Jibangshu Paul vs National Investigation Agency on 27 July, 2011

Bench: I A Ansari, A K Goswami

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA,
MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

CRIMINAL APPEAL NO. 29 OF 2011

Sri Jibangshu Paul,
S/o Late Nalini Paul,
Resident of Ram Krishna Nagar,
Karimganj,
P.S. Ram Krishna Nagar,
Dist. Karimganj, Assam ... Appellant

-Vs-

National Investigation Agency (NIA),
Under Ministry of Home Affairs,
Government of India,
New Delhi (Camp - Guwahati)
... Respondent

BEFORE
HON'BLE MR JUSTICE I A ANSARI
HON'BLE MR JUSTICE A K GOSWAMI

For the appellant	:	Mr. B. K. Mahajan, Advocate Mr. A. Choudhury, Advocate Mr. N. J. Das, Advocate,
For the respondent	:	Mr. Z. Kamar, Public Prosecutor, Assam,
Amicus Curiae:		Mr. N. Dutta, Senior Advocate,
Dates of hearing	:	24.05.2011, 31.05.2011 & 01.06.2011
Date of delivery of judgment and order	:	27.07.2011

JUDGMENT AND ORDER

(Ansari, J)

1. In a case registered by the police against an accused on the basis of First Information Report, whether bail can be granted to the accused in respect of the case, as a whole, or offence-wise ?

2. During the course of investigation of a case, or while filing the charge-sheet, when a penal Section is added to the offence(s), whereunder the case already stands registered, whether the accused is required to apply afresh for being allowed to go on bail in respect of the newly added penal Section and, if so, whether the application for such a bail would mean that the accused has surrendered himself to the jurisdiction of the Court, wherein he has applied for bail, and may or may not, therefore, be allowed to go on bail if the added offence (penal Section) is a „non-bailable one and the facts and circumstances of the case do not warrant release of the accused on bail in case of such an offence ?

3. Whether cancellation of earlier bail is necessary if the Court finds that it lacks jurisdiction to grant bail in respect of the subsequently added penal Section ?

4. In the event of addition of a penal Section to a case, as indicated hereinabove, is it the duty of the Investigating Officer to

inform the Court, which had granted bail to the accused, or on whose order, the accused stood released on bail, as regards the addition of the penal Section, providing him thereby with an opportunity to apply for bail in respect of the added penal Section, or, whether the police can arrest such an accused on the basis of the newly added penal Section without informing the Court, which had granted bail to the accused, or without giving any opportunity to the accused, who was already on bail, to apply to the Court for bail in respect of the penal Section, which stands subsequently added in such a case, or whether the accused needs to be informed, in such a case, as regards the addition of the penal

Section, so that the accused can, in respect of the added penal Section, apply for bail ?

5. Whether the nature of the newly added penal Section shall have any bearing on the Court s decision to grant or not to grant bail and how the Court shall decide, in a case of such a nature, the question of granting or not granting of bail ?

6. What are the parameters for determination of the question as to whether the added penal Section is graver than the ones in respect whereof, the accused already stands granted bail ?

7. What are, generally, the parameters of power of a Court,

while granting bail in a „non-bailable offence ?

8. Whether the cancellation of bail is permissible in law only when the accused violates the conditions of bail, or whether bail is also possible to be cancelled, when the Magistrate, who has granted bail, or the Court, which has allowed the accused to go on bail, finds that he or it lacked jurisdiction to grant bail ?

9. How Section 167(2) CrPC differs from the provisions embodied in Section 309(2) CrPC ?

These are some of the prominent questions, which have arisen, in the present appeal, for determination.

2. This appeal, under Section 21 of the National Investigation Agency Act, 2008, (for short, the NIA Act'), is preferred against the orders, dated 20.02.2010 and 03.01.2011, passed by the learned Special Judge, National Investigation Agency (in short, the NIA') in NIA

Case No.02/2009, under Sections 120(B)/121/121A of the Indian Penal Code, 1860, read with added Sections 16, 17, 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967, (for short, the UA(P) Act), rejecting the prayer of the appellant to allow him to remain on previous bail and directing that he be taken into custody forthwith.

3. The material facts and various stages, which have led to the present appeal, may, in brief, be set out as under:

(i) One Ratneswar Das, Sub-Inspector of Police, filed an Ejahar before the Officer-in-Charge, Diyungmukh Police Station, North Cachar Hills, stating, inter alia, that an information was received from high-level sources that some persons/workers of the North Cachar Hills Autonomous Council (popularly known as NC Hills Autonomous Council) were going to deliver huge amount of cash of DHD(J), a terrorist gang, somewhere between Haflong and Diyungmukh, for the purpose of procuring arms and ammunitions and for promoting organisational activities with a view to wage war against the State and that accordingly, he along with available forces, under the guidance of the Deputy Superintendent of Police (Headquarters), Haflong, started checking of vehicles coming from the direction of Haflong and proceeding towards Diyungmukh. It had been further stated, in the Ejahar, that on 10.02.2009, at about 3.30 PM, during checking of vehicle No. AS-08-5133 (a Mahindra Scorpio vehicle), at Thaijowari, wherein Golon Daulagupu, a member of NC Hills Autonomous Council, and Sri Jibangshu Paul were travelling, recovered cash amount of Rs.32,11,000/- from the possession of Jibangshu Paul, who failed to give any satisfactory explanation with regard to carrying of such huge amount of cash with them indicating thereby that the cash,

which had been found in the possession of Jibangshu Paul, was being carried to be handed over to the DHD(J) extremists and, as such, they had committed the offence of criminal conspiracy to wage war against the State with the help of DHD(J) extremists and the cash was accordingly seized in presence of witnesses. Based on this Ejahar and treating the same as First Information Report, Diyungmukh Police Station Case No.03/2009, under Sections 120(B)/121/121A IPC, was registered against Golon Daulagupu, MAC, NC Hills Autonomous Council, and Jibangshu Paul (i.e., the present accused-appellant) and both the occupants of the said car including Jibangshu Paul were arrested.

(ii) Taking note of the fact that the accused-appellant had been in custody since 10.02.2009 and about 15 days had already passed and taking note also of the fact that the co-accused had already been granted bail, the appellant was ready to cooperate with the police during investigation and that there was no chance of his absconding, the learned District Magistrate, NC Hills, acting as a Magistrate, by order, dated 26.02.2009, allowed the accused-appellant to go on bail of Rs.50,000/- with one surety of the like amount.

(iii) On 01.06.2009, the Central Government, in exercise of its power under Section 6(5) read with Section 8 of the NIA Act, directed the NIA to take up investigation of the case. Diyungmukh Police Station Case No.03/2009 aforementioned, then, came to be registered by the NIA as FIR No. 02 of 2009 and the investigation of the case was, thereafter, conducted by the NIA. Thus, the Assam Police had conducted the investigation till 05.06.2009 and, during this period of

investigation, apart from Golon Daulagupu and Jibangshu Paul, two

more persons, amongst others, namely, Biraj Chakraborty and Karuna Saikia were also arrested.

(iv) During the course of investigation, which the NIA had conducted, 13 more persons were arraigned, as accused, under Sections 16, 17, 18, 19 and 20 of the Unlawful Activities Prevention Act, 1967, (in short, UA (P) Act, 1967') and Section 25(i)(d) of the Arms Act, 1959. On completion of investigation, the NIA submitted charge-sheet, on 18/19.10.2010, under Sections 120B, 121, 121-A IPC and under Sections 16, 17, 18, 19 and 20 of the UA (P) Act, 1967 and Section 25(1)(d) Arms Act, 1959. Thus, Section 16, 17, 18, 19 of the UA(P) Act, 1967, read with Section 25(1)(d) of the Arms Act, 1959, were the added Sections in the charge-sheet.

(v) Based on this charge-sheet, Spl/NIA Case No.02/2009 was registered in the Court of the Special Judge, NIA, Assam, Guwahati.

(vi) After receiving notices, some of the accused persons, including the present appellant, appeared in the Court of learned Special Judge and they filed petitions to allow them to remain on previous bail. These petitions were admitted for hearing.

(vii) On 03.11.2010, an application was filed by the NIA, in the Court of learned Special Judge, NIA, stating to the effect, inter alia,

that the accused persons, including the present appellant, had not approached any Court for grant of bail in respect of offences under Sections 16, 17, 18, 19 and 20 of the UA(P) Act, 1967, which were added on 20.02.2010, and, therefore, they be taken into judicial custody till such time the accused persons (including the present appellant) furnish appropriate bail order in respect of all the penal sections, which they stood charged with.

(viii) A written objection to the said application, dated 03.11.2010, was filed by the present appellant. In the said written objection, it was contended that after appearance, he had been granted the privilege to remain on his previous bail by the Court of the learned Special Judge. It was further stated therein that his name did not figure in the list of 13 persons in respect of whom Sections 16, 17, 18, 19 and 20 of the UA(P) Act and Section 25(i) (d) of the Arms Act, 1959, were added. During the period of investigation, new penal Sections were added on 20-12-2010, but till the charge-sheet was filed on 18-10-2010, the investigating agency had never sought for cancellation of his (i.e., the appellant's) bail. The application, therefore, filed by the NIA was, according to the present appellant, wholly misconceived and the appellant cannot be taken into custody unless the bail, granted to him, earlier by the District Magistrate, NC Hills, on 26-02-2009, was cancelled and, apparently, there was no ground for cancellation of bail of the appellant.

(ix) On 20.12.2010, when the case came up for order, the appellant was absent, but filed Petition No.2799/2010 showing the cause for his not being present in the Court. The cause shown was that the mother of the appellant had been suffering from ailment. Rejecting the said prayer, non-bailable Warrant of Arrest was directed to be issued by order, dated 20.12.2010, passed by the learned Special Court. The appellant's petition seeking that he be allowed to remain on previous bail, already granted by the learned District Magistrate, NC Hills, Haflong, by order, dated 26.02.2009, was also rejected.

(x) The argument, advanced on behalf of the NIA, in the Court of the learned Special Judge, was that the appellant had not been granted bail under the newly added Sections, namely, Sections

16,17,18,19 and 20 of the UA(P) Act, 1967, and that bail had been granted to the appellant only in respect of the offences under Sections 120(B)/121/121A IPC and that such grant of bail cannot be availed of for the newly inserted serious offences. It was, however, contended, on behalf of the appellant, in the learned Special Court, that the learned Special Court was not authorised to exercise power to remand the appellant to custody under Section 167(2) Cr.P.C., because charge-sheet had already been filed and the situation, wherein an accused can be remanded, under Section 309(2) Cr.P.C., to custody was not available in the present case.

(xi) On considering the materials on record and after hearing the learned counsel for the parties, the learned Special Judge, as has been noted earlier, directed that the accused persons, including the present appellant, who had not been granted bail by any Court for the offences under Sections 16, 17, 18, 19 and 20 of the UA(P) Act, be taken into custody with further observation that they may apply, in accordance with law, for fresh bail for the offences under Sections 16, 17, 18, 19 and 20 of the UA(P) Act.

4. During the course of discussion, in his order, dated 20.12.2010, while rejecting bail, the learned Special Judge opined that considerations, which had prevailed before the Court at the earlier point of time, were in respect of less heinous offences and those considerations would be different from the considerations, which would weigh upon the Court at the time of consideration of enlarging an accused, on bail, in connection with more serious offences, such as, offences under Sections 16, 17, 18, 19 and 20 of the UA(P) Act, 1967.

5. We have heard Mr. B.K. Mahajan, learned counsel, for the appellant, and Mr. D.K. Das, learned Standing Counsel, NIA. Having regard to the questions that have arisen for consideration in this appeal, this Court appointed Mr. N. Dutta, learned Senior counsel, as Amicus Curiae, and we have had the benefit of hearing him too.

PRINCIPLES GOVERNING, ORDINARILY, GRANTING OF BAIL

6. Generally, while considering an application for bail in a non-bailable case, the factors, to be considered, are:(i) whether there is any prima facie or reasonable ground, as the case may be, to believe that the accused had committed the offence, (ii) the nature and gravity of the offence, (iii) severity of the punishment if the accused happens to be convicted, (iv) chances of the accused absconding or fleeing away if given the opportunity of bail, (v) the character, behaviour, antecedents, means, position and standing of the accused in the society, (vi) likelihood of the offence being repeated, (vii) reasonable apprehension of the witnesses being tampered with or the investigation being interfered with. While a vague allegation that the accused may tamper with the evidence or witnesses would not be a ground to refuse bail, the fact remains that when the accused is of such a character that his mere presence, at large, would intimidate the witnesses or if there is material to show that there is likelihood of the accused using his liberty to subvert justice or tamper with the evidence, then, bail would be refused.

7. Points out the Supreme Court, in State of Maharashtra Vs. Anand Chintaman Dighe, reported in (1990) 1 SCC 397, that there

are no hard and fast rules regarding grant or refusal of bail. Each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the court. Where an offence is of a serious nature, the court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of the offence, character of the evidence, circumstances, which are peculiar to the accused, a reasonable possibility of presence of the accused not being secure at the trial and the reasonable apprehension of witness being tampered with, the larger interest of the public or such similar other considerations. (See also State Vs. Capt. Jagjit Singh, reported in (1962) 3 SCR 622).

8. In the State of UP (through CBI) Vs. Amarmani Tripathi, reported in (2005) 8 SCC 21, the Court has summed up the factors, which are, generally, required to be taken into account, while considering an application seeking bail. The relevant observations, made in this regard, read as under:

> —18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail(see Prahlad Singh Bhati v. NCT, Delhi : (2001) 4 SCC 280 : 2001 SCC(Cri) 674 and Gurcharan Singh v. State(Delhi Admn.) : (1978) 1 SCC 118 : 1978 SCC(Cri) 41 : AIR 1978 SC 179. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would

intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused.

We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan : (2004) 7 SCC 528 : 2004 SCC(Cri) 1977(SCC pp. 535-36, para 11)

> "11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from no-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:
>
> (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
>
> (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
>
> (c) Prima facie satisfaction of the court in support of the charge.(See Ram Govind Upadhyay v. Sudarshan Singh : (2002) 3 SCC 598 : 2002 SCC (Cri) 688 and Puran vs. Rambilas : (2001) 6 SCC 338 : 2001 SCC(Cri) 1124."

(Emphasis is supplied)

REASONS FOR GRANTING BAIL : IMPERATIVES AND LIMITATIONS

9. It needs to be borne in mind that, while granting bail, though a detailed examination of the evidence and elaborate documentation of the merits of a given case is not to be undertaken, the Court owes a duty to assign reasons for prima facie concluding as to why bail was being granted. So lays down the Supreme Court, in Puran Vs. Rambilas, reported in (2001) 6 SCC 338, in the following words:

> "8. He submitted that in view of these observations the learned Additional Sessions Judge did not give reasons whilst granting bail. He submitted that in these circumstances the Additional Sessions Judge cannot be faulted. He submitted that the High Court could not cancel bail on this ground. We see no substance in this contention. Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. What the Additional Sessions Judge had done in the order, dated 11-9-2000, was to discuss the merits and demerits of the evidence. That was what was deprecated. That did not mean that whilst granting bail, some reasons for prima facie concluding why bail was being granted did not have to be indicated."

10. The requirement of the law to assign prima facie reasons for granting bail has been insisted upon in Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another, reported in (2004) 7 SCC 528, too, wherein the Court observed, referring to Puran's case (supra), thus:

> "18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in the case Puran v. Rambilas: (SCC p. 344, para 8)

> "Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. ... That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated."
>
> We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail."

11. Coupled with the above, the Supreme Court, in Kalyan Chandra Sarkar (supra), has held that the Court shall exercise its discretion to grant bail in a judicious manner and not as a matter of course and though, on the subject of granting of bail, examination of evidence and elaborate documentation of the merit of the case need not be

undertaken, there is a need to indicate, in such orders, the reasons for prima facie concluding as to why bail was being granted, particularly, when the accused is charged with having committed a serious offence, because the appellate Court has every right to know the reasons as to why bail has been granted. Any order, devoid of such reasons, would suffer from non-application of mind. This apart, reiterated the Supreme Court, in Kalyan Chandra Sarkar (supra), that the Court shall consider, among other circumstances, the following factors too before granting bail, namely, (a) the nature of accusation and the severity of punishment in case of conviction and the nature of

supporting evidence, (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and (c) prima facie satisfaction of the court in support of the charge.

12. Cautioning the courts not to discuss, while considering the question of bail, too minutely, the merit of the materials available so as to avoid causing of prejudice to the parties concerned, the Supreme Court, in Vaman Narain Ghiya v. State of Rajasthan,(2009) 2 SCC 281, held as under:

> "11. While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been pre-judged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required. (See Niranjan Singh v. Prabhakar Rajaram Kharote.) Where the offence is of serious nature, the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public." (Emphasis is supplied)

13. From the discussions, held above, what surfaces is that a court, while granting or refusing bail, must assign the reasons for its decision. The reasons assigned, however, must not be an elaborate

discussion of the materials collected so that the accused is not prejudiced and his case must not appear to have been prejudged. There is, therefore, a need, on the part of the court, to maintain a balance between the need to assign reasons for refusing or granting bail, on the one hand, and the caution to be applied, on the other, to

ensure that the assignment of reasons should not be so elaborate that the case of the accused appears to have been prejudged.

DISTINCTION BETWEEN GRANT OF BAIL AND CANCELLATION THEREOF

14. What, now, needs to be taken note of is that the factors, governing grant of bail, are different from the factors, which are, generally, taken into account for the purpose of cancellation of bail. This distinction has been succinctly brought out by the Supreme Court in Dolat Ram Vs. State of Haryana, reported in (1995) 1 SCC 349, in the following words:

> "4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail, so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly(illustrative and not exhaustive) are : interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused

> to retain his freedom by enjoying the concession of bail during the trial."

(Emphasis is supplied)

15. From what have been laid down in Dolat Ram (supra), it

becomes clear that there, indeed, exists a distinction between rejection of bail in a non-bailable case at the initial stage and cancellation of bail so granted. For the purpose of cancellation of bail, cogent and overwhelming circumstances are necessary. Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of materials placed on the record, of the possibility of the accused absconding is yet another reason justifying cancellation of bail. However, cautions the Supreme Court, in Dolat Ram (supra), that once bail, already granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

16. In Amarmani Tripathi (supra), the Court has referred to, and relied upon, the case of Dolat Ram Vs. State of Haryana, reported in (1995) 1 SCC 349, for the purpose of bringing out the distinction between the factors, relevant for rejecting bail in a non-bailable case, and the factors, relevant for cancellation of bail, when bail already stands granted.

CAN BAIL BE CANCELLED IF ACCUSED HAS NOT ABUSED
HIS LIBERTY OF BAIL ?

17. A microscopic reading of the observations of the Supreme Court, in Dolat Ram's case (supra), as reproduced above, clearly brings out one aspect of law, namely, that the grounds of cancellation of bail, which have been enumerated, in Dolat Ram's case (supra), are general in nature and that these conditions are only illustrative and not exhaustive inasmuch as the Court has observed, in Dolat Ram (supra), –.....Generally speaking, the grounds for cancellation of bail, broadly illustrative and not exhaustive .

18. The question, therefore, is as to what the Supreme Court meant when it observed that the grounds, which are generally considered for cancellation of bail, are 'illustrative and not exhaustive'. This aspect of law, now, needs examination in the present appeal.

19. Having taken into account the general conditions of granting of bail and the principles, governing cancellation of bail, in the sense that bail, if granted, cannot, ordinarily, be cancelled unless there are supervening circumstances making it no longer conducive for effective investigation or for fair trial to allow the accused to enjoy his liberty of bail, it is, now, time to consider as to whether bail, if once granted by a Magistrate, cannot, under any circumstances, be cancelled by a Court of Session or a High Court by taking resort to the provisions of Section 439 Cr. PC unless violation of the conditions of bail or misuse of the liberty of bail by the accused is shown to the satisfaction of the Court. In other words, the question is: when cancellation of bail is sought not on the ground that the accused has misused his liberty of bail, but on

the ground that the Magistrate had ignored relevant materials, while granting bail and thereby granted bail in a case, where bail ought not

to have granted, whether it is within the ambit of the powers of the High Court, under Section 439 (2) Cr. PC, to cancel such bail even when there is no accusation that the accused has misused his liberty of bail?

20. To put it a little differently, the question is: Unless an accused has misused his liberty of bail, whether bail, already granted by a Magistrate, can be interfered with by the High Court by invoking the provisions of Section 439 (2) Cr. PC if the Magistrate, while granting bail, had ignored or not taken into account the relevant materials, which warranted that bail be refused? More than three decades ago, the Supreme Court, in Gurcharan Singh Vs. State (Delhi Administration), reported in (1978) 1 SCC 118, observed:

> "if, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439 (2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis--vis the High Court. "
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> (Emphasis is supplied)

21. From the above observations, made in Gurcharan Singh (supra),

what clearly transpires is that when the State is aggrieved by an order of a Magistrate granting bail to an accused, where bail ought not have been granted, it is still competent for the State to move the High Court to invoke its powers under Section 439 (2) Cr. PC for cancellation of

such bail even though there is no allegation of misuse of the liberty of bail by the accused or even when no new circumstances warranting cancellation of bail might have arisen. Thus, it is possible for the High Court to cancel bail of an accused, where bail has been granted by a Magistrate or a Court of Session in the circumstances in which bail ought not have been granted. Such cancellation is possible even if there is no new circumstances justifying cancellation of bail in the sense that the accused has misused his liberty of bail. Such cancellation of bail would be, in fact, cancellation of bail on merit by virtue of the provisions of Section 439 (2) Cr. PC and not because of misuse of liberty on bail.

22. As already indicated above, the Supreme Court, in Dolat Ram Vs. State of Haryana, reported in (1995) 1 SCC 349, pointed out, though not explicitly, yet cogently, that in order to cancel bail, though very cogent and overwhelming circumstances are necessary and though, generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any

manner, these circumstances or factors are merely 'illustrative and not exhaustive' meaning thereby that even for reasons other than interference with due course of administration of justice, it is possible to cancel bail.

23. It was contended, in Puran Vs. Rambilas, reported in (2001) 6 SCC 338, that once bail has been granted, it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission, reliance was placed on the decision of

Dolat Ram (supra). Pointed out the Supreme Court, in Puran's case (supra), that even in Dolat Ram (supra), the Court, having held that the general grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner, has, however, clarified that these instances are merely 'illustrative and not exhaustive'. One of the grounds for cancellation of bail, according to the Supreme Court, in Puran's case (supra), would be where, ignoring material evidence on record, a perverse order granting bail is passed in a heinous crime and that too, without giving any reasons. Such an order, according to the Supreme Court, in Puran's case (supra), would be against principles of law and the interest of justice would also require that such a perverse order be set aside and the bail be

cancelled. Further points out the Supreme Court, in Puran's case (supra), that where bail has been granted arbitrarily and in wrong exercise of discretion by the trial Court, such a decision needs to be corrected by the High Court.

24. A Full Bench of this Court too had, in State of Assam and Ors. (suo moto), reported in 2007 (1) GLT 330 (FB), the occasion to deal specifically with the question as to whether bail, if granted, can be cancelled, when the Magistrate had ignored relevant materials, while granting bail and thereby granted bail in a case, where bail ought not to have been granted, though, while applying for cancellation of such bail by the State, there is no accusation of misuse of the liberty of bail by the accused.

25. The Full Bench, referring to Gurcharan Singh (supra), pointed out that the approach, in such a case, should be whether an order, granting bail, was vitiated by any serious infirmity for which it was right and proper for the High Court to interfere with the interest of justice.

26. The Full Bench, referring to Gurcharan Singh (supra), pointed out that the approach, in such a case, should be whether an order, granting bail, was vitiated by any serious infirmity for which it was right and proper for the High Court to interfere with the interest of

justice.

27. What emerges from the above discussion is that it is permissible for the High Court to cancel bail by invoking its jurisdiction under Section 439(2) Cr.PC if a Magistrate or Court of Session grants bail to an accused, in a case, by ignoring the relevant materials or on consideration of irrelevant factors and thereby allowed the accused to go on bail in a case, where bail ought not to have been granted. The High Court can cancel such bail even if no new circumstances exist indicating interference with the investigation of the case by the accused by misusing his liberty of bail.

RELEVANT LEGISLATIONS

28. In the light of the facts, as have been set out above, leading to the present appeal, materials on record and the submissions made by the learned counsel for the parties concerned, we, now, proceed to determine the question as to whether the impugned order, refusing to grant bail to the accused-appellant, Jibangshu Paul, can be sustained.

29. Before we discuss the sustainability of the impugned order, it is worth recalling that when the Terrorists and Disruptive Activities (Prevention) Act, 1987, was repealed, the Prevention of Terrorist Activities Act, 2002, came to be enacted to combat, amongst others,

the menace of terrorism. However, even Prevention of Terrorist Activities Act, 2002, came to be repealed in 2004 and when the terror attack took place in Mumbai on 26.11.2008, there was no specific legislation, in force, to help India's fight against terrorism at the national level inasmuch as investigations into the acts of terrorism were to be, ordinarily, carried by the various agencies at the State level. In the aftermath of Mumbai terror attacks, National Investigation Agency Act, 2008 (which is being referred to as 'the NIA Act'), therefore, came into force on 31.12.2008. The NIA Act created Special Courts for trial of scheduled offences. In order to make law more stringent than what it was, the Unlawful Activities (Prevention) Act, 1967 (which is being referred to as, the 'UA (P) Act, 1967'), too, witnessed significant amendments introduced on 31.12.2008.

30. In the light of the scheme of investigation as perceived by the NIA Act, the trial of scheduled offences, the relevant penal provisions and also the provisions with regard to bail, as have now been incorporated, in the UA(P) Act, 1967, the present appeal needs consideration.

31. As terrorism has become a threat to the very existence of human society and terrorist activities have not remained a localized crime, a national investigation agency, which can co-ordinate and oversee investigation into the offences having national and cross-border repercussion, was deemed necessary. It is to meet this requirement

that the NIA has been given birth. Whether, under the scheme of our Constitution, the NIA is or is not a valid legislation has not been debated in the present case.

32. Bearing in mind the threat of terrorism and its national and international ramifications, which India has to fight vis-à-vis the limitations on the powers of the Special Court to grant bail and the High Court's jurisdiction and powers in such matters, the present appeal, seeking to get set aside the impugned order of the learned Special Court refusing to grant bail to the accused-respondent, Jibangshu Paul, needs to be examined.

WHETHER THE POWER OF THE SPECIAL COURT, CONSTITUTED UNDER THE NIA ACT, TO GRANT BAIL IS GOVERNED BY SECTION 437 CrPC OR SECTION 439 CrPC ?

33. On a close reading of Section 16 of the NIA Act, what becomes clear is that notwithstanding the fact that, according to Section 16 (3) of the NIA Act, a Special Court, for the purpose of trial of a scheduled offence, has all the powers of a Court of Session and shall try such offence 'as if it were a Court of Session', the Special Court does not become a Court of Session inasmuch as it is only the power of trial of a Court of Session that the Special Court, by virtue of Section 16 (3), entitled to exercise. In other words, the expression, 'as if it were a Court of Session', which occurs in Section 16 (3), really reflects that it is only the procedure for trial of a Sessions case, which a Special Court can follow; but it is, otherwise, not a Court of Session.

34. We may pause here to point out that Section 16 (3) of the NIA Act states, "subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a

Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session." Similar provisions existed in Section 14 (3) of TADA. Both the provisions are, thus, pari materia. The Supreme Court had the occasion to interpret Section 14 (3) in Usmanbhai Dawoodbhai Memon (supra). Referring to the expression 'as if it were', appearing in Section 3 of the TADA, the Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that though the Parliament has vested, by using the words 'as if it were', in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14 (3), must be restricted to the procedure to be followed for trial of an offence under the TADA, i. e., trial must be in accordance with the procedure prescribed by the Code in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, which appear at para 18, read as under:

> "18. No doubt, the legislature by the use of the words "as if it were" in Section 14 (3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by Learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i. e. such trial must be in accordance with the procedure prescribed under the Code of the

trial before a Court of Session, insofar as applicable."

35. The above impression gets strengthened from the fact that Section 16 (1) of the NI Act provides that a Special Court may take cognizance of offence, without the accused being committed to it for trial, which, in turn, implies that a Special Court takes cognizance of an offence as a Court of original jurisdiction and does not have the

trappings of a Court of Session, which cannot, ordinarily, take, in the light of Section 193 of the Code, cognizance of an offence, unless the case, in terms of Section 209 of the Code, is committed to it, for, Section 193 states that a Court of Session cannot take cognizance of an offence as a Court of original jurisdiction except when the Code or the special law provides otherwise. Thus, a Court of Session could not have taken cognizance of an offence, under the NIA Act, without the case having been committed to it; but, as the NIA Act provides for taking cognizance of an offence by a Court of Session, without the case being committed to it, the Court of Session can take cognizance of offence, under the NIA Act, as the Court of original jurisdiction. Such a deviation is possible even in respect of a specified offence under the Indian Penal Code. For instance, sub-Section (2) of Section 199 of the Code provides that when an offence, falling under Chapter XXI of the IPC, is alleged to have committed against a person, who, at the time of such commission, is the President of India, Vice-President of India,

Governor of a State, the Administrator of a Union territory or a minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his functions, a Court of Session may take cognizance of such an offence, without the case being committed to it, upon a complaint, in writing, made by the Public Prosecutor.

36. Section 16 of the NIA Act also makes it clear that cognizance of an offence can be taken by a Special Court on the basis of a complaint of facts that constitute such offence or upon a police report of such facts. Thus, a Special Court can take cognizance of an offence not only

on the basis of a complaint, as defined in Section 2 (d) of the Code, but also on the basis of a police report, as defined in Section 2 (r) of the Code, the police report being, as indicated above, the report, which the police submits, under Section 173 (2), on completion of investigation and is popularly known as charge-sheet.

37. The question, which, now, arises for consideration is: when a Special Court takes cognizance of an offence under the NIA Act, is it exercising its powers given to a Magistrate under Section 190 of the Code, though it (i. e. , the Special Court), in terms of Section 16 (3) of

the NIA Act, has all the powers of a Court of Session?

38. We have already indicated above that unlike a Court of Session, which cannot try a case, unless committed to it, under Section 209 of the Code, by a court of competent jurisdiction, a Special Court can take cognizance of an offence without any order of committal being issued by any Magistrate, if the Special Court receives a complaint of facts that constitute an offence, or, upon police report of such facts. Since there is nothing in the NIA Act to show that a complaint has to be necessarily made by a public servant, it clearly follows that any individual can file a complaint before a Special Court. When such a complaint is filed, what is the course of action, which the Special Court can adopt ? Obviously, the Special Court may take, in terms of Section 16 (1), cognizance of the offence, which the complaint may disclose, and proceed to record, in terms of Section 200 of the Code, the statements of the complainant and his witness (es), if any, present. If the Special Court feels the necessity, it may even hold, in terms of Section 202 of the Code, an enquiry, and, on completion of such

enquiry, it may either, in terms of Section 203 of the Code, dismiss the complaint, or, in terms of Section 204 of the Code, issue processes.

39. We may pause here to point out that Section 190 (1) of the Code prescribes three distinct modes of taking of cognizance by a

Magistrate, the modes being: (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

40. Coupled with the above, Section 193 read with Section 209 of the Code provides for a fourth mode of taking cognizance, namely, by way of commitment to the Court of Session.

41. Thus, Section 190 read with Sections 193 and 209 of the Code provides, broadly speaking, four distinct modes of taking of cognizance, three of the modes of taking cognizance being confined to a Magisterial Court and the fourth mode of taking cognizance being confined to the Courts of Session, namely, (i) upon receipt of a complaint of facts, which constitute such offence, (ii) upon a police report of such facts (iii) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed, and (iv) by way of commitment. The legislature may, in a given case, restrict taking of cognizance to one or more modes, which have been prescribed by Section 190. No wonder, therefore, that there are several statutes, which prescribe very limited mode of taking of cognizance. For instance, under Section 20 of the

Prevention of Food Adulteration Act, 1954, (in short, 'the PFA Act') cognizance of an offence, under the PFA Act, cannot be taken except by, or with the written consent of, the Central or the State Government or a person authorizes, in this behalf, by general or special order, by the Central or State Government. The only exception, in this regard, is when a prosecution is instituted, under the proviso to Section 20 (1), by a purchaser or recognized consumer association if the purchaser or the recognized consumer association, as in Section 12, produces, in the Court, a copy of the report of the Public Analyst along with the complaint.

42. In order to clearly appreciate that a Court of Session, while functioning as a Special Court, under the NIA Act, cannot be treated to be a Court of Session, though it (Special Court) may have the powers of the Court of Session, as far as the procedure for trial is concerned, a reference may be made to the provisions of the Prevention of Corruption Act, 1988 (in short, 'the PC Act, 1988'). Section 5 of the PC Act, 1988, lays down the procedure and powers of a Special Judge. Sub-Sections (1) and (3) of Section 5 are of some relevance in the present case; hence, both these Sub-Sections are reproduced below:

> "5 (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973, (2 of 1974), for the trial of warrant cases by the Magistrates.
> 5 (2) *** *** ***
> 5 (3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to

> the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor";

43. When Sub-Sections (1) and (3) of Section 5 of the PC Act, 1988, are read together, what becomes clear is that Section 5 empowers a Special Judge to take cognizance of offence without the accused having been committed to it for trial and, though it shall follow the procedure prescribed by the Code for the trial of warrant cases by the Magistrates, the Court of the Special Judge shall be deemed to be a Court of Session. Thus, though a Special Judge, appointed under the PC Act, 1988, and functioning as the Court of the Special Judge, shall be deemed to be a Court of Session, it does not suffer from the limitations, which a Court of Session suffers from inasmuch as Section 193 of the Code disallows the Court of Session from taking cognizance of offence without case having been committed to it for trial; whereas a Court of Special Judge, in the PC Act, 1988, can take cognizance without the case being committed to it for trial. In other words, the Court of Special Judge, under the PC Act, 1988, acts and functions as a Court of original jurisdiction and not as a Court of Session, though the Court of the Special Judge shall, otherwise, be deemed to be a Court of Session. This apart, the PC Act,1988, disempowers the Special Judge

from taking cognizance unless requisite sanction for such prosecution is accorded by the prescribed authorities. In fact, even in respect of certain classes of offences under the Indian Penal Code, a court of original criminal jurisdiction cannot, in exercise of its powers under Section 190, take cognizance of certain categories of offences except

upon appropriate sanction having been granted, in this regard, by the competent authority. Section 197 of the Code furnishes one of such illustrations. Even in respect of some other offences under the Indian Penal Code, the mode of taking of cognizance, under Section 190, stands restricted. For instance, in certain offences against marriage, such as, adultery or, bigamy, no cognizance can be taken except upon complaint as prescribed in Section 198. In short, thus, it is for the legislature to provide the mode of taking of cognizance and also the manner of taking of cognizance.

44. While Sub-Section (1) of Section 190 prescribes, as pointed out above, three distinct modes of taking of cognizance, by a Magistrate, which includes taking of cognizance even upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed, a Special Court, constituted under the NIA Act, cannot, in the light of Section 16 (1) of the NIA Act, take cognizance on the basis of information received or

upon its own knowledge; it can take cognizance only on the basis of complaint or police report, as indicated above, by Section 16 (1) of the NIA Act.

45. Should, therefore, a Special Court, under the NIA Act, be regarded as a Court of Magistrate, or, can it still be regarded as a Court of Session or is the Special Court, under the NIA Act, a combination of the Court of Magistrate and the Court of Session and, therefore, a Special Court is a class of Courts, which, notwithstanding the specified categories of Courts mentioned in Section 6 of the Code,

a special class of Court created by the 'special law', namely, the NIA Act?

46. When a Special Court can take cognizance of an offence without the case being committed to it, unlike what is required to be done in the case of a Court of Session, it logically follows that a Special Court is a court of original jurisdiction and cannot be regarded as a Court of Session except to the extent as provided by the NIA Act itself. The proposition, that a Special Court is not a Court of Session, is also supported by the fact that the NIA Act empowers a Special Court to try certain classes of offences, in a summary way, in the same manner as is done by a Magistrate in exercise of his powers under

Section 263 and 265 of the Code.

47. The above aspect of law will become transparent when one considers the case of A. R. Antulay Vs. R. S. Nayak, reported in (1984) 2 SCC 500. In A. R. Antulay (supra), the question had arisen as to whether a Special Court, constituted under the P. C. Act, 1952, could take cognizance on the basis of a private complaint and, in this regard, it was urged, inter alia, before the Supreme Court, that since a Court of Special Judge has all the trappings of the Court of Session, it cannot take cognizance on the basis of a complaint, as provided by Section 190 of the Code, because, Section 190 of the Code confers power to take cognizance only on the Magistrate in any of the three modes prescribed therein and Section 190 cannot be resorted by a Court of Session to be able to take cognizance of offence on the basis of a 'complaint'. The Constitution Bench was, therefore, in A. R. Antulay (supra), called upon to decide the question as to whether the

Court of Special Judge, under the PC Act, 1947, as stood amended by the Criminal Law (Amendment) Act, 1952, is a Court of Magistrate or a Court of Session.

48. Turning down the above argument, the Supreme Court pointed out that if Section 190 of the Code cannot be availed of by a Special Judge, none of the modes of taking of cognizance of offences, as mentioned in Section 190, would be available to a Special Judge. In

the case of A. R. Antulay (supra), it was P. C. Act, 1947, which was in force and Sections 6 and 8 of this Act had fallen for interpretation by the Constitution Bench. Section 6 of the PC Act, 1947, (as amended in 1952) read as under:

> "6. (1) The State Government may, by notification in the official Gazette, appoint as many special Judges as may be necessary for such area as may be specified in the notification to try the following offences, namely:- (a) an offence punishable under Section 161, 162, 163, 164, 165 or Section 165-A of the Indian Penal Code or Section 5 of the Prevention of Corruption Act, 1947. (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a). (2) A person shall not be qualified for appointment as special Judge under this Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898. "

49. Thus, Section 6 of the PC Act, 1947, prescribed the offences, which could have been taken cognizance of and tried by a Special Judge. In the PC Act, 1988, it is, now, Section 3, which lays down the offence, which can be taken cognizance of and tried by a Special Judge. While in the PC Act, 1988, it is Section 5, which lays down the procedure and power of a Special Judge, it was Section 8 of the PC Act, 1947, which contained the procedure and power of a Special Judge. Section 8 of the PC Act, 1947, read as under:

> "8 (1) A special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant cases by Magistrates.
> (2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole

circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof, and any pardon so tendered shall, for the purposes of Sections 339 and 339-A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under Section 338 of that Code.

(3) Save as provided in sub-section (1) or sub-section (2) the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not consistent with this Act, apply to the proceedings before a special Judge and for the purposes of the said provisions, the Court of the special Judges shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(3-A) In particular, and without prejudice to the generality of the provisions contained in sub-section (3) the provisions of the Code of Criminal Procedure, 1898, shall so far as may be, apply to the proceedings before a special Judge, and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate.

(4) A special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted"

50. What is, now, of immense importance to note is that in terms of Section 8 (3) of the PC Act, 1947, as well as in terms of Section 5 (3) of the PC Act, 1988, a Special Judge may take cognizance of offence

without the accused being committed to him for trial and, in trying the accused person, he shall follow the procedure, prescribed by the Code, for trial of warrant cases by the Magistrate and that while exercising its powers, the Court of a Special Judge shall be deemed to be a Court of Session. It was, therefore, contended, in A. R. Antulay (supra), that a Special Court is not a Court of Magistrate, though it can take cognizance without the case being committed to it for trial and, hence,

unlike a Magistrate, a Special Judge could not have taken cognizance on the basis of a complaint of fact constituting the offence. The Constitution Bench, in A. R. Antulay (supra), having pointed out that the Code perceives four distinct modes of taking of cognizance of offence, noted that there is, apart from the four modes, which the Code prescribes, (and which we have already mentioned above) for the purpose of taking of cognizance, no other known or recognized mode of taking of cognizance of an offence by a criminal court exists and, hence, if a Court of a Special Judge is a criminal court, it cannot take cognizance of offence except in any one of the modes, which the Code prescribes. The relevant observations, made in this regard, in A. R. Antulay (supra), read as under:

> "17. Now the Code of Criminal Procedure prescribed only four methods of taking cognizance of an offence whether it be by a Magistrate or a Sessions Court is for the time being immaterial. The Code prescribes four methods for taking cognizance upon a complaint, or upon a report of the police officer or where the Magistrate himself comes to know of the commission of offence through some other source and in the case of Sessions Court upon a commitment by the Magistrate. There is no other known or recognised mode of taking cognizance of an offence by a criminal court. Now if Court of Special Judge is a criminal court, which at least was not disputed, and jurisdiction is conferred upon the presiding officer of the Court of Special Judge to take cognizance

> of offences simultaneously excluding one out of the four recognised modes of taking cognizance, namely, upon commitment by a Magistrate as set out in Section 193, the only other method by which the Court of Special Judge can take cognizance of an offence for the trial of which it was set up, is any one of the remaining three other methods known to law by which a criminal court would take cognizance of an offence, not as an idle formality but with a view to initiating proceedings and

ultimately to try the accused. If the language employed in Section 8 (1) is read in this light and in this background that a Special Judge may take cognizance of offence without the accused being committed to him for trial, it necessarily implies that the Court of Special Judge is armed with power to take cognizance of offences but that it is denied the power to take cognizance on commitment by the Magistrate. This excludes the mode of taking cognizance under Section 193. Then remains only Section 190 which provides various methods of taking cognizance of offences by courts. *** *** *** ***

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18. Section 8 (1) says that the Special Judge shall take cognizance of an offence and shall not take it on commitment of the accused. The Legislature provided for both the positive and the negative. It positively conferred power on Special Judge to take cognizance of offences and it negatively removed any concept of commitment. It is not possible therefore, to read Section 8 (1) as canvassed on behalf of the appellant that cognizance can only be taken upon a police report and any other view will render the safeguard under Section 5-A illusory.

19. *** *** ***

20. *** *** ***

21. *** *** ***

22. *** *** ***

23. Once Section 5-A is out of the way in the matter of taking cognizance of offences committed by public servants by a Special Judge, the power of the Special Judge to take cognizance of such offences conferred by Section 8 (1) with only one limitation, in any one of the known methods of taking cognizance of offences by

courts of original jurisdiction remains untended. One such statutorily recognised well-known method of taking cognizance of offences by a court competent to take cognizance is upon receiving a complaint of facts which constitutes the offence. And Section 8 (1) says that the Special Judge has the power to take cognizance of offences enumerated in Section 6 (1) (a) and (b) and the only mode of taking cognizance excluded by the provision is upon commitment. It therefore, follows that the Special Judge can take cognizance of offences committed by public servants upon receiving a complaint of facts constituting such offences.

24. *** *** ***

25. *** *** ***

26. For more than one reason it is not possible to accept this submission. If Section 190 cannot be availed, we fail to see how a Special Judge would be entitled to take cognizance on a police

> report. If Section 190 is not attracted all the three modalities of taking cognizance of offences would not be available. One cannot pick and choose as it suits one's convenience. Either all the three modalities are available or none. And Section 8 (1) which confers power of taking cognizance does not show any preference. On this short ground, the submission must be rejected. "
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> (Emphasis is added)

51. It has been pointed out by the Supreme Court, in A. R. Antulay (supra), that the Special Court is an addition to the classes of courts, which Section 6 of the Code provides for, and it is not necessary that a Special Court has to be either a Court of Magistrate or a Court of Session. Far from this, a Special Court, according to A. R. Antulay (supra), may be a combination of both. Shorn of all embellishments, the Court of a Special Judge, Supreme Court observed, is a court of original criminal jurisdiction and, except those powers and functions, which are specifically conferred on such a court, or, specifically denied, it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status description of

Magistrate or a Court of Session and that it will enjoy all the powers, which a court of original jurisdiction enjoys, save and except the ones, which are specifically denied.

52. The Supreme Court reiterates, at paragraph 28 of A. R. Antulay (supra), that the Court of Special Judge has to be treated as a court of original criminal jurisdiction and shall have all the powers, which a court of original criminal jurisdiction has under the Code, except those powers, which are specifically excluded. Having examined the matter

from different angles, the Apex Court concluded, in A. R. Antulay (supra), that a private complaint, which may be filed by a complainant, is maintainable under the scheme of the P. C. Act, 1952, and that a court of Special Judge can take cognizance on the basis of such a complaint. The relevant observations, which appear at paragraph 27 and 28, in A. R. Antulay (supra), read as under:

> 27. . . . . .
> .....

..... .

To take the cases of corruption out of the maze of cases handled by Magistrates, it was decided to set up special courts. Section 6 conferred power on the State Government to appoint as many Special Judges as may be necessary with power to try the offences set out in clauses (a) and (b). Now if at this stage a reference is made to Section 6 of the Code of Criminal Procedure which provides for constitution of criminal courts, it would become clear that a new court with a new designation was being set up and that it has to be under the administrative and judicial superintendence of the High Court. As already pointed out, there were four types of criminal courts functioning under the High Court. To this list was added the Court of a Special Judge. Now when a new court which is indisputably a criminal court because it was not even whispered that the Court of Special Judge is not a criminal court, is set up, to make it effective and functionally oriented, it becomes necessary to prescribe its powers, procedure, status and all ancillary provisions. While setting up a Court of a Special Judge keeping in view the fact that the high dignitaries in public life are likely to be tried by such a court, the qualification prescribed was that the person to be appointed as Special Judge has to be either a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge. These three dignitaries are above the level of a Magistrate. After prescribing the qualification, the Legislature proceeded to confer power upon a Special Judge to take cognizance of offences for the trial of which a special court with exclusive jurisdiction was being set up. If a Special Judge has to take cognizance of offences, ipso facto the procedure for trial of such offences has to be prescribed. Now the Code prescribes different procedures for trial of cases by different courts. Procedure for trial of a case before a Court of Session is set out in Chapter XVIII; trial of warrant cases by Magistrates is set out in Chapter XIX and the provisions therein included catered to both the types of cases coming before the Magistrate, namely, upon police report or otherwise than on a police report. Chapter XX prescribes the procedure for trial of summons cases by Magistrates and Chapter XXI prescribes the procedure for summary trial. Now that a new criminal court was being set up, the Legislature took the first step of providing its comparative position in the hierarchy of courts under Section 6 Crpc by bringing it on level more or less comparable to the Court of Session, but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8 (1) itself that it is not a Court of Session because it can take cognizance of offences without commitment as contemplated by Section 193 Crpc. Undoubtedly in Section 8 (3) it was clearly laid down that subject to the

provisions of sub-sections (1) and (2) of Section 8, the Court of Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. In contra-distinction to the Sessions Court this new court was to be a Court of original jurisdiction. The Legislature then proceeded to specify which out of the various procedures set out in the Code, this new court shall follow for trial of offences before it. Section 8 (1) specifically says that a Special Judge in trial of offences before him shall follow the procedure prescribed in the Code of Criminal Procedure for trial of warrant cases by Magistrates. The provisions for trial of warrant cases by the Magistrate are to be found in Chapter XXI of 1898 Code. A glance through the provisions will show that the provisions therein included catered to both the situations namely, trial of a case initiated upon police report (Section 251-A) and trial of cases instituted otherwise than on police report (Section 252 to 257). If a Special Judge is enjoined with a duty to try cases according to the procedure prescribed in foregoing provisions he will have to first decide whether the case was instituted upon a police report or otherwise than on police report and follow the procedure in the relevant group of sections. Each of the Sections 251-A to 257 of 1898 Code which are in pari materia with Sections 238 to 250 of 1973 Code refers to what the Magistrate should do. Does the Special Judge therefore, become a Magistrate? This is the fallacy of the whole approach. In fact, in order to give full effect to Section 8 (1), the only thing to do is to read Special Judge in Sections 238 to 250 wherever the expression "magistrate" occurs. This is what is called legislation by incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate to take cognizance of the offence, Special Judge is a Magistrate? What is to be done is that one has to read the expression "special Judge" in place of Magistrate, and the whole thing becomes crystal clear. When taking cognizance, a Court of Special Judge enjoyed the powers under Section 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a Court of Session. The entire argument inviting us to specifically decide whether a Court of a Special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a Special Judge has to be one or the other, and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the court and must be eschewed. Shorn of all embellishment, the Court of a Special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied.

> "28. Section 9 of the 1952 Act would equally be helpful in this behalf. Once Court of a Special Judge is a Court of original criminal jurisdiction, it became necessary to provide whether it is subordinate to the High Court, whether appeal and revision against its judgments and orders would lie to the High Court and whether the High Court would have general superintendence over a Court of Special Judge as it has over all criminal courts as enumerated in Section 6 of the Code of Criminal Procedure. The Court of a Special Judge, once created by an independent statute, has been brought as a Court of original criminal jurisdiction under the High Court

> because Section 9 confers on the High Court all the powers conferred by Chapters XXXI and XXXIII of the Code of Criminal Procedure, 1898 on a High Court as if the Court of Special Judge were a Court of Session trying cases without a jury within the local limit of the jurisdiction of the High Court. Therefore, there is no gainsaying the fact that a new criminal court with a name, designation and qualification of the officer eligible to preside over it with powers specified and the particular procedure which it must follow has been set up under the 1952 Act. The court has to be treated as a Court of original criminal jurisdiction and shall have all the powers as any Court of original criminal jurisdiction has under the Code of Criminal Procedure, except those specifically excluded. "

(Emphasis is added)

53. Section 5 (3) of the P. C. Act, 1988, reads, "save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor"; whereas Section 16 (3) of the NIA Act reads:

> "subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session. "

54. If the provisions, contained in Section 5 (3) of the P. C. Act, 1988, and Section 16 (3) of the NIA Act are dispassionately analyzed, it becomes clear that under the NIA Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as the procedure, prescribed in the Code, for trial before a Court of Session is concerned. The expression, 'as if it were a Court of Session', does not mean that the Special Court would become a Court of Session.

55. Thus, as far as the trial of scheduled offences by the Special Court, NIA, are concerned, the Special Court will have the power of the Court of Session as far as such power is, in the light of the modified provisions of the NIA Act, exercisable as regards the procedure of trial by the Special Court or the Court of Session, as the case may be. But, so far as taking of cognizance of Scheduled offences is concerned, the Special Court's role is of the court of original criminal jurisdiction.

56. Notwithstanding, therefore, the fact that while functioning as a trial Court, the Special Court or, in the absence of constitution of a Special Court, a Court of Session shall be treated 'as if it were a Court of Session', the fact of the matter, in the light of A. R. Antulay (supra), remains that irrespective of the fact as to whether a Special Court has been constituted or not under the NIA Act, a Special Court, if constituted, or the Court of Session, if the Special Court has not been constituted, is, under the NIA Act, not a Court of Session, this Special Court does not suffer from the trappings of

a Court of Session and, while trying an offence, it has to follow, so far as applicable, the procedure for trial of a sessions case, as envisaged by the Code. The Special Court, under the NIA Act, will, however, remain, for the purposes, other than trial, a Court of original criminal jurisdiction. Necessarily, therefore, such a Court, being a Court of original jurisdiction, is the appropriate Court (and not the Court of Magistrate), which can authorize detention of a person accused of having committed an offence under the NIA Act and remand him to custody, police or judicial, in terms of the provisions of Section 167 (2) of the Code. There is no dispute that a Special Court has been constituted under the NIA Act and the orders, which stand impugned in this appeal were passed by the Special Court, NIA.

57. Thus, a Special Court, under the NIA Act, also exercises the power of a Magistrate as contemplated under Section 167 of the Code, when the case is pending for investigation, though such a Court has the power of a Court of Session so far as the trial is concerned except, of course, to the extent as its power may stand modified by the relevant provisions of the statute enacted in this regard. It is only in exceptional circumstances, as provided by Section 167 (2-A) of the Code, that an accused, who is arrested in connection with an offence, under such a 'special law', as the NIA Act is, can be produced before a Magistrate for the purpose of transit to the Special Court, if immediate production, as envisaged by Section 167, before the Special Court of competent jurisdiction, is not possible, or, unless the 'special law' itself provides for such powers of production before a Magistrate. For instance, in a case, under the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short, 'the NDPS Act'), production of an arrested accused before a Judicial Magistrate, instead of a Special Court, is permissible, and such Magistrate may order detention of such a person, in custody, for a period not exceeding fifteen days. This can be well-understood by a reference to the scheme of the NDPS Act, which empowers a Special Court to take cognizance of an offence on the basis of 'police report'. Since no commitment, as provided in Section 209 Cr. PC. is required to be made in the NDPS Act, the power to remand the accused to the police or judicial custody has to be exercised by the Special Court, constituted under the NDPS Act. In order to, however, enable the investigating agency to produce an accused in connection with an offence under the NDPS Act, before a Court other than a Special Court, specific provisions, in the form of Section 36 (a) (b) in the NDPS Act, have been made, which empower a Magistrate to remand to custody such an accused for the initial period of 15 days. But, thereafter, the accused can be detained only on the basis of remand order passed by the Special Court or where the Special Court, under the NDPS Act, has not been constituted, by the Court of Session.

58. As a corollary, what one can very safely conclude is that unless a 'special law' provides a Magistrate to pass orders of remand despite the Special Court (if the Special Court has been constituted or the Court of Session, when a Special Court has not been constituted), no order of remand of such an accused can be made by a Magistrate except during the transit period as contemplated by Section 167 (2-A) of the Code or where the statute itself provides for such production before some other authority, such as, a Judicial Magistrate, as in the case of NDPS Act.

59. Now, the question is: when such an arrested person applies for bail, whether the application for bail, so made, would be treated to be an application under Section 439 of the Code on the ground that a Special Court has the power of a Court of Session so far as the trial of the offence is concerned

or is the Special Court, when such Court is constituted, or the Court of Session, when the Special Court has not been constituted, as the case may be, can entertain such an application for bail only in terms of Section 437 of the Code?

60. The question, therefore, is this: When a person, arrested in connection with a Scheduled offence, is, on being taken into custody, brought, or pursuant to the fact that he is wanted in connection with a scheduled offence, appears, before a Special Court, when a Special Court stands constituted under the NIA Act, or before a Court of Session, when the Special Court has not been constituted, what is the source of power, if any, of the Special or of the Court of Session, as the case may be, to consider an application for bail, if such an accused applies for bail. Will a Special Court or Court of Session exercise powers, in respect of such an application for bail, under Section 437 or 439 of the Code or under some other provisions of the NIA Act ? In order to reach a correct answer to this question, one has to carefully analyse the provisions of Section 437 vis-a-vis Section 439. With this end in view, both these sections are reproduced hereinbelow:

> "437. When bail may be taken in case of non-bailable offence. (1). When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail, but (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, of he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:
>
> Provided that the Court may direct that a person in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:
>
> Provided further that the Court may also direct that a person in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.
>
> Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:
>
> Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor. (2) If it appears to such officer or

> Court at any stage of the investigation, inquiry or trial as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446a and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided. (3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI of the Indian Penal Code (45 of 1860) or abetment of, or attempt to commit, any such offence, is released on bail under sub-section (1) the Court shall impose the conditions,- (a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, (b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and (c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,and may also impose, in the interests of justice, such other conditions as it considers necessary. (4) An officer or a Court releasing any person on bail under sub-

section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing. (5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. (6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not cocluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. (7) If, at any time after the conclusion of the trial of a person accused of any non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered".

> "439. Special powers of High Court or Court of Session regarding bail.- (1) A High Court or Court of Session may direct- (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section; (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:"

61. From a careful reading of the provisions contained in Section 437 (1), what becomes transparent is that Section 437 (1) gives power to grant bail to a court 'other than the High Court or Court of Session'. Admittedly, a Special Court, under the NIA Act, is not a Court of Session and even the Court of Session, while acting as the Special Court under the NIA Act, does not, as already discussed

above, act as a Court of Session. The Special Court is also not a High Court, for, a Special Court, as defined in Section 2 (h), is a Court, which is constituted, under Section 11, by the Central Government or, under Section 22, by a State Government. The expression, 'a Court other than the High Court, or the Court of Session', has very wide meaning and includes, within its ambit, not only the Magisterial Courts, but all such Courts, including a Special Court, which do not fall within the expressions, 'the High Court' or 'the Court of Session'. A Special Court, under the NIA Act, not being a High Court, or a Court of Session, would obviously fall within the expression 'a Court other than the High Court or the Court of Session'.

62. It is also well to remember that merely because of the fact that a Court of Session can function as a Special Court if Special Court is not constituted under a special law, it does not follow that the Court of Session, which exercises the powers of the Special Court, would become a Court of Session. In the given scheme of a 'special law', a Court of Session, as already pointed out in AR Antulay (supra), may become a Court of original jurisdiction with no trappings of the Court of Session. In such circumstances, merely because of the fact that a Sessions Judge exercises the jurisdiction of a Special Court, the Special Court would not be treated, or would not be deemed, to have become, a Court of Session. When the Special Court, in the case at hand, falls within the expression, 'a Court other than the High Court or the Court of Session', which appears in Section 437 (1), it logically follows that a Special Court would run all the limitations, which are imposed by Section 437 on the powers of a Court, covered by Section 437, in respect of granting of bail. Logically extended, this will mean that, amongst other limitations, as specified by sub-Section (1) of Section 437, a Special Court would not be able to release a person on bail if there appears a reasonable ground for believing that he has been guilty of offences punishable with death or imprisonment for life except when a case is covered by the proviso to Section 437 (1), which says that even such an accused person may be released, if the accused person is a woman or is sick or is infirm or if, for any other special reason, the Special Court considers it just and proper to release such a person.

63. Unlike, therefore, the powers, which a Court of Session enjoys, while considering a bail application, under Section 439, the Special Court runs the limitations, which are imposed by Section 437. Resultantly, therefore, a Special Court cannot enlarge a person on bail except to the extent as provided in Section 437. Apart from the limitations imposed on the powers of a Special Court as are prescribed by Section 437, even the special statute, which creates the Special Court, can impose additional limitations. No wonder, therefore, that the power to grant bail, in the case of NDPS, is much more restricted than what Section 437 provides inasmuch as Section 37 of the NDPS imposes further limitations, on the Special Court, in matters of granting bail and such limitations would apply to a Sessions Judge even if he acts as a Special Court under the NDPS Act, for, while exercising the powers of a Special Court, the Sessions Judge does not act or function as a Court of Session, but as a Court of ordinary criminal jurisdiction.

64. We may pause, at this stage, to point out that with the object of prevention of, and for coping with terrorist and disruptive activities and for matters connected with or incidental thereto, the Terrorist and Disruptive Activities (Prevention) Act, 1987, popularly known as 'tada', was enacted. Section 20 (8) of the TADA contained provisions with regard to the Designated Court's power to grant bail, the Designated Court being a Court constituted, under the TADA, to try offences under

the TADA. Section 20 (8) read:

> " (8) Notwithstanding anything contained in the Code, no person, accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless, (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. "

65. In Usmanbhai Dawoodbhai Memon (supra), the Supreme Court had an occasion to consider the question as to whether Section 439 of the Code could be invoked by a person accused of an offence under the TADA? Yet another question, which arose, in Usmanbhai Dawoodbhai Memon (supra), was as to whether the source of power of the Designated Court to grant bail was Section 20 (8) of the TADA, which we have quoted above, or Section 437 of the Code.

66. In Usmanbhai Dawoodbhai Memon Vs. State of Gujarat, reported in (1988) 2 SCC 271, the application for bail having been refused by the Designated Court constituted under the TADA Act, the accused had applied for bail to the High Court under Section 439 read with Section 482 of the Code. The High Court rejected the bail application on the ground that it had no jurisdiction to entertain any such application under Section 439 or by taking recourse to its inherent powers under Section 482 Cr. PC. The reason, assigned by the High Court, was that the TADA Act, being a special enactment and the Designated Court, constituted thereunder, not being a Court subordinate to the High Court, and, further, that in view of the provisions contained in sub-section (1) of Section 19 of the Act, which provided that an appeal, as a matter of right, shall lie, against any judgment, sentence or order of the Designated Court, not being an interlocutory order, to the Supreme Court, and in view also of the explicit bar, contained in sub-section (2) thereof, which provided that no appeal or revision shall lie before any court, there was exclusion of jurisdiction of the High Court in regard to the proceedings before a Designated Court.

67. It was also urged before the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), that since a Court of Session, in the absence of constitution of a Designated Court, can exercise the powers of the Designated Court, the source of power to grant bail is Section 439 and not Section 437 of the Code. This was resisted by the Government by contending that the source of power of a Designated Court is really traceable to Section 437 and not Section 439 and that a Designated Court is nothing, but, 'a Court other than the High Court or the Court of Session', an expression, which appears in sub-Section (1) of Section 437. This construction was accepted by the Supreme Court in Usmanbhai Dawoodbhai Memon (supra). The Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that the use of ordinary courts does not imply use of standard procedure too. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system and though the Parliament, in its wisdom, has adopted the framework of the Code, yet the Code is not applicable except to the extent as the provisions, contained in the TADA, make it possible to apply the provisions of the Code.

68. It is worth noticing that the Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that the jurisdiction and power of a Designated Court are derived from the TADA and it is the TADA that one must, primarily, look to, for the purpose of deciding the question as to whether the Designated Court's power to grant bail is relatable to Section 437 or 439 and/or whether the High Court has the power to invoke its jurisdiction, under Section 439 or 482, to grant bail under the TADA, and, having examined the entire scheme of the TADA, the Supreme Court, in Usmanbhai Dawoodbhai Memon (supra), concluded that the source of the power of a Designated Court to consider bail is traceable to Section 437 and not Section 439 inasmuch as the Designated Court falls within the expression, "a Court other than the High Court or the Court of Session".

69. Similarly, in the case at hand, one has to, primarily, look into the provisions of the scheme of the NIA Act in order to determine if the power of the Special Court, in respect of grant of bail, is relatable to Section 437 or 439 and/or whether the High Court has the power to grant bail to an accused, under the NIA Act, by invoking its jurisdiction under 439 of the Code.

70. We may pause here to note that Section 16 (3) of the NIA Act states, "subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session." Similar provisions existed in Section 14 (3) of TADA. Both the provisions are, thus, peri materia. The Supreme Court had the occasion to interpret Section 14 (3) of the TADA in Usmanbhai Dawoodbhai Memon (supra). Referring to the expression 'as if it were', appearing in Section 3 of the TADA, the Supreme Court pointed out, in Usmanbhai Dawoodbhai Memon (supra), that though the Parliament has vested, by using the words, 'as if it were', in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14 (3), must be restricted to the procedure to be followed for trial of an offence under the TADA, i. e. , trial must be in accordance with the procedure prescribed, by the Code, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, which appear at para 18, read as under:

> "18. No doubt, the legislature by the use of the words "as if it were" in Section 14 (3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by Learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i. e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable. We must give some meaning to the opening words of Section 14 (3) "subject to the other provisions of the Act" and adopt a construction in furtherance of the object and purpose of the Act. The manifest intention of the legislature is to take away the jurisdiction and power of the High Court under the Code with respect to offences under the Act. No other construction is possible. The expression "high Court" is defined in Section 2 (l) (e) but there are no functions and duties vested in the High Court. The only mention of the High Court is in Section 20 (6) which provides that Sections 366-371 and Section 392 of the Code shall apply in relation to a case involving an offence triable by a Designated Court, subject to the modifications that

> the references to "court of Session" and "high Court" shall be construed as references to "designated Court" and "supreme Court" respectively. Section 19 (1) of the Act provides for a direct appeal, as of right, to the Supreme Court from any judgment or order of the Designated Court, not being an interlocutory order. There is thus a total departure from different classes of criminal courts enumerated in Section 6 of the Code and a new hierarchy of courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court, not being an interlocutory order, and substituting the Supreme Court for the High Court by Section 20 (6) in the matter of confirmation of a death sentence passed by a Designated Court. "

71. Having held that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 inasmuch as the Designated Court falls within the expression 'a Court other than the High Court or Court of Session', the Supreme Court further clarified that the Designated Court's power to grant bail is not contained in Section 20 (8); rather, Section 20 (8) places only limitations on such power in addition to the limitations, which the Code has already imposed, on a Designated Court, by making it a Court within the ambit of Section 437. This was made explicit by Section 20 (9), which provided that the limitations on the granting of bail, specified in sub- section (8), are in addition to the limitations under the Code or any other law for the time being in force.

72. The Supreme Court has also pointed, in Ushmanbhai Dawoodbhai Memon (supra), that the powers of the High Court to entertain even an appeal has not been made available under the TADA inasmuch as an appeal lies, under Section 19 of the TADA, to the Supreme Court against any judgment, sentence or order passed by the Designated Court. Pointing out that the State has enacted TADA Act by treating terrorism as a special problem and created a Special Court to deal with such problem, the fact that even under the TADA, the ordinary courts are being used under the scheme of the Act, it does not, as a corollary, imply that since the ordinary courts are being used, standard procedure, which ordinary courts adhere to, must be followed by the Special Court too. The Supreme Court has pointed out that when the legislature can create a Special Court to deal with a special problem, it can also create a new procedure within the existing system and, in the case of TADA, while the Parliament, in its wisdom, has adopted the framework of the Code, it has chosen not to apply the procedures of the Code in its entirety and since the jurisdiction and the powers are derived by a Designated Court from the TADA, it is the TADA, which should decide the question as to whether a High Court can invoke its powers, under Section 439 and/or 482 of the Code, for the purpose of considering an application for bail, or not. The relevant observations, appearing at para 17, read :

> "17. The legislature by enacting the law has treated terrorism as a special criminal problem and created a special court called a Designated Court to deal with the special problem and provided for a special procedure for the trial of such offences. A grievance was made before us that the State Government by notification issued under Section 9 (1) of the Act has appointed District and Sessions Judges as well as Additional District and Sessions Judges to be judges of such Designated Courts in the State. The use of ordinary courts does not necessarily imply the use of standard

> procedures. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system. Parliament in its wisdom has adopted the framework of the Code but the Code is not applicable. The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in Sections 3 (1) and 4 (2) and provides for a special procedure for the trial of such offences. Under Section 9 (1), the Central Government or a State Government may by notification published in the Official Gazette, constitute one or more Designated Courts for the trial of offences under the Act for such area or areas, or for such case or class or group of cases as may be specified in the notification. The jurisdiction and power of a Designated Court is derived from the Act and it is the Act that one must primarily look to in deciding the question before us. Under Section 14 (1), a Designated Court has exclusive jurisdiction for the trial of offences under the Act and by virtue of Section 12 (1), it may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code. "

73. Leaving no one in doubt that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 of the Code and not to Section 20 (8) and that Section 20 (8) merely imposes limitations in addition to the limitations, which Section 437 already imposes, the Supreme Court observed and held, in Ushmanbhai Dawoodbhai Memon (supra), at para 20 thus:

> ". . It is quite obvious that the source of power of a Designated Court to grant bail is not Section 20 (8) of the Act but it only places limitations on such powers. This is implicit by Section 20 (9) which in terms provides that the limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. It, therefore, follows that the power derived by a Designated Court to grant bail to a person accused of an offence under the Act, if in custody, is derived from the Code and not from Section 20 (8) of the Act. "

74. What emerges from the above discussion is that it is the Special Court under the NIA Act, where an accused is required to be produced if he is arrested in connection with an offence punishable under the NIA Act and, upon his production, it is the Special Court, which shall have the power to grant bail. The source of power of the Special Court to consider an application for bail is traceable to, and governed by, the provisions of Section 437 of the Code and while considering such an application for bail, the Special Court will not exercise the power of bail as if it is considering an application for bail under Section 439 and, consequently, the Special Court would have all the limitations, which a Magistrate has, while deciding an application for bail, under Section 437 of the Code.

75. Having, thus, settled the fact that under the NIA Act, the Special Court exercises the power to grant, or refuse, bail, by taking recourse to Section 437 of the Code and not any other provisions of

the Code, not even Section 439 thereof, or under any of the provisions of the NIA Act, we, now, turn to the question as to whether a High Court, within the scheme of the NIA Act, can take resort to Section 439 of the Code, particularly, when the Court of Session, while acting as a Special Court, under the NIA Act, is denuded of its power contained in Section

439.

76. In other words, the question is: Whether the High Court, while exercising its appellate jurisdiction under Section 24(1) of the NIA Act, in respect of an order passed by the Special Court refusing to grant bail, has any power other than that of the Special Court? This question brings us to the differences, if any, between the High Court's powers under Section 24(1) of the NIA Act vis-à-vis Section 439 of the Code.

DIFFERENCE BETWEEN THE HIGH COURT'S APPELLATE JURISDICTION UNDER SECTION 24 (1) OF THE NIA ACT VIS-A-VIS HIGH COURT'S POWER UNDER SECTION 439 CR. PC.

77. The question, which is, now, necessary to consider is as to how the provisions, embodied in Sub-Section (1) of Section 24 of the NIA Act, conferring appellate jurisdiction on the High Court, against orders granting or refusing bail by a Special Court, needs to be understood. In other words, the question is: How this appellate power, contained in Section 24 (1), differs from the power, which the High Court, ordinarily, enjoys to grant or cancel bail under Section 439 Cr. PC ?

78. In order to clearly bring out the difference between Section 24 (1) of the NIA Act vis-a-vis the provisions of Section 439 Cr. PC, it is necessary to bear in mind the power of the High Court to grant or cancel bail under Section 439 Cr. PC vis-a-vis a Magistrate's power to grant bail under Section 437 Cr. PC. For a better understanding of the matter, we may point out that a careful reading of Section 437 (1) Cr. PC shows that though a Magistrate may allow an accused, who is in custody, to go on bail even in a non-bailable case, such a person shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Thus, Section 437 (1) imposes limitation on the Magistrate's power to grant bail to a person accused of, or suspected of the commission of, an offence punishable with death or imprisonment for life if there appear reasonable grounds for believing that he has been so guilty.

79. What is, however, extremely important to note is that the legislature, while imposing limitation by Section 437 (1) on the powers of the Magistrate, has expressly excluded, from the purview of this limitation, the Court of Session and the High Court. Having excluded from the embargo of the limitation, which Section 437 (1) imposes on a Magistrate's power to grant bail, Section 439 (1) Cr. PC confers special powers on the High Court and the Court of Session to grant bail even when there are reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. In other words, unlike the limitations, which Section 437 (1) imposes on the Magistrate's power to grant bail, there is no limitation imposed under Section 439 Cr. PC against granting of bail by the High Court or the Court of Session to a person accused of having committed an offence punishable with death or imprisonment for life.

80. Though, ordinarily, it would be legitimately expected that the accused would apply for bail to the Court of Session or the High Court if bail has been rejected by a Magistrate, there is no limitation imposed by Section 439 (1) on the power of the Court of Session or the High Court to entertain an application for bail, made by an accused, when he is arrested, without such application for bail having been moved before, and rejected by, the jurisdictional Magistrate. Unfettered though the power to grant bail under Section 439 Cr. PC may be, the fact remains that even the High Court, while exercising power to grant bail under Section 439 (1) Cr. PC, cannot overlook the overriding considerations, which govern grant of bail, in a non-bailable case, such as, the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of the possibility of repeating the offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds, which cannot be exhaustively set out. This aspect of law clearly surfaces on a careful reading of the following observations made in Gurcharan Singh v. State(Delhi Admn.), reported in (1978) 1 SCC 118.

> "18. . . . . With regard to the first category, Section 437 (1) Crpc imposes a bar to grant of bail by the Court or the officer-in-charge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing that he has been so guilty. . . . . On the other hand, if to either the officer-in-charge of the police station or to the Court, there appear to be reasonable grounds to believe that the accused has been guilty of such an offence, there will be no question of the Court or the officer granting bail to him.
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> 21. Section 437 Crpc is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session.
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> 22. . . . . Unless exceptional circumstances are brought to the notice of the Court, which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person, who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has, ordinarily, no option in the matter, but to refuse bail subject, however, to the first proviso to Section 437 (1) Crpc and in a case, where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.
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> 24. Section 439 (1) Crpc of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1), there is no ban imposed under Section 439 (1) Crpc against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439 (1) Crpc of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437 (1) and Section 439 (1) Crpc of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

(Emphasis is added)

81. From the observations, made, particularly, at para 24 in Gurcharan Singh (supra), it becomes clear that unlike the ban, which Section 437 (1) imposes on the Magistrate's power to grant bail in a case, where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, there is no such limitation imposed on the powers of the High Court under Section 439 (1) against granting of bail even in a case, where a person is accused of an offence punishable with death or imprisonment for life, though such an application for bail would be, ordinarily, made after the accused has failed to obtain bail from the Magistrate. This shows that, ordinarily, there is no bar for an accused to apply for bail directly to the High Court by invoking the High Court's jurisdiction under Section 439 (1) Cr. PC without moving for bail to the Magistrate. Similarly, an aggrieved person may apply for cancellation of bail by invoking the High Court's jurisdiction under Section 439 (2) Cr. PC. Once, however, the provisions for appeal is made against an order granting or refusing bail, the recourse to Section 439 Cr. PC cannot be had for the purpose of either obtaining bail or to get the bail, already granted, cancelled.

82. The scheme of the NIA Act, if analysed carefully, shows that accused has to apply for bail, if he so chooses, to the Special Court and if bail is refused by the Special Court, then and then only, the accused may prefer an appeal to the High Court in terms of Section 24 (1) against an order refusing to grant bail. In other words, without having applied for bail and the prayer for bail having been disallowed by the Special Court, a person, who is accused of having committed a scheduled offence covered by the scheme of the NIA Act, cannot directly apply for bail to the High Court under Section 439 (1) or Section 24 (1) of the NIA Act. Similarly, if the Special Court grants bail, the State may prefer an appeal to the High Court, in terms of Section 24 (1), seeking cancellation of such bail.

Hence, without applying for bail to the Special Court, an accused, who is arrested, cannot apply for bail to the High Court by taking recourse to Section 439 Cr. PC.

83. An order refusing or granting bail, in a case under the Prevention of Terrorist Activities Act, 1987, too, was an appealable order under Section 34 thereof. Explaining the power of the High Court, while considering an appeal from an order granting bail and how it differs from an application for bail under Section 439 Cr. PC., the Supreme Court, in State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Ors, reported in (2003) 8 SCC 50, observed as under:

> "10. Sub-section (4) of Section 34 of POTA provides for an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word "appeal" is used both in the Code of Criminal Procedure and the Code of Civil Procedure and in many other statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:
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> "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, especially the submission of a lower court's decision to a higher court for review and possible reversal.
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> An appeal, strictly so-called, is one in which the question is, whether the order of the court from which the appeal is brought was right on the material which the court had before it. An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.
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> An appeal, generally speaking, is a rehearing by a superior court on both law and fact.
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> 11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation of bail under sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradistinction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a sine qua non for approaching the High Court."

84. Referring to the above observations, made in Salimbhai Abdulgaffar Shaikh (supra), one of us (Ansari, J), in Redaul Hussain Khan vs. State of Assam, reported in 2009 (3) GLT 855, held as under:

> "98. In the light of the observations made above, it becomes clear that an appeal is a proceeding to rectify an erroneous decision of a Court both on facts as well as on law. An order, granting or refusing bail, could have been, in the light of the provisions of Section 34 (4), examined on merit by the High Court without any other fetters and while considering a question of cancellation of bail the general principles, governing Section 439 (2) of the Code, would not come in the way. The Apex Court, in Salimbhai Abdulgaffar Shaikh (supra), while laying down that the scheme for appeal, under the POTA, is in contradistinction to that of the Code, pointed out that an appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing or granting bail, the accused cannot prefer appeal to the High Court seeking bail. What, further, follows from the above discussion is that even a High court could not have invoked its power, under the Section 439, to grant bail to a person, accused of an offence under the POTA. Consequently, in order to obtain release on bail, an accused person, arrested under the POTA, was required to, first, apply for bail to the Special court, where the Special Court was constituted, or to the Court of Session, where the Special Court was not constituted, and, if his application for bail was rejected, then and then only he could have preferred an appeal against the order refusing bail.

Similarly, even the State could have preferred an appeal if the Special Court or the Court of Session, as the case may be, happened to grant bail to such an accused person in exercise of powers under Section 437 of the Code.

99. Though it was contended, in Salimbhai Abdulgaffar Shaikh (supra), that TADA had not taken away the High Court's power under Section 439, the Supreme Court, referring to Usmanbhai Dawoodbhai Memon (supra), held that there was complete exclusion of the jurisdiction of the High Court, under the TADA, to entertain a bail application made under Section 439 and that this view was reiterated in State of Punjab Vs. Kewal Singh, reported in 1990 Supp SCC 147. The Apex Court concluded, at para 14, in Salimbhai Abdulgaffar Shaikh (supra), thus:

> „14. That apart, if the argument of the learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 Crpc in the original or concurrent jurisdiction, which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.

> 85. Agreeing with the above position of law, a Division Bench of this Court, in Jayanta Kumar Ghosh & Anr. vs. State of Assam & ors, reported in (2010) 4 GLT 1, concluded that once the investigation, under the scheme of the NIA Act, is taken over by the Agency, it is the Special Court, which can authorize further detention of an arrested accused. Observed the Court, in Jayanta Kumar Ghosh (supra), thus, "When such an arrested accused applies for bail to the Special Court, the source of power to consider such an application for bail lies in Section 437 and not Section 439 of the Code. Even a High Court cannot invoke its powers, under Section 439, to grant bail if it has been refused by the Special Court nor can the High Court, by resorting to its power under Section 439, cancel bail if bail has been granted to such an accused by the Special Court. If the bail has been refused or granted by the Special Court, the aggrieved party may, however, prefer an appeal, in terms of Section 21 (4), to the High Court.

Such an appeal has to be heard by a Division Bench of the High Court and in such an appeal, the merit of the order, granting or refusing bail, can be questioned."

86. We are in complete agreement with the observations, made in Jayanta Kumar Ghosh (supra). Agreeing, thus, with the position of law as mentioned above, let us, now, determine as to what limitations the Special Court ran, in the present case, in the matter of granting of bail to the accused-respondent. While considering this aspect of the bail, it needs to be noted that the respondent herein is an accused of having committed offences under Sections 120 (B)/121/121 (A) IPC read with Sections 25 (1b) (a) of the Arms Act and Sections 17/18/19 of the Unlawful Activities (Prevention) Act, 1967. As already pointed out above, the UA (P) Act, 1967, has undergone several amendments by the the Unlawful Activities (Prevention) Amendment Act, 2008. By these amendments, Sections 43A, 43B, 43C, 43D, 43E and 43F have been added under Chapter VII. Sub-Section (1) of Section 43D, makes every offence, punishable under the UA (P) Act, 1967, a 'cognizable offence'. Sub-Section (2) of Section 43D clarifies that the references to "fifteen days", "ninety days" and "sixty days", whenever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively. Sub-Section (5) of Section 43D, which is of utmost importance, reads as under:

> "(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter 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. "

(Emphasis is added)

87. A bare reading of Sub-Section (5) of Section 43D shows that apart from the fact that Sub-Section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-Section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail by laying down 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 that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UA (P) Act is prima facie true, such accused person shall not be released on bail or on his own bond.

88. Thus, if the Special Court, on perusal of the case diary, forms an opinion that there are reasonable grounds for believing that the accusation, against an accused person, of the commission of offences or offences under Chapter IV and/or Chapter VI is prima facie true, it will not remain within the powers of the Court to grant bail in such a case. This position is further made clear by Sub-Section (6) of Section 43D, which lays down that the restrictions, on granting of bail specified in sub-section (5), are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on grating of bail. The logical conclusion would, therefore, be that in a case, investigated by the agency, if the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail to such an accused except as may be provided by law.

89. In the backdrop of Clause (i) and (ii) of Section 437 (1) Cr. PC, when one reverts to Section 43D (5), what surfaces is that the proviso to Sub-Section (5) of Section 43D, (which lays down that notwithstanding anything contained in the Code of Criminal Procedure, no person accused of an offence, punishable under Chapter IV and VI of the NIA Act shall, if in custody, 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 Cr. P. C. is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true), can be treated to be, and can be read, by legal fiction, as Clause (iii) of Section 437 (1).

90. Analyzing the scheme of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, □NDPS Act'), which imposes limitations on the Court's power to release an accused on bail, J. S. Verma, J (as his Lordship then was), pointed out, in the case of Union of India Vs. Thamisharasi and Ors. reported in (1995) 4 SCC 190, at Para 12 and 13, as under:

> "the limitation on the power to release on bail in Section 437 Cr. P. C. is in the nature of a restriction on the power, if reasonable grounds exist for the belief that the accused is guilty. On the other hand, the limitation on this power in Section 37 of the NDPS Act is in the nature of a condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the Court is satisfied that there are reasonable grounds to believe that he is not guilty. Under Section 437 Cr. P. C. it is for the prosecution to show the existence of reasonable grounds to support the belief in the guilt of the accused to attract the restriction on the power to grant bail;

> but under Section 37 NDPS Act it is the accused who must show the existence of grounds for the belief that he is not guilty, to satisfy the condition precedent and lift the embargo on the power to grant bail. This appears to be the distinction between the two provisions, which makes Section 37 of the NDPS Act more stringent.
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> 13. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provision in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in sub- section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to sub-section (2) of Section 167 Cr. P. C. which operates in a different field relating to the total period of custody of the accused permissible during investigation."

91. From what has been concluded, in Para 13, in Thamisharasi's case (supra), it becomes clear that the limitation, imposed by Section 37 of the NDPS Act, would, to the extent that it is inconsistent with the provisions of Section 437 Cr.P.C. , prevail upon the corresponding provisions of the Code of Criminal Procedure and the limitation, so imposed on granting bail, would be in addition to the limitation, which the Code of Criminal Procedure already places. Thus, the limitation, imposed by the proviso to Section 43D (5), shall, to the extent that it is inconsistent with Section 437, would supersede Section 437 and if it is not inconsistent, then, it would be in addition to the limitations imposed by Section 437.

92. The proviso to Section 43D (5) imposes a limitation in addition to the limitations, which Clauses (i) and (ii) of Section 437 (1) impose on the Court's power to release an accused on bail. Thus, the proviso to Section 43D (5) is an additional restriction on the Court's power to grant bail.

93. We have, thus, settled that when a case is registered and investigated, under the NIA Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code. We have also settled that the powers of the Special Court, constituted under the NIA Act, to grant bail is covered by, and shall remain confined, within the ambits of Section 437 Cr. P. C. and, as an appellate Court, the High Court's power, under Section 24 (1) of the NIA Act, would be coextensive with the powers of the Special Court. We have further settled that the ban, imposed on the power of the Court to release an accused, if a case falls within the proviso to Section 43D (5), is in addition to the limitations imposed on the powers of Special Court (same as magisterial courts) by Clauses (i) and

(ii) of Section 437 (1).

CONCEPT OF PROVISO TO SECTION 43-D (5)

94. Dealing with the concept of the proviso to Section 43D(5), a Division Bench of this Court, speaking through one of us (Ansari, J), in Jayanta Kumar Ghosh (supra), observed and held as under:

> "(63) Before proceeding further, it is also, to our mind, necessary to ascertain as to what the scope of the proviso to Section 43-D (5) is and when would this proviso be attracted. While dealing with this aspect of the appeal, it is necessary to bear in mind that the proviso to Section 43-D (5) states 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. The expression, 'prima facie true' is an expression, which does not, ordinarily, appear in penal statutes. (64) Let us, therefore, ascertain as to what the word 'prima facie' means. The word, prima facie, has been described in the Black's Law Dictionary as: "sufficient to establish fact or raise a presumption unless disproved or rebutted". Rebuttable presumption means an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence. Rebuttable resumption also means prima facie presumption or disputable presumption or conditional presumption.
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> (65) The Concise Dictionary of Collins has defined, prima facie, as an adjective thus: "at first sight; as it seems at first. " And prima facie evidence as an evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted. (66) Wharton's Law Lexicon defines that a prima facie case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of the same, are believed.
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> (67) The Supreme Court, in Marlin Burn Ltd. Vs. R. N. Banerjee, 1958 SCR 514 at p. 530 (AIR 1958 SC 79 at p.
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> 85), observed thus:
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> „A prima facie case does not mean a case proved to the hilt but a case, which can be said to be established if the evidence, which is led in support of the same, were believed. While determining whether a prima facie case had been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion, in question, and not whether that was the only conclusion, which could be arrived at on that evidence. "

(68) The meaning of the word, 'prima facie', given in Marlin Burn Ltd. (supra), has been followed by the Supreme Court, in its later decision, in The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. Vs. B. Dasappa, M. T. represented by the Binny Mills Labour Association, reported in AIR 1960 SC 1352.

(69) From the meaning, attributed to the word, 'prima facie', by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in The Management of the Bangalore Woollen Cotton and Silk Mills (supra), what clearly follows is that prima facie is a Latin word, which means, 'at first sight or glance or on its face' and, in common law, it is as 'the first piece of evidence of fact', i. e. , considered true unless revoked or contradicted. (70) In the face of the above observations made by the Supreme Court, it may be construed that prima facie case would mean whether the inference drawn is a possible inference or not. (71) The word, 'true', according to Collins Dictionary, means something, which is not false, fictional or illusory, but factual and confirming with reality or exactly in tune. Webster's Third New International Dictionary defines True as: "something, which is in accordance with fact or reality".

(72) The word, 'true' has been defined, in World Book Dictionary, as "agreeing with fact, not false".

(73) Thus, the expression, 'prima facie true', would mean that the court shall undertake an exercise to determine as to whether the accusations, made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the court assumes the contents of the complaint to be true and correct and, then, proceed to decide as to whether the allegations, made in the complaint, make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the court to determine the truthfulness or veracity of the accusations. However, when the word, 'prima facie', is coupled with the word, 'true', it implies that the court has to undertake an exercise of cross-checking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made are inherently improbable, or wholly unbelievable, it may be difficult to say that a case, which is prima facie true, has been made out.

(74) The term 'true' would mean a proposition that the accusation brought against the accused person, on the face of the materials collected during investigation, is not false. The term false again would mean a proposition, the existence of which cannot be a reality. While arriving at a finding whether there are reasonable grounds for believing that the accusation against the accused is prima facie true or false, the Court can only look into the materials collected during investigation, and on its bare perusal should come to a finding that the accusation is inherently improbable, however, while so arriving at a finding the Court does not have the liberty to come to a conclusion which may virtually amount to an acquittal of the accused.

(75) In the case of State of Gujarat Vs. Gadhvi Rambhai Nathabai, reported in (1994)5 SCC 111, the Supreme Court while dealing with the principles governing the granting of bail under the TADA, observed :

> „8. It is true that for the purpose of grant of bail, the framers of the Act require the Designated Court to be satisfied that there were reasonable grounds for believing that the accused concerned was not guilty of such offence but this power cannot be exercised for grant of bail in a manner which amounts virtually to an order of acquittal, giving benefit of doubt to the accused person after weighing the evidence collected during the investigation or produced before the court. At that stage the

Designated Court is expected to apply its mind as to whether accepting the allegations made on behalf of the prosecution on their face, there are reasonable grounds for believing that the accused concerned was not guilty of the offence. At that stage the Designated Court is not required to weigh the material collected during the investigation. (76) In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true, the Special Court will be dis-empowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or microscopic dissection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Special Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are wholly improbable. When the materials are, on examination by the Special Court, are found to be not wholly improbable and the Special Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter VI of the UA (P) Act, are prima facie true, such materials would be enough to attract the bar imposed by the proviso to Section 43D (5).

(77) To put it a little differently, the Special Court is required to examine the materials, collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Special Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Special Court, on undertaking such an exercise, finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the case would be treated as a case, which is sufficient for the Special Court to form an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true.

(78) The expression, 'reasonable ground', means something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence

(s) alleged. Under Section 437 CrPC, an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 CrPC, the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. (See Union of India Vs.

Thamissharasi, reported in (1995) 4 SCC 190, and Union of India Vs. Shiv Shankar Kesari, reported in (2007) 7 SCC 798).

(79) Coupled with the above, the proviso to Section 43-D (5) does not require a positive satisfaction by the court that the case against the accused is true. What is required is a mere formation of opinion by the court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UA (P) Act, 1967, can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by the proviso to Section 43-D (5) on the court's power to grant bail, gets attracted.

(80) We may point out that Section 20 (8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter as 'the TADA Act') (since repealed), laid down that no person, accused of an offence punishable under the said Act, or any rule made thereunder, shall, if in custody, be released on bail, or on his own bond, unless, amongst others, the court is satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence, while on bail. Section 20 (9) of the Act made it clear that the limitation on granting of bail, specified in sub-Section (8) of Section 20, is in addition to the restrictions, which the Code of Criminal Procedure, or any other law, in force, imposes.

(81) There are no corresponding provisions, in the NIA Act, as were present in Section 20 (8) and Section 20 (9) of the TADA Act. Notwithstanding, however, the fact that the provisions (as contained in sub-Section (8) and/or sub-Section (9) of Section 20 of the TADA Act) no longer find place in the NIA Act, the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a 'court' other than the High Court and Court of Session. In such circumstances, the limitations, imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437 CrPC, are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43-D (5), there would be an additional bar, on the part of the Special Court, to release an accused on bail, the bar being that the Special Court shall not release the accused on bail or on his own bond 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.

(82) In short, thus, while the Special Court, constituted under the NIA Act, does not suffer from the limitations, which the TADA Courts had by virtue of the provisions of Section 20 (8), read with Section 20 (9) thereof, the fact remains that the Special Court, not being a Court of Session or of the High Court, cannot exercise the powers of the Court of Session or High Court under Section 439 CrPC. Hence, while dealing with the scheduled offences, covered by the proviso to sub-Section (5) of Section 43-D, Special Court, constituted under the NIA Act, would suffer not only from the

limitations imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437, but also by the proviso to sub-Section (5) of Section 43-D of the UA (P) Act, 1967, wherever the provisions, contained in the proviso to Section 43-D (5), would be applicable. MERIT OF THE APPEALS."

95. We fully agree with the above exposition of law as regards the concept of the proviso to Section 43D(5).

96. To put it a little differently, we may point out that the Special Court is required to examine the materials, collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Special Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Special Court, on undertaking such an exercise, finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the case would be treated as a case, which is sufficient for the Special Court to form an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true.

97. The expression, „reasonable ground , means, it may be noted, something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence(s) alleged. Under Section 437 CrPC, an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 CrPC, the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. (See Union of India vs. Thamissharasi, reported in (1995) 4 SCC 190, and Union of India vs. Shiv Shankar Kesari, reported in (2007) 7 SCC 798).

98. Coupled with the above, it is also noticeable that the proviso to Section 43-D(5) does not require a positive satisfaction by the court that the case against the accused is true. What is required is a mere formation of opinion by the court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UA(P) Act, 1967, can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by the proviso to Section 43-D(5) on the court's power to grant bail, gets attracted.

99. It is also worth pointing out that Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as □the TADA Act') (since repealed), laid down that no person, accused of an offence punishable under the said Act, or any rule made thereunder, shall, if in custody, be released on bail, or on his own bond, unless, amongst others, the court is satisfied,

where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence, while on bail. Section 20(9) of the Act made it clear that the limitation on granting of bail, specified in sub- Section (8) of Section 20, is in addition to the restrictions, which the Code of Criminal Procedure, or any other law, in force, imposes.

100. It may be borne in mind that there are no corresponding provisions, in the NIA Act, as were present in Section 20(8) and Section 20(9) of the TADA Act. Notwithstanding, however, the fact that the provisions (as contained in sub-Section (8) and/or sub-Section (9) of Section 20 of the TADA Act) no longer find place in the NIA Act, the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a □Court other than the High Court and Court of Session. In such circumstances, the limitations, imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437 CrPC, are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43-D(5), there would be an additional bar, on the part of the Special Court, to release an accused on bail, the bar being that the Special Court shall not release the accused on bail or on his own bond 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.

101. Thus, what can be safely concluded is that while the Special Court, constituted under the NIA Act, does not suffer from the limitations, which the TADA Courts had by virtue of the provisions of Section 20(8), read with Section 20(9) thereof, the fact remains that the Special Court, not being a Court of Session or of the High Court, cannot exercise the powers of the Court of Session or High Court under Section 439 CrPC. Hence, while dealing with the scheduled offences, covered by the proviso to sub-Section (5) of Section 43-D, Special Court, constituted under the NIA Act, would suffer not only from the limitations imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437, but also by the proviso to sub-Section (5) of Section 43-D of the UA(P) Act, 1967, wherever the provisions, contained in the proviso to Section 43-D(5), would be applicable.

102. In complete agreement with Jayanta Kumar Ghosh (supra), we may observe that when a case is registered and investigated, under the NIA Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code. We have also settled that the powers of the Special Court, constituted under the NIA Act, to grant bail is covered by, and shall remain confined, within the ambits of Section 437 Cr.P.C. and, as an appellate Court, the High Court's power, under Section 24(1) of the NIA Act, would be coextensive with the powers of the Special Court. We have further settled that the ban, imposed on the power of the Court to release an accused, if a case falls within the proviso to Section 43D(5), is in addition to the limitations imposed on the powers of Special Court (same as magisterial courts) by Clauses (i) and (ii) of Section 437(1).

103. While considering the present appeal, it needs to be noted that the scheme of the Code of Criminal Procedure, as can be noticed from a combined reading of Section 57, 167 and 309, is this: Under Section 57, investigation should be completed, at the first instance, within 24 hours; if

arrested, the person should be brought by police before the nearest Magistrate as provided under Section 167. The law does not authorise a police officer to detain a person for more than 24 hours exclusive of the time necessary for journey from the place of arrest to the Magistrate's Court. Section 167(1) also obliges a police officer to transmit, while forwarding an accused to the nearest Magistrate, a copy of the entries in the diary relating to the case. The entries in the diary are meant to furnish to the Magistrate such information, which may be necessary in order to enable him to take a decision whether the accused should be detained in custody any further or not. Section 167 enables the Magistrate to authorise detention of an accused in custody for a term not exceeding 15 days at a time. (See Central Bureau of Investigation, Special Investigation Cell-I, New Delhi -vs- Anupam J. Kulkarni, reported in (1992) 3 SCC 141.

104. What is significant to note is that Section 167(2) as well as Section 309(2) relate to powers of remand, though under two different situations. While the power to remand an accused to custody during investigation is exercised by a Magistrate under Section 167, i.e., at pre-cognizance stage, the power to remand an accused, under Section 309(2), is available to a Court after charge- sheet has been filed and cognizance has been taken. In neither case, judicial custody should exceed for a term exceeding 15 days at a time. This does not mean that this period of 15 days cannot be repeated by successive remand.

105. In fact, during the course of trial, an accused can be kept in custody by resorting to the power under Section 309(2) exercisable by the Court. When the accused is on bail, he cannot be re-arrested on charge-sheet having been filed against him or on cognizance being taken. We are, however, confronting a situation, where an accused was on bail in respect of certain penal provisions and at the time of filing of charge-sheet, certain new penal provisions were added. Was, in such a case, the accused required to be enlarged on bail and whether, in such a case, the learned Special Judge had the power to remand the accused to custody, as has been done in the present case on the ground that the added penal provisions constitute more heinous offence.

106. Mithabhai Pashabhai Patel and others Vs. State of Gujarat, reported in (2009) 6 SCC 332, which Mr. Mahajan heavily relies on, can be of no assistance to the facts of the present case inasmuch as Mithabhai Pashabhai Patel (supra) makes it clear that if an accused is already on bail, he cannot be remanded to custody on the charge-sheet being submitted. Nowhere it has been held, in Mithabhai Pashabhai Patel (supra), that an accused cannot be remanded to judicial custody after filing of the charge-sheet or after taking of cognizance if such a situation arises. The legislature, as pointed out by the Supreme Court, in Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni, reported in (1992) 3 SCC 141, has intended to prevent prolonged judicial custody of accused and, that is why, the judicial custody cannot, ordinarily, be longer than 60 days or 90 days, as the case may be; whereas, in exercise of the power under Section 309 (2), the accused can be kept in judicial remand throughout the trial, though the period of each remand cannot exceed a period of 15 days.

107. While considering the case of Mithabhai Pashabhai Patel (supra), it needs to be noted that the appellants, in the said case, had been granted bail. They were obviously not in custody of the Court and they could not have been taken into custody, ordinarily, unless their bail was cancelled. The

position, in the case at hand, is quite different.

108. In order to correctly appreciate the context in which the decision, in Mithabhai Pashabhai Patel (supra), was rendered, and the position of law, which has been laid therein, it is appropriate to recall that in Mithabhai Pashabhai Patel (supra), the appellants were being prosecuted for commission of various offences under the Indian Penal Code read with Section 135 of the Bombay Police Act. During the course of investigation, all the six appellants were arrested and they were remanded to police custody in terms of Section 167(2) of the Code. Eventually, charge-sheet was laid against them on completion of investigation. The case was committed to the Sessions Court and cognizance of offences was taken by the Sessions Judge. The appellants were granted bail by the High Court, by order, dated 30.08.2003. Dissatisfied, however, with the manner in which investigation was carried out, the matter was carried to the Supreme Court and, it was, by order, dated 26.03.2008, that the Supreme Court appointed a Special Investigating Team (SIT). (See National Human Rights Commission Vs. State of Gujarat, reported in (2009) 6 SCC 342).

109. Pursuant to the directions, so issued by the Supreme Court, the State Government, in Gujarat, issued a notification, on 01.04.2008, constituting a Special Investigating Team (SIT) to investigate into the cases. In terms of the said notification, the SIT could work out the modalities and norms for its enquiry/investigation including further investigation. During the course of such investigation, an Assistant Superintendent of Police sought for remand of the accused-appellant for a period of 14 days, the reason assigned being that the offences, under some provisions, were added and investigation, with respect to the said offences, had not been carried out. Hence, the accused were required to be given into police custody. Though the Sessions Judge rejected the application, the High Court allowed the SIT's application remanding the appellants to the custody of the SIT. It was the correctness of the order, passed by the High Court, which became the focal point for determination.

110. In answering the question so raised, the Supreme Court pointed out, in Mithabhai Pashabhai (supra), that while directing constitution of the SIT, it had not directed re- investigation. What the Supreme Court had directed was further investigation in terms of Section 173(8) of the Code. Pointing out that under Section 173(8), investigating agency can pray for remand to investigate further, but formal request may not be insisted upon in certain situations. Drawing distinction between further investigation and re-investigation, the Court pointed out that Section 167(2) comes into play during pre-cognizance stage and it is during this period that police remand is possible; whereas, Section 309(2) comes into play at the post-cognizance stage for the purpose of remanding the accused to custody. Obviously, the power, under Section 309(2), to remand an accused into custody cannot be exercised unless the bail of the accused, if the accused is on bail, is cancelled. The Supreme Court pointed out, in Mithabhai Pashabhai Patel (supra), at para 18, that being in the custody of the Court, the appellants could not have been taken into custody by the police unless their bail was cancelled and, hence, the High Court was incorrect in taking the view that even during further investigation, the power to remand an accused to police custody is possible.

111. Mithabhai Pashabhai Patel (supra) was, thus, a case, which arose out of a direction given during the stage of further investigation remanding the appellant to police custody and it is this remand

order, which was interfered with. The position, in the case at hand, is quite different. Here is a case, wherein the accused was allowed to go on bail under Sections 120B/121/121A IPC. On completion of investigation, while submitting charge-sheet, Sections 16, 17, 18, 19 and 20 of the UA(P) Act, 1957, and Section 25(i) (d) of the Arms Act, 1959, have been added. In this fact situation, it is not only the investigating agency, which has pointed out to the learned Special Court that the accused was required to go on bail under the added penal provisions, but even the accused had applied to the learned Special Court seeking to be allowed to remain on previous bail. It is in the context of the facts of such a case that the impugned order was passed by the learned Special Court pointing it out that the offences, which stood added, were more heinous in nature and, in the facts and attending circumstances of the case, the accused-appellant, Jibangshu Paul, was not entitled to bail.

112. Here was, thus, a case, wherein the accused was not on bail in respect of the added offences, whereunder trial has to take place. The question, now, is: Was the NIA incorrect in law in pointing out to the learned Special Court that no bail order having been passed in respect of the added penal provisions, the accused-appellant was required to be taken into custody, particularly, when the accused-appellant had himself applied for an order allowing him to remain on previous bail in respect of the added penal provisions.

113. It may, now, be noted that the fact situation, in the present case, is akin to the case of Hamida Vs. Rashid alias Rasheed and others, reported in (2008) 1 SCC 474, wherein the appellant, Hamida, had lodged an FIR, 13.6.2005, at Kotwali Police Station, Muzaffarnagar, alleging therein that when her husband, Balla, was participating in a Panchayat of their community, the four accused-respondents had attacked him with licensed as well as illegal arms exhorting that they would kill him. Accused Naushad had assaulted Balla with a long knife due to which Balla received serious injuries and the other accused fired from their respective weapons and, thereafter, ran away from the scene. On the basis of the FIR so lodged, a case was registered under Sections 324, 352 and 506 IPC and the injured Balla was rushed to the district Hospital, where he was medically examined and found to have sustained serious stab wound in his abdomen from which loops of intestines were coming out.

114. On their arrest, when the accused-respondent, in Hamida (supra), applied for bail, the appellant, Hamida, put in her appearance through a counsel and filed an affidavit stating that since serious injuries had been caused to Balla and accused had resorted to firing, the offence committed by them was one under Section 307 IPC, but the police, in collusion with the accused, had registered the case only under Sections 324, 352 and 506 IPC. In the application so made, the appellant, Hamida, also pointed out that due to serious nature of injuries sustained by Balla, he had been referred to the Medical College, Meerut, and the bail application should be heard after summoning the medical examination report. The Chief Judicial Magistrate, however, allowed the accused to go on bail by observing that remand of the accused had been sought in respect of the offences registered against them and as the offences were bailable, the accused-respondents were entitled to bail making it, however, clear that if the case was converted into a more serious offence, the accused would not get the benefit of the bail, which had been granted to them.

115. Later on, the remaining two accused were also released on bail. Balla succumbed to his injuries in the night intervening 16th and 17th of June, 2005. Thereafter, the offence was converted into one under Section 304 IPC. In Hamida's case (supra), after the offence was converted under Section 304 IPC and the investigation in connection therewith had been pending, the accused respondents filed a petition, under Section 482 Cr.P.C., in the High Court, seeking a direction to the Chief Judicial Magistrate, Muzaffarnagar, to permit them to remain on previous bail even after conversion of the offence into one under Section 304 IPC. The only submission, in support of this application, made, on behalf of the accused- respondents, was that the accused had not misused the privilege of bail and they should, therefore, be allowed to remain on bail even after conversion of offence, which were bailable into non- bailable one. It is almost the same submissions, which have been made, in the present case, on behalf of the accused- appellant inasmuch as here also, it has been insisted, on behalf of the accused-appellant, that the accused-appellant had not misused his liberty of bail and, hence, he may be allowed to continue on his previous bail even though the charge-sheet has been submitted for offences not only under Sections 120B, 121, 121-A IPC, which were the offences (when the accused-appellant had been allowed to go on bail), but also under Sections 16, 17, 18, 19 and 20 of the UA (P) Act, 1967, read with Section 25(1)(d) Arms Act, which have been subsequently added.

116. Reverting back to the case of Hamida (supra), it needs to be noted that the High Court had accepted the prayer of the accused-respondents by directing that if the applicants appear before the Court, they shall be allowed to go on bail. Apart from the question, which Hamida (supra), had raised, namely, whether it was permissible for the High Court to grant bail by taking resort to Section 482 Cr.PC., what was, in question, was: When the case had been converted to one under Section 304 IPC, whether the accused were required to go on bail afresh in respect of the offence under Section 304 IPC inasmuch as the accused had never been arrested for commission of an offence under Section 304 IPC and they had never been enlarged on bail under the said penal provision. The principal submission of the counsel for the appellant, Hamida, in this regard, in the case of Hamida (supra), was:

> □5. The principal submission of learned counsel for the appellant is that the power under Section 482 CrPC could not have been exercised by the High Court in granting bail to the respondents-accused as there is a specific provision in the Code of Criminal Procedure viz. Section 439 under which the accused could approach the appropriate court for grant of bail to them. It has been further submitted that while exercising power under Section 482 CrPC the High Court has committed grave error in issuing the direction that the bail granted to the accused for an offence under Section 324, 352 and 506 IPC will enure to their benefit even after conversion of the case which was registered against them into one under Section 304 IPC. The submission is that the respondents-

accused ought to have surrendered and after they had been taken into custody, they should have applied afresh for bail in the offence under Section 304 IPC."

(Emphasis is added)

117. The reactive observations of the Supreme Court to the above submission, made on behalf of the appellant, Hamida, that the accused ought to have surrendered and after they were taken into custody, they should have had applied for fresh bail in respect of the offence under Section 304 IPC, is extremely important inasmuch as the Supreme Court observed :

> □6. We are in agreement with the contention advanced on behalf of the complainant appellant. (Emphasis is added)

118. From the case of Hamida (supra), what cannot be ignored and must be treated as the law of the land is that bail is granted in respect of 'an offence'. Consequently, when an offence is one in respect whereof, the accused had never gone on bail, the accused must apply for bail irrespective of the fact as to whether the offence is bailable or non-bailable. If the offence is bailable, the accused would, as a matter of right, demand bail. If the offence is non-bailable, the parameters for consideration for granting of bail would be governed by Section 437 if the Court is a Court of Magistrate or a Court other than the Court of Sessions or the High Court, such as, the Special Court, NIA.

119. Consequently, in the present case too, when the offences under Sections 16, 17, 18, 19 and 20 of the UA (P) Act, 1967 and Section 25(1)(d) Arms Act, were added in the charge-sheet filed against the accused-appellant, the accused-appellant ought to have, in the light of what has been laid down in Hamida (supra), applied for bail, on his appearance in the learned Special Court. In fact, the accused-appellant appears to have accepted this position of law inasmuch as he did apply to the learned Special Court, as already indicated above, for being allowed to go on previous bail. By legal fiction, the application, so made by the accused-appellant, amounted to the accused-appellant surrendering to the jurisdiction of the learned Special Court seeking bail in respect of the additional offences and once he had surrendered to the jurisdiction of the Special Court, (which the Special Court, indeed, had), the Special Court was bound to consider as to whether the accused shall or shall not, in the facts and attending circumstances of the case, be allowed to go on bail treating the accused-appellant to have come into its custody, for, the question of granting of bail would not arise without the accused having been fallen into the custody of the Court concerned. In a case of present nature, what consideration would prevail upon a Special Court would depend upon the penal provisions and also the facts and attending circumstances of the case. Nevertheless, the accused-appellant would be treated in the custody of the Court and it is, then, for the Court to decide on the basis of the penal provisions and the facts and attending circumstances of the case as to whether the accused-appellant deserves to be allowed to go on bail or not.

120. In the case at hand, too, therefore, the question would be as to whether the accused-appellant should have been granted bail. In this regard, it needs to be noted that if the offence is more heinous than the one, whereunder an accused had already gone on bail, the fact that he was already on bail would be of no avail. One of the tests for determining if an offence is more heinous or not is the length of punishment; but this cannot be the sole or invariable test. For instance, though punishment for an offence of murder, under Section 302 IPC, may be death, the fact of the matter remains that intentional killing of one person and commission thereby of an offence of murder would not be same as commission of murder of a large number of persons by resorting to an act of terrorism. Similarly, waging war against the State can be regarded as a more heinous offence than a

case of murder inasmuch as the offence of waging war against the State threatens the very existence of the State, though punishment for both the offences, namely, murder and waging war against the State, may be the same.

121. In the case at hand, the accused-appellant had been enlarged on bail in respect of an offence of waging war against the State. The limitations, however, which have been imposed on the powers of the Special Court by Section 34(D) of the UA(P) Act, 1967, were not applicable to the case against the accused-appellant, when he was, initially, arrested and allowed to go on bail. The factors, therefore, while considering the accused-appellant's application, made in the Court of the learned Special Court, seeking bail, stood on an entirety different footing inasmuch the learned Special Court, as already discussed above, would have no jurisdiction to grant bail to the accused-appellant if it finds that the case, against the accused-appellant, is prima facie true or, in other words, the learned Special Court could not have allowed the accused-appellant to go on bail unless it could take the view that the prosecution has not been able to show that the case, against the accused-appellant, was prima facie untrue.

122. It needs to be noted, at this stage, that the accused was released on bail, on 26.02.2009, by the learned District Magistrate, NC Hills, acting as a Judicial Magistrate under Section 437 Cr. PC. barely within a period of two weeks, but what were the considerations for bail. The learned Magistrate had observed, for the purpose of granting bail, that the co- accused were on bail, the accused was ready to co-operate with the police during investigation and there is no chance of his absconding as he is a local person and that his release on bail is not likely to adversely affect investigation. The considerations, which prevailed upon the learned Magistrate, while granting bail, were contrary to the Full Bench decision of this Court in Re - State of Assam & others (suo moto), reported in 2007 (1) GLT 330 (FB), which we have referred to, and which clearly lays down that if there is a 'reasonable ground' for holding that the accused has committed an offence, which is punishable by death or imprisonment for life, the Magistrate has no power to grant him bail unless the case of the accused falls within one or more of the exceptions embodied in the proviso to Section 437 Cr.PC.

123. In the present case, admittedly, the proviso was not attracted. The power under Section 437 could not have, therefore, been exercised to grant bail within a period of two weeks as was done in the present case. The fact that the investigating agency had not asked for cancellation of bail does not mean that it would debar the learned Special Court from considering as to whether the accused-appellant shall be allowed to go on bail or not, when the offences under Sections 16, 17, 18, 19 and 20 of the UA (P) Act, 1967, read with Section 25(1)(d) Arms Act, stood added and the proviso to Section 43(D) deny the Special Court the power to grant bail to a person if he is accused of committing an offence and the case diary or the charge-sheet makes the Special Court form an opinion that there are reasonable grounds for believing that the accusation, against the accused person, is prima facie true.

124. In fact, a question had arisen in Bijendra @ Virendra Vs. State of U.P., reported in 2006 Crl.J. 2253, the question being this: With the addition of offence under Section 308 IPC, which is triable by the Court of Session, the fact that the accused-appellant was on bail under Sections

147/148/323/504/452 IPC, which were all triable by Magistrate and not by the Session Judge, whether it was sufficient to give a fresh bond in respect of an offence under Section 308 IPC. The Court, in Bijendra (supra), pointed out that the case number is allotted to a case registered by police or Magistrate for the purpose of identification of the case, but bail is granted against offence(s), which the accused is alleged to have committed. Merely, therefore, the fact that an accused is on bail in a case, it would not be sufficient to allow the accused to remain on bail if an offence is added unless the Court grants bail in respect of the added offence.

125. It may be further noted that the Allahabad High Court pointed out, in Birendra (supra), that crime number or case number has no relevance to bail and that on addition of a new offence, accused is required to appear before the Court of competent jurisdiction and seek bail and his bail cannot be considered unless and until he surrenders himself and places himself to the custody of the Court in respect of the offence, wherein he seeks to be released on bail, custody being sine qua non for consideration of bail. Consequently, when an accused is charge-sheeted with an added offence, he must surrender to the Court of competent jurisdiction and place himself to the custody of the Court seeking bail in respect of the added offence, for, in order to obtain bail in the newly added offence, the accused has to surrender to the Court and he would be, then, treated to be in the custody of the Court and it would be, then, for the Court to determine whether or not to grant him bail. In this regard, it has been pointed out, in Birendra (supra), and we agree, that Section 437 Cr.PC talks of □An offence' and plurality of words has been intentionally eschewed by the legislature in the formation of Section 437 Cr.PC, because each offence is to be tried separately and joinder of charges is an exception to this general rule.

126. In the light of the decision in Hamida (supra), which we have already discussed above, we are in complete agreement with the decision rendered in Bijendra (supra).

127. What logically follows from the above discussion is that apart from the fact that the appellant had himself applied, for being allowed to remain on his previous bail, though bail had not been granted to the appellant in respect of the added offences, it was the duty of the learned Special Court to examine the record and determine for itself, in terms of the statutory requirements of the UA(P) Act, 1976, (which we have already discussed above), if there are reasonable grounds to believe that the case, as against the accused-appellant, is prima facie true. Without determining the question as to whether the case, as against the accused- appellant, was prima facie true or not, the learned Special Court could not have allowed the accused to go on bail. In the present case, the learned Court below has clearly pointed out that the offences, which have been added in the charge-sheet, are more heinous in nature. This observation is not wholly misplaced. We are, therefore, of the view, and the learned counsel for the parties agree, that it is, now, for this Court to decide this appeal on merit as to whether the accused-appellant deserves to go on bail even in respect of the added offences. For this purpose, this Court has to, obviously, determine, in terms of the requirements of the UA(P) Act, 1967, and keeping in view the restrictions imposed on a Special Court by the proviso to Section 34(D), if the materials collected during investigation do or do not reveal that the prosecution's case, as against the accused-appellant, is prima facie true.

128. If the answer to the question, posed above, is affirmative, bail cannot be granted. If, however, the answer to the question is in the negative, the accused-appellant deserves to be allowed to go on bail.

129. In the backdrop of the above position of law discussed above, as a whole, we may, now, consider the merit of the present appeal. For the purpose of deciding the merit of the present appeal, it is appropriate to take note of the prosecution's case, which may, in brief, be set out as under:

> (i) DHD(J) is an unlawful association within the meaning of Section 2(p) of the UA(P) Act, 1967, inasmuch as DHD(J) indulges in unlawful activities as defined in Section 2(o) of the UA(P) Act, 1967, and has been declared as an unlawful association after accused Phojendra Hojai and Babul Kemprai were arrested on 1st of April, 2009, with an amount of Rs.1 (one) crore, in cash, and some weapons.

Accused Niranjan Hojai (since absconder) is the Commander-in-Chief of DHD(J), who operates from outside India; whereas accused Jewel Garlosa is the Chairman of DHD(J), who, earlier, operated from Nepal, but established, later on, a hideout, at Bangalore, in conspiracy with accused-appellant, Ashringdaw Warisa @ Partho Warisa, who has, in turn, taken help of, and support from, accused Samir Ahmed.

(ii) The ASDC, which is a political organization, came, with the support of DHD(J), to power in NCHAC in alliance with another national party. On coming to power, Dipolal Hojai was elected as the Chief Executive Member (in short, □CEM') of the NCHAC. When, however, Niranjan Hojai found that Dipolal Hojai was not proving to be as useful as was needed and promised, a tele-conference was, in the presence of Dipolal Hojai, held between Niranjan Hojai and those executive members of the NCHAC, who belong to ASDC and their said alliance partners. In this tele-conference, Niranjan Hojai asked Dipolal Hojai to resign from the office of the CEM and elect Mohit Hojai as the CEM of NCHAC. Dipolal Hojai accordingly resigned on the pretext of ill-health and accused Mohit Hojai became the CEM.

(iii) Thereafter, Mohit Hojai, an active member of the DHD(J), made full use of his office in helping the activities of DHD(J) in close contact with Niranjan Hojai and their other associates. For the purpose of running the affairs of DHD(J) as an unlawful association and also for carrying out its terrorist acts, fund was needed and this fund was obtained not only by kidnapping, abduction, extortion, murder, etc, but also by dishonest misappropriation of Government funds made available by the State Government to run the administrative affairs of the NCHAC.

(vi) For the purpose of siphoning of government fund with the help of the elected members of the Council, contractors and government servants and to strengthen thereby the subversive activities of the DHD(J), a criminal conspiracy was entered into by the present appellant, Jibangshu Paul, with others named in the charge-sheet. In accordance with this criminal conspiracy, the funds, earmarked for the PHED Department and Social Welfare Department, were utilised by the DHD(J) by way of siphoning off directly a sum of Rs.13.5 Crore from the Bank account of Social Department in the year 2008-2009 and a sum of Rs.3 Crore from the PHED Department in the year 2009. The

appellant along with many others had entered into the criminal conspiracy during the month of November, 2008, at Haflong, in the erstwhile NC Hills, now known as Dima Hasao District, and at other places and had defalcated huge sums of money from the funds available with the NCHAC by creating false and fabricated documents and the amount(s), so realised, were channelized through Hawala operators, at Guwahati and Calcutta, to reach arm smugglers, who smuggle arms and ammunitions and supply the same to DHD(J) to commit acts of terror and violence and to wage war against the State with a view to thwart its ultimate authority. Cheques were issued, in the name of non-existing persons, by one Karuna Saikia, who, while holding the post of Executive Engineer, also functioned as Additional Chief Engineer, PHED Department. Karuna Saikia was a close associate of Mohet Hojai (who was the then Chief Executive Member of the NCHAC). On the direction of Mohet Hojai, such cheques were encashed by the present appellant, who is a contractor.

130. For the reason of clarity, relevant portions of the charge- sheet are reproduced below:

> "17.1 The North Cachar Hills Autonomous District Council (NCHAC) was constituted under the provisions of the sixth schedule to the Constitution of India to administer the autonomous district NCHAC has three wings of administration viz. Legislature, Judiciary, and Executive. Apart from the subjects enshrined in the sixth schedule, the Government of Assam has transferred almost all the administrative departments with executive power to the Council except for General Administration, Police, Treasury, Election and Judiciary. The NCHAC has 28 members in the Executive Committee including 2 nominated members. There are 12 Executive Members, each of whom is placed in charge of a department. The leader of the majority party is chosen as the CEM who has the finance portfolio of the Council. There is a Planning Board for the NCHAC and CEM is also the Chairman of the Planning Board. NCHAC is under the administrative responsibility of the Hill Area Development Department of the Government of Assam.
>
> 17.3 The main activity of the DHD (J) after 2006 was to siphon off Government funds through extortion and with the help of elected members of the Council, Contractors and Government Servants in order to finance their subversive activities mainly targeted at major infrastructure projects in that area. Two Government projects badly affected by the acts of terror and violence by DHD (J) are the „East West Corridor Project and the Broad Gauge Conversion Project between Lumding and Silchar. DHD(J) has also indulged in several attacks on the security forces notable ones are the ambush on the Central Reserve Police Force (CRPF) personnel in which seven men were killed and the ambush on the Assam Police party in which six men lost their lives.
>
> In the past two years, DHD (J) has laid three major ambushes on the security forces besides other killings. The violence level by the group has increased significantly after 2006. It was revealed in investigation that some of the weapons obtained from DHD (J) and presently in the custody of the State have the same number and make as that of the weapons looted after the killing of security force personnel by the DHD (J).

Thus it is evident that the DHD (J) has been indulging in terrorist acts within the meaning of Section 15 of the UA (P) Act, 1967.

17.4 A portion of funds allotted to two main Departments i.e. Public Health Engineering (PHE) Department and Social Welfare Department were utilized by the DHD(J). It was found during investigation that an amount of Rs.13.5 crore was siphoned away directly from the bank account of Social Welfare Department in the year 2008-2009 besides a large amount by other means and about Rs.3 crores were siphoned from the PHE Department in the year 2009 itself.

17.5 The accused 1. Jibangshu Paul 2. Golon Daulagupu 3. Karuna Saikia 4. Mohet Hojai 5. Md. Redaul Hussain Khan @ Ranu 6. Jewel Gariosa @ Mihir Barman @ Debojit Singha 7. Anshringdaw Warisa @ Partho Warisa @ Anandra Singha 8. Samir Ahmed 9. Vanlalchhana @ Vantea @ Joseph Mezo 10. Maisawmkimi 11. George Lam Thang 12. Niranjan Hojai 13. Jayanta Kr. Ghosh 14. Debasis Bhattacherjee @ Bapi 15. Sandip Kr. Ghosh @ Shambhu Ghosh 16. Phojendra Hojai, and others entered into criminal conspiracy during November 2008 at Haflong, NC Hills district (now Dima Hasao district) and other places, created false and fabricated documents and defalcated huge sums of money from the funds available with NCHAC which was channelized through Hawala operators at Guwahati and Kolkata to reach armed smugglers who smuggled in arms and ammunitions and supplied it to DHD(J) to commit Acts of terror and violence and to wage war against State with a view to overawe its legitimate authority.

17.6 In pursuance of the said criminal conspiracy, cheques were issued in the name of non- existing persons by the accused Karuna Saikia on the direction of Mohet Hojai and the cheques were en-

cashed from State Bank of India, Haflong by Jibangshu Paul, a contractor on 31.1.2009 and

3.2.2009 and the cash amounting to about Rs.33.45 lakhs was kept with himself for further supplying it to Mohet Hojai through his authorized representative for the terrorist activities. The amount of Rs.32,11,000 seized on 11.2.2009 was from the money kept by Jibangshu Paul after withdrawing from the bank which he was going to hand over to Mohet Hojai.

17.7 In pursuance of the said criminal conspiracy, cheques were issued in the name of Uttam Phonglosa @ Munna Phonglosa and Dilip Phonglo by the accused Karuna Saikia on the direction of Mohet Hojai and the cheques were deposited in their account without supplying any materials and a total cash amount of Rs.95,48,500 was withdrawn and delivered to the accused Mohet Hojai for the terrorist activities of the DHD(J).

17.8 In pursuance of the said criminal conspiracy, cheques were issued in the name of non- existing persons by the accused Karuna Saikia on the direction of Mohet Hojai and the cheques were en-

cashed from State Bank of India, Haflong by Jibangshu Paul, a contractor on 9.2.2009 and handed over the cash amounting to about Rs.70,00,000 to Mohet Hojai and to his authorized representative for the terrorist activities.

17.9 In pursuance of the said criminal conspiracy, Golon Daulagupu who is a member

Autonomous Council, NC Hills, is a close associate of Mohet Hojai and Jibangshu Paul. He is a member of DHD(J), a terrorist organization. He was found along with Jibangshu Paul on 11.2.2009 when he was apprehended in his official vehicle with the fund of Rs.32,11,000 which was en-cashed by Jibangshu Paul for supplying it to Mohet Hojai for the DHD(J) to support their terrorist activities.

17.10 In pursuance of the said conspiracy, Karuna Saikia who is the Additional Chief Engineer, Public Health Engineering Department and close associate of Mohet Hojai (CEM of NC Hills Council), Niranjan Hojai (C-in-C of DHD(J)). Jibangshu Paul and J.K.Ghosh, used to provide funds for DHD(J) to procure arms and ammunitions for waging war against the State. He siphoned the funds of NCHAC by issuing cheques in the name of non-existing persons/without receiving the supply of materials on the direction of Mohet Hojai and directed Jibangshu Paul, Dilip Phonglo and Munna Phonglosa for en-cashing the cheques from State Bank of India, Haflong. The en-cahsed amount was delivered to Mohet Hojai through his authorized representative on his direction.

17.13 In pursuance of the said criminal conspiracy, Jewel Gariosa @ Mihir Barman @ Debojit Singha who is a self styled commandant-in-chief of DHD, a splinter group of former armed insurgent group of Assam called Dimasa National Security Force (DNSF) is also a close associate of Jiranjan Hojai, Niranjan Hojai and he visited Katmandu and also went to Bangkok during 2007 on Nepali passport in a different name. Their visit to Bangkok relates to the procurement of arms and ammunitions to create terrorist activities. He also took shelter in a residential premises at Bangalore arranged by the accused Samir Ahmed. He was staying at Bangalore on a false name to conceal his true identity and to evade arrest by police. He was in contact over phone and email with Niranjan Hojai who continued to live abroad controlling the activities of DHD (J). He was also found in the company of the accused Vanlalchana when he visited Bangkok.

17.16 In pursuance of the said criminal conspiracy, Vanlalchhana @ Vantea @ Joseph Mezo who is an arms dealer involved in arms smuggling from abroad, met the Chief of DHD(J) Jewel Garlosa and C-in-C Niranjan Hojai at Bangkok and Kwalalampur and finalized the deal for arms supply. He

sent arms to DHD(J). He also delivered dollars after converting Indian rupees to the accused Niranjan Hojai for procurement of arms and ammunitions. He pointed out the concealment of weapons at a place called Saronveng in the house of Nampui which was meant to be delivered to DHD(J) and the same were seized.

17.19 In pursuance of the said criminal conspiracy, Niranjan Hojai who is a Commander-in-Chief of the DHD(J), continued to live abroad controlling the activities of DHD(J) over phone and email. He was found in Nepal along with Jewel Gariosa and Ahshringdaw Warisa. He went to Bangkok during December 2007 using the false identity. He utilized the extracted funds for procurement of weapons from abroad and to smuggle the same into India to create terrorist activities and to wage war against India. He received the funds in dollars obtained through Hawala channel. He pointed out the concealment of arms by their cadres. A huge catch of arms was recovered from NC Hills district (now Dima Hasao). Out of the seized weapons three SLR rifles were actually looted after ambush on the security forces.

17.23 In pursuance of the said criminal conspiracy, Phojendra Hojai who is a Contractor and member of DHD (J), received the funds obtained through hawala channel and sent it to the accused Niranjan Hojai through Vanlalchana. Phojendra Hojai was the main member of the DHD(J) who used to collect funds from accused Mohet Hojai either though Hawala or physically and then supplied to the receivers sent by Niranjan Hojai. He was also the carrier of Rs.1 crore sent by the accused Mohet Hojai on the 1st April 2009 for the accused Niranjan Hojai. [Emphasis added]

131. Thus, the prosecution case rests substantially on the theory of criminal conspiracy. It may be pointed out, in this regard, that in every case, it is not necessary that there must be direct evidence of criminal conspiracy inasmuch as criminal conspiracy may be inferred from circumstantial evidence too if such evidence is based on acts or omissions indicating existing of such criminal conspiracy. We may, in this regard, take into account not only those incriminating materials, which allegedly exist against DHD(J) as an unlawful association and its terrorist acts, but also those materials, which allegedly exist against accused, Niranjan Hojai (since absconder), Jewel Garlosa, Chairman, DHD(J) and Mohet Hojai, Chief Executive Member, NCHAC, Karuna Saikia, and, amongst others, the present appellant.

132. We may pause here to point out that in National Investigation Agency -vs- Redaul Hussain Khan, reported in 2009 (3) GLT 855, it was submitted before the Supreme Court that DHD(J) cannot be held to have been indulging in terrorist acts inasmuch as it has been notified as an unlawful association after the occurrence, leading to the registration of the present case, had already taken place. Turning down this argument, the Supreme Court held that there was little doubt that even on the day, when R.H. Khan (i.e., the respondent in Crl. Appeal No.25/2010, whose bail we have just cancelled) was apprehended, DHD(J) was indulging in terrorist acts, although it came to be declared as an unlawful association sometime later and, hence, the provisions of the UA(P) Act, 1967, would be attracted to the facts of the present case. The relevant observations, made, in this regard, in Redaul Hussain Khan (supra), read as under:

> "15. Mr. Rawal submitted that although Mr. Ghosh had referred to some newspaper reports indicating that there was a possibility of amnesty being granted to the members of DHD(J), the same was yet to materialize, and, on the other hand, it also indicated that the said organization was indulging in terrorist activities. Accordingly, in view of the definition of "terrorist act" in Section 15 of the 1967 Act and the provisions of Sections 13 and 17 thereof, there was little doubt that even on the date when the petitioner was apprehended, DHD(J) was indulging in terrorist acts, although, it came to be declared as an "unlawful association" sometime later. Mr. Rawal urged that having regard to the above, the Special Leave Petitions filed against the order of the High court refusing to grant bail were liable to be dismissed.
>
> 16. We have carefully considered the submissions made on behalf of the respective parties and we are unable to agree with Mr. Ghosh that the provisions of the Unlawful activities (Prevention) Act, 1967, would not be attracted to the facts of the case. We are also unable to accept Mr. Ghosh's submissions that merely because DHD(J) had not been declared as an "unlawful association" when the petitioner was arrested, the said organization could not have indulged in terrorist acts or that the petitioner could not have had knowledge of such activities."

(Emphasis is supplied)

133. Coupled with what have been indicated above, it also needs to be noted that the charge-sheet has already been laid, in the present case, and the accused-appellants have already been furnished with the copies of the materials, on which the prosecution relies. Hence, the materials, which have already been furnished to the accused-appellants, can be taken note of, and discussed, in order to ascertain whether the accused-appellant deserves to be granted bail or not.

134. It is, indeed, necessary to pause here and note that Section 437(1) Cr.PC imposes, as already discussed above, restrictions on the power of the Special Court and, consequently, on the powers of the High Court too, to release an accused on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or imprisonment for life. This apart, as already discussed above, the proviso to Section 43D(5) of the UA(P) Act, 1967, imposes yet another limitation on the Special Court's power as well as on the power of the High Court, while considering an application for bail under Section 21 (4) of the NIA Act, the limitation being that if there are reasonable grounds for believing that the accusations, made against an accused involving him in the commission of an offence under Chapter IV and/or Chapter VI of the UA(P) Act, 1967, are prima facie true, the accused cannot be allowed to go on bail.

135. However, determination of the question as to whether there are „reasonable grounds for believing or not would obviously invite the Court to assign reasons so as to make it clear as to why this Court has taken the view that no „reasonable grounds to believe exist or as to why „reasonable grounds to believe exist. In either way, therefore, the reasons are necessary to be assigned and that is what invites and compels us to discuss, albeit as briefly as possible, the materials on record, which, to our mind, are relevant for the purpose of deciding this appeal and some of these materials

not only the learned Special Public Prosecutor, but even the learned counsel for the appellant has freely referred to.

136. The statements of PW1, PW2 and PW9, when read together, clearly reveal that on 11-02-2009, PW9, as Deputy Superintendent of Police (HQ), NCHAC, received information that huge amount of money was being carried to be delivered to DHD(J), whereupon checking of vehicle was resorted to. The statements of these witnesses also reveal that a Scorpio vehicle was intercepted on 11-02-2009 and inside the said vehicle, the occupants, amongst others, were the present appellant, namely, Jibangshu Paul and accused Golon Daulagupu, a Member of the NCHAC. PW 5, 6 and 7 are witnesses to the seizure of a sum of Rs. 32,11,000/-, found in cash, inside the said vehicle. The vehicle was an official vehicle having red light with PW8 acting as PSO of Golon Daulagupu. In fact, PW8 admits that he performed the duty of PSO of Golon Daulagupu and, on 11-02-2009, he along with the driver, namely, Ram Prasad Sharma, was in the Scorpio, when the police intercepted the vehicle. It is also in the statement of PW8 that a sum of Rs. 32,11,000/- was found, in cash, inside the vehicle. The statement of PW8, who is the PSO of Golon Daulagupu, reveals that he went to the appellant, Jibangshu Paul, who carried a bag to the vehicle and, it is this bag, which was found by the police, to contain money, in cash. The purpose of using the official vehicle, with red light and a PSO, according to prosecution, was to avoid checking and safe transportation of the money to the earmarked destination. The money was, as indicated hereinbefore, seized.

137. PW 10, who, as an LDA, at the relevant point of time, used to work in the office of the Executive Engineer, PHED, Haflong, as Cashier. His statement discloses that usually, contractors/suppliers submit their bills to the concerned Sub- Divisional Officer, who, on completion of verification thereof, forwards the bill for payment to the Executive Engineer and the Executive Engineer, then, forwards the bill, if payment is to be made, to the bill clerk/bill auditor, who, in turn, checks the bill and, then, forwards the bill to the Account Officer, who, then, makes over the bill, if payment is found fit to be made, to the Executive Engineer and the Executive Engineer sends the bill to him (PW10) for preparing cheque and make payment. The statement of PW10 shows that Karuna Saikia, Executive Engineer, PHED, used to reside at the house of the appellant, Jibangshu Paul, and, on 2/3 occasions, cheques were issued by Karuna Saikia without any bills and vouchers. This witness has also stated that on 07-02-2009, when Karuna Saikia was in Guwahati, he instructed PW10 to draw cheques, after confirming the names from the appellant, amounting to Rs. 68,25,000/- and to hand over the same to the present appellant, who was to go to Guwahati for obtaining Karuna Saikia's signature on the cheques. PW10 claims that since there was no bill or voucher for making payments by cheque, he made an inquiry, in this regard, from Karuna Saikia, who, in turn, told him that bills and vouchers would be submitted by him on return from Guwahati.

138. What is important to note is that according to PW10, he prepared the cheques, handed over the cheques to the present appellant and returned to the office, but after about 1 (one) hour, Karuna Saikia, again, telephoned him and asked him to prepare one cheque of Rs. 12,60,000/-, in the name of Dilip Phonglo, and hand over the cheque to Dilip Phonglo for his (Karuna Saikia) signature, at Guwahati, whereupon PW10 prepared the cheque, contacted Dilip Phonglo, over phone, and handed over the unsigned cheque to him. It is in the statement of PW10 that he was aware of the fact that cheques were encashed and Jibangshu Paul (i.e., the present appellant) played main role in the

encashment of the cheques. This witness has stated that in the same manner, cheques were prepared at the house of the appellant.

139. PW 18, who is an UDA in the office of the Chief Engineer, PHED, has stated that he had brought release order from the State Government for, altogether, Rs. 5 Crore, Rs. 2 Crore being under non-plan head and Rs.3 Crore for maintenance of the existing scheme. It is in the statement of PW18 that in the first week of January, 2009, Mohit Hojai, Chief Executive Member (CEM), called him (PW18) over phone, Mohit Hojai handed over 8 names, written on a piece of paper, and ordered him (PW18) to hand over the said piece of paper to Karuna Saikia to issue work orders/supply orders in respect of those names and he (PW18) did as he had been ordered by Mohet Hojai. PW18 has also stated that in the month of January, 2009, Karuna Saikia took him to the house of Mohet Hojai on a hired auto carrying a bag with him and, on the way, Karuna Saikia told him that the bag, which contained money, was to be given to Mohet Hojai and, on reaching Mohet Hojai's house, Karuna Saikia went inside the house and returned after handing over the bag and till the time Saikia returned, he (PW18) remained in the auto rickshaw.

140. What is, now, extremely important to note is that, according to PW 18, on 09-02-2009, morning, Mohet Hojai called him to Mohet Hojai's office and told him that he (Mohet Hojai) had already talked to Karuna Saikia and directed him (PW18) to contact Karuna Saikia and asked him to send the balance amount of money on that day itself, whereupon PW18 contacted Karuna Saikia and informed him (Karuna Saikia) about the order of CEM. What is interesting to note is that PW 18 states that Karuna Saikia asked him (PW 18) to collect money from the present appellant, at 4-00 p.m., and, as per direction of Karuna Saikia, one Joybesh, who used to work for Mohet Hojai, came to the office of PW 18 to collect money, whereupon PW 18 took Joybesh to the house of the present appellant, who already knew about the delivery of the money to Mohet Hojai, and the present appellant, thereafter, gave them (PW 18 and Joybesh) a bag containing about Rs. 70,00,000/- and, thereafter, by delivering the money to Mohet Hojai, PW 18 came back to his house.

141. More importantly, PW18 states that on 10-02-2009, i.e., a day before the present appellant was allegedly found with cash by the police, Karuna Saikia phoned PW18 and ordered him to inform the present appellant to deliver the remaining cash, on 11-02-2009, positively as per direction already given by Mohet Hojai to the present appellant and PW18 accordingly went to the house of the appellant and passed the massage to the present appellant.

142. PW 29, who is a contractor, has given a statement to the effect that, from time to time, he had encashed cheques of diverse sums of money given to him by Karuna Saikia, and, then, handed over the money to Mohet Hojai directly at his house, but the cheques were issued without any supply orders having been made. The important aspect of the statement of PW 29 is that Karuna Saikia had told him that the money had been demanded by the „jungle party -- which is an expression, according to the prosecution, to refer to the underground extremists -- and has to be, therefore, sent immediately, whereupon he (PW29) encashed the cheque from the bank and handed over the money to Mohet Hojai at his residence. It is in the statement of PW 29 that on 07.02.2009, at about 11-00 a.m., one Shri Sriwell Masa, who was employed as the Cashier, at the office of the PHE, at Haflong, called him (PW 29) near Haflong bus stand and handed over an unsigned cheque of Rs.

12,60,000/- in his (PW 29's) name. The said Sriwell Masa told him that the cheque was to be signed by Karuna Saikia, Executive Engineer, PHE, and, thereafter, the same was to be taken to Guwahati. PW 29 further stated that after his meeting with the said Masa, he contacted Karuna Saikia over phone, whereupon Saikia asked him (PW 29) to reach Lanka Bus stand on 09.02.2009, at 11-00 a.m., for obtaining his (Saikia's) signature on the said cheque and for further instructions. On the appointed day, PW 29 accordingly went to Lanka, by bus, and reached there at 10-45 a.m. Karuna Saikia also reached there, by bus, at about 11-30 a.m. Saikia signed the cheque and, while handing over the cheque to PW 29, Saikia attested PW 29's signature on the reverse side of the said cheque and instructed PW 29 to encash the cheque the next day. Saikia further instructed PW 29 to deliver the encashed amount of money to Mohet Hojai directly at his residence. Saikia, during conversation with PW 29, assured PW 29 that Saikia would issue supply order in his (PW 29) favour shortly and that the profit, derived from the supply of materials (i.e., the supply order assured to be issued) would be more than rupees five lakhs. On 10.02.2009, PW 29 encashed the cheque and handed over the entire money to Mohet Hojai at the later's residence. PW 29 states that Saikia constantly remained in touch with him before and after withdrawal of the said money from bank and was liaising with Mohet Hojai.

143. The statement of PW 36 and PW 37 reflect laundering of money through hawala network. PW 51, PW 53 and PW 57 have described the role, played by Niranjan Hojai, Commander-in- Chief, DHD(J), in the resignation of Dipolal Hojai, the then Chief Executive Member, NCHAC. The statements of PW 53, Dipolal Hojai, who was the former Chief Executive Member of the NCHAC, being of great relevance in the context of the present case, particularly, for the purpose of determining the threat, which DHD(J), headed by Niranjan Hojai as its Commander-in- Chief, allegedly posed to the stability of the State, are reproduced below:

> "On the 26th of November, after attending session of the Council, I went as a Chief Guest in a medical programme. The EM of Medical Department, Kulendra Daolagupu was also with me. At 5-00 p.m., when I was reaching home, Bijonyendra Sengyung, EM, Agriculture, called me up and said that he had been trying to find me. When I asked as to what was the matter, he replied that I have been asked to make you talk to Niranjan Hojai of the DHD(J). He also said that if I wait for sometime, the phone of Niranjan will come.
>
> I then went to my bedroom and asked Bijoyendra to wait in the sitting room. The phone came after 15 minutes. He gave the phone to me. Niranjan Hojai asked me to call for a meeting of all elected members of the Council to discuss an urgent matter. I called everyone at 7-00 p.m. in my house and said that it was an emergency meeting. Most of the members of the ASDC and the BJP attended the meeting. I thought that the meeting was probably to discuss the cease fire. Probably Bijoyendra and Mohet Hojai already knew as to what was in store. After we had gathered a phone call again came on the phone of Bijoyendra Sengyung. Niranjan asked whether all had gathered or not. He asked me to put the speaker phone on the "ON" mode. Bijoyndra said that his phone did not have a good speaker and gave the number of Kulendra Daulagupu. The call of Niranjan came on Kulendra s phone and the mobile speaker was put on

> full volume and kept at the centre of the table. Niranjan said, "I am the C-in-C of DHD(J). By tomorrow 10-00 a.m. Dipolal Hojai has to resign and Mohet Hojai has to be made the CEM. If you do not listen, you will have the same fate as Purnendu Langthasa." One Debajit Thaosen, who was slightly drunk tried to argue. He asked him as to why this was being ordered. Niranjan replied that Dipolal did not do much for the Dimasas regarding nomenclature of N.C. Hills, making a Dimasa S.P., D.C. and Dimasa HODs of all departments. Debojit then said that even Mohet Hojai cannot get these things done. Niranjan then told him to shut up. I asked others to support after the call and tried to resist the pressure. But all others did not support due to fear. I had to resign. Mohet Hojai was E.M. of Social Welfare from Jan, 2008 to November, 2008. He became CEM in the first week of January, 2009, as per the direction of Niranjan Hojai. He was elected unopposed due to fear of Niranjan Hojai and Maorang Dimasa. Mohet Hojai retained important portfolio with him including Social Welfare. PHE was with him till February, 2009."

[Emphasis added]

144. PW 57 has supported, in substance, the above statement of PW 53, Dipolal Hojai, and has stated as to how Niranjan Hojai made Dipolal Hojai (PW 53) resign from the office of Chief Executive Member of the NCHAC and how Mohet Hojai became the Chief Executive Member of the NCHAC with the support of Niranjan Hojai. The statement of PW 57 clearly indicate that money for DHD(J) was paid by the contractors to Mohet Hojai.

145. We may turn, now, to the statements of PW 63, Kulendra Daolapugu, who was an Executive Member of the NCHAC from February, 2008, to November, 2008), has stated that in the month of November, 2008, the Executive Members of the NCHAC, who belong to ASDC and their alliance partner, held a tele-conference with Niranjan Hojai, Commander-in-Chief, DHD(J), at the official residence of the then CEM, Dipulal Hojai, which was attended by this witness too. In this conference, according to this witness, he kept the speaker of his mobile phone on speaker mode so that the other Members could hear what was being spoken in the conference; and that in this tele-conference, Niranjan Hojai asked Dipulal Hojai to resign from the post of the CEM, as he had failed to resolve many of the issues, and he (Niranjan Hojai) also asked those, who were attending the conference, to elect Mohit Hojai as the CEM and, on the following day, Dipulal Hojai resigned showing health problem and Mohit Hojai was elected as the CEM without any opposition. This witness has also given statement to the effect that he had gone, with accused Mohit Hojai, to Kualalampur, where they met Niranjan Hojai and that after Niranjan Hojai had talked to this witness, Mohit Hojai took Niranjan Hojai to his room for talking to Niranjan Hojai separately. This witness's statement shows, apart from everything else, not only a close connection, but also a deep association between Mohit Hojai and Niranjan Hojai.

146. Apart from what have been indicated above, we find, on perusal of the relevant case diary and the report, submitted under Section 173 CrPC, that there are enough materials implicating among others, (i)Niranjan Hojai, Commander-in- Chief, DHD(J), presently an absconder, (ii)Jewel Garlosa, Chairman, DHD(J) and (iii) Mohit Hojai, who headed NCHAC as the CEM. The materials,

so collected, and until shown otherwise, reveal, in tune with what the NIA alleges, thus: Dipolal Hojai, the then elected Chief Executive Member (CEM), North Cachar Hills Autonomous Council (NCHAC), resigned from the post of CEM, N.C. Hills, to make way for Mohit Hojai. Dipulal Hojai's statement, in this regard, is of great importance, which clearly reveals that the DHD(J) was indulging in terrorist acts. In fact, the statement of Kulendra Daulagupu shows that the members of the NCHAC had a telephonic conference with Niranjan Hojai, Commander-in-Chief, DHD(J) and in the said conference, Niranjan Hojai asked Dipulal Hojai, the then CEM, NCHAC, to elect Mohit Hojai, as the CEM, because Dipulal Hojai had failed, as CEM, to resolve many issues. Following the direction, so received in the said telephone conference, Dipulal Hojai resigned pretending his resignation to be on health ground and Mohit Hojai got elected as the CEM without any opposition.

147. Coupled with the above, from the statement of PW 64, Subrata Thaosen alias Zaifrang Dimasa, what transpires is that he joined DHD(J) in June, 2005, and since then, he has been working as the said outfit's Publicity Secretary having acquired requisite training from the said organisation. According to this accused, he knew that Rs.1,50,35,000/- had come to the hands of the said organisation by way of tax and, out of this fund, he sent Rs.75,00,000/- to some of his associates and, further, as much as Rs.4.5 Crore was obtained by their organisation from a merchant by kidnapping him and keeping him in jungle for about 15 days. The statements of this accused also show that an amount of Rs.10,00,000/- was paid to another banned outfit, namely, NSCN(IM), and that a part of the sum has also been spent for providing medicine to the members of their own cadre. According to this accused person's statements, other outfits, who are involved in the acts of terrorism, have given shelter to the members of the DHD (J) and also worked with them. This accused has confessed that Ex-CEM (former Chief Executive Member) in NCHAC, Purnendu Langthasa, and Ex-Executive Member, Ajit Bodo, Dy. Chairman, NCHAC, were among the members, who have been killed by the members of the DHD(J), on the instructions of, amongst others, Niranjan Hojai, Commander-in-Chief of DHD(J). The reason for killing is that in terms of the assurance given, agreed number of seats, in the said Council, had not been given to the over ground associates of the DHD(J). This accused confesses that arms and ammunitions, which are used by this outfit, are supplied by Lallian Mizo, a smuggler of arms. This accused also described various other incidents of killings, and arson and getting news publisized through television.

148. It has also surfaced from the statement of PW 64 that the leaders of the NCHAC gave, in terms of their assurance, which they had given before the election of the said Council, Rupees 2 Crore. According to his statements, the DHD(J) campaigned, in the election, for its alliance partner, which is a national political party, but not for another national political party and restrained voters, by threatening them, not to cast votes in favour of a particular national political party, by telling them that they would face dire consequences if they voted for the said political party. The statements of PW 64 further show that an understanding was reached before the last election with this outfit and a national political party that if their alliance came to power, Dipolal Hojai must be made the Chief Executive Member (CEM) of the NCHAC. His statement also reveals that the DHD(J) urged the labourers to stop work in a particular cement factory; but the labourers did not listen to them and that is why, there was mass killing of the labourers. His statements also reveal that DHD(J) indulges in collection of illegal tax and one of the senior citizens of Haflong was kidnapped by the „tax commander , because of the former's refusal to pay tax and was released on payment of ransom.

From the statements of this witness, it also transpires that DHD(J) collects huge amount of money by unlawful means and the money, so procured, is utilized for, amongst others, purchase of arms and ammunitions and that the said group had also killed some of those labourers, who were involved in the project of conversion of extension of broad gauge line from Lumding to Badarpur.

149. Thus, on the basis of the materials on ground, and unless shown otherwise, at the trial, there are reasonable grounds to believe that the DHD(J) ran, or attempted to run, almost a parallel Government, killed with impugnity those, who do not abide by what is directed to be done, they indulged in extortions, kidnappings, siphoning off the Government fund for purchase of arms and ammunition.

150. We may pause here to point out that we are alive to the position of law that the statement of one accused cannot be treated as substantive evidence against his co-accused. We are also conscious of the fact that keeping excluded the statement of a co-accused, when the evidence, adduced on record, otherwise, satisfy the Court of the guilt of the accused, the statement of the co-accused can be used as an aid for strengthening the conclusion, which the Court may have, independent of the statement of the co-accused, already reached. Whether the statements, recorded in the present case, are voluntary or involuntary, is a question, which would be determined at the trial. What is, however, relevant and material is that the statements, recorded in the present case, support the statements of the witnesses given to the effect that DHD(J) collects tax without being authorized by law; it is involved in running a racket of kidnapping, extortion and murder of those, who may not agree with the philosophy of, or carry on the directions of, DHD(J). The DHD(J) is also involved in ethnic killings. The DHD(J) interferes with free and fair elections and force people, by threat and intimidation, to cast vote in favour of such a party, who may agree to support the cause of the DHD(J).

151. Thus, until shown, otherwise, at the trial, the acts of the DHD(J) and its members must be inferred to amount to „terrorist acts within the meaning of Section 15 of the UA(P) Act, particularly, because their acts are calculated, as the materials in the case diary reflect, to threaten the unity, integrity, security and sovereignty of India and they strike terror in the people, in general, and, at times, even in a given section of the people, such as, the labourers, by use of criminal force. Obviously, those, who help and aid the terrorist acts of the DHD(J) and its members, would be abettors of such offence(s). As the DHD(J) ran, or attempted to run, almost a parallel Government, thereby shaking the very foundation of the constitutional scheme of governance, in India, its actions and the actions of its activists, such as, Niranjan Hojai, Mohit Hojai and Jewel Garlosa do amount to, unless can be shown otherwise, at the trial, the offence of waging war against the State within the meaning of Section 121 IPC and is punishable by death or imprisonment for life in terms of the penal provisions of Sections 121 of IPC and, those, who help the DHD(J) and/or its activists in carrying out the activities of the DHD(J), would be, if not members of the DHD(J), be responsible as abettors of the offence of waging war against the State and their acts of abetment, too, would be punishable to the same extent as do the acts of the chief perpetrators of such offences. This apart, whoever commit a terrorist act is punishable by Section 16 of the UA(P) Act, which falls under Chapter IV thereof. A person, who commits a terrorist act, cannot be allowed to go on bail, because of the proviso to Section 43D(5).

152. It needs to be noted that a terrorist organization within the meaning of Section 2(m) means an organization listed in the schedule to the said Act or an organization operating under the same name as an organization so listed. A terrorist gang, according to Section 2(l), means any organization other than terrorist organization, who are systematically or otherwise connected with, or involved in, terrorist act.

153. We have already pointed out above that DHD(J) has been carrying on terrorist acts and the DHD(J), in the light of what Section 2(l) provides, has to be regarded as a terrorist gang. A member of a terrorist gang, who is involved in the terrorist act, shall be punishable, according to Section 20 of UA(P) Act, with imprisonment for life and shall also be liable to fine.

154. In the present case, the activities of the DHD(J) are carried out (as the materials collected during investigation reveal and until shown otherwise) with intent to threaten, inter alia, the security and sovereignty of India. These acts of the DHD(J), therefore, as already indicated above, amount to terrorist acts. This apart, killing of the labourers, as described above, by the members of the DHD(J) in order to strike terror in them also falls within the definition of the term terrorist act as given in Section

15. Even those, who associate and aid the activities of DHD(J), when DHD(J) is involved in carrying out the activities, which threaten the unity, integrity, security and sovereignty of India, as is the case at hand, such persons would also be liable to the same extent as do perpetrator of the terrorist acts. In short, a person, who abets commission of a terrorist act, would be responsible to the same extent as the person, who commits terrorist act. When a terrorist act results into death of a person, the person, who commits the terrorist act, shall be punished with death or imprisonment for life and when a person abets commission of such an offence, he, too, would be liable, as an abettor, to the same extent as the person committing such a terrorist act.

155. We may also point out that Section 17 of the UA(P) Act states:

> Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such 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.

156. The language, used in Section 17, clearly shows that when a person raises or collects funds or provides funds or attempts to provide funds to any person knowing that such funds are likely to be used by such person(s) to commit a terrorist act , then, the person, who collects or provides funds or attempts to provide funds, would commit an offence under Section 17.

157. In the case at hand, there are quite a few transactions, wherein present appellant had collected funds for accused Mohit Hojai knowing well that Mohit Hojai was a DHD(J) activist and he had

come to power as the CEM with the blessings of Niranjan Hojai. Any prudent person, placed in the position of the present appellant, would have known that the funds, which they were carrying for Mohit Hojai, were likely to be used for the purpose of terrorist acts. Whether such funds have, as a matter of fact, been used or not for commission of terrorist act is not material in the face of the provisions of Section 17. What is material is a person's knowledge that such funds are likely to be used for committing a terrorist act.

158. In the absence of anything showing to the contrary, the inference (at this stage) would be that the present appellant, acting in conspiracy with Mohet Hojai, helped in carrying the money of Mohit Hojai from one place to another and while so doing, he knew that the money was likely to be used for terrorist acts. In such circumstances, these appellants cannot, but be interfered, albeit tentatively and unless can be shown otherwise, to have prima facie committed offence under Section 17.

159. The materials, collected by the investigating agency, very clearly show that every prudent person, connected with the affairs of administration of the NCHAC, knew as to how DHD(J) has been influencing the running of the Government in the NCHAC. Unless, therefore, it is shown otherwise, a person, who is so close to Mohit Hojai (as the appellant), cannot but be inferred (at this stage) to have known as to why Mohit Hojai strikes terror in the heart and mind of the people, in general, and the □public servants', such as, Karuna Saikia, Sriwell Masa, and Sri Biraj Chakraborty, in particular. The terror, which Mohit Hojai succeeded in creating in the minds of such officers, was because of his being a functionary of the DHD(J). In such circumstances, how Mohit Hojai had come to power, whose blessings and whose support he had enjoyed and whose strength he was using to strike terror in others must be inferred, at this stage, to have been known to the present appellant too and yet, when the appellant was regularly helping Mohit Hojai in carrying money from one place to another, he has to be inferred to have known (unless he can show otherwise and which he has not shown so far) that he, as ordinary prudent men, knew that the funds, which he was making available to Mohit Hojai or was carrying on the instructions of Mohit Hojai from one place to another, were likely to be used for commission of terrorist acts. In such circumstances, one is constrained to hold, and we do hold, albeit tentatively, that there are reasonable grounds to believe that the case, against the present appellant, as regard commission of offences under various penal provisions of the UA(P) Act including one under Section 17 thereof, is prima facie true.

160. We may pause here to point out that since this appeal had been admitted for hearing, but the hearing was inconclusive, the Court directed that the execution of the warrant of arrest already issued against the accused-appellant by the learned Special Court shall remain suspended.

161. In the order, dated, 20.12.2010, which stands impugned in this appeal, the learned Special Court has clearly pointed out that the present appellant having not been granted bail by any Court in respect of the offences under Sections 16, 17, 18, 19 and 20 of the UA(P) Act, 1967, he needs to be taken into custody forthwith. A non-bailable warrant of arrest was accordingly issued, which remained unexecuted with the report that the appellant had not been found available at the address and his whereabouts is also not known to the inmates of the house. The learned Special Court, on 03.01.2011, therefore, directed non- bailable warrant of arrest be issued against the present appellant. In the facts and attending circumstances of the present case, since we have found that the

accused-appellant cannot be allowed to go on bail, we see no reason to interfere with the impugned orders, dated 20.12.2010 and 03.01.2011. This appeal, therefore, fails and the same shall accordingly stand dismissed.

162. Considering the fact that this Court has found that the accused-appellant cannot be allowed to go on bail, the consequence is that this appeal shall stand dismissed and the conditional order of suspension of the warrant of arrest shall accordingly stand withdrawn. The accused-appellant shall be taken into custody forthwith and be produced before the learned Special Court, NIA, Guwahati, so that further order of remand may be passed by the learned Court below.

163. Before parting with this appeal, we make it clear that whatever views and opinions we have expressed with regard to the facts discernible from the relevant case diary and the records are tentative in nature and these are meant for the purpose of considering the appellant's prayer for bail. Our views and opinions shall not be taken as final views and opinions of this Court as regards the guilt or otherwise of the accused-appellant.

164. With these above observations and directions, this appeal shall stand disposed of.

JUDGE JUDGE

Rk/TUC