the case of Thwaha Fasal vs Union of India reported in 2021 SCC Online SC 1000, to contend that, "while dealing with the issue of grant of bail, the Court shall also have to keep in mind that the restrictions imposed by sub section (5) of section 43D of the Unlawful Activities (Prevention) Act, 1967 per se do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution, and mere attending the conspiracy meetings and possessing some documents supporting the meeting cannot be a ground to come to the conclusion that the accused had association with terrorist organisation, and mere association with a terrorist organisation is not sufficient to attract Section 38 and mere support given to a terrorist organization is not sufficient to attract Section 39". In the said case, the Hon'ble Supreme Court while deciding the Criminal Appeal on merits found that there is no material in the charge sheet to project active participation of the accused in the offence and taking into consideration the fact that the Accused was taking treatment for psychological disorder and was a student of law, came to conclusion that there is no accusation against the accused for commission of offence punishable under Sections 38 and 39 of the Act and thereby, confirmed the granting of bail to the Accused.

46. In the present case, as already stated supra, there is sufficient material against the appellant/Accused No.25 in the charge sheet which project active participation of the appellant in the offence and the call details clearly depicts that the association and support of the appellant is with an intention of furthering the activities of a terrorist organization. Considering the entire material on record, including charge sheet filed against appellant by the Investing Officer, this Court is of the considered opinion that there is prima facie case against appellant and thereby he is not entitled to the bail in view of sub section (5) of 43D of the Unlawful Activities (Prevention) Act, 1967. The very judgment in the case of Thwaha Fasal supra, at para 23 clearly depicts that, while deciding a bail petition filed by an accused against whom offences under chapter IV and VI of the Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. The scope of inquiry to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The Court while examining the issue of prima facie case as required under sub section (5) of section 43D is not expected to hold mini trial and the Court is not supposed to examine the merits and demerits of the evidence. If charge sheet already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is.

47. As already stated supra, the charge sheet filed against the appellant clearly depicts his active participation in the offence as a member of the terrorist gang and in conspiracy with other accused persons for criminal act in violent acts. Thereby, he was coordinating with movement of other

accused persons including SDPI during the violent acts at K.G. Halli and D.J. Halli Police Stations. Thereby the aforesaid judgment is in fact against the appellant and will no way assist the case of the appellant in the peculiar facts and circumstances of the present case.

VI. CONCLUSION

48. For the reasons state above, the point raised in the present Criminal Appeal is answered in the negative holding that the Appellant /A25 has not made out any ground to interfere with the impugned order passed by the Trial Court, rejecting the bail application filed by the appellant under Section 439 of the Code of Criminal Procedure.

VII. RESULT

49. In view of the above, we pass the following ORDER

(i) The Criminal appeal filed by Appellant/Accused No.25 hereby dismissed.

(ii) The impugned order dated 27.08.2021 made in Spl.C.C.No.141/2021 on the file of XLIX Additional City Civil and Sessions Judge (Special Court for trial of NIA Cases)(CCH-50), Bengaluru, rejecting the bail application filed by the Accused No.25, is hereby confirmed.

Sd/-

JUDGE Sd/-

JUDGE kcm