NEUTRAL CITATION NO: 2022/DHC/004325

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 09.09.2022
% Pronounced on : 18.10.2022

\+ **CRL.A. 173/2022**

UMAR KHALID …..Appellant

Through : Mr. Trideep Pais, Senior Advocate with Ms. Sanya Kumar, Mr. Sahil Ghai and Ms. Rakshanda Deka, Advocates.

versus

STATE OF NATIONAL CAPITAL TERRITORY OF DELHI
..... Respondent

Through : Mr. Amit Prasad, SPP for State along with Mr. Ayodhya Prasad, Advocate with Inspector Anil Kumar and Inspector Lokesh Sharma, P.S.: Special Cell, Lodhi Colony.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. The Appellant has preferred the present Appeal under Section 21(4) of the National Investigation Agency Act, 2008 r/w Section 43-D(5) of the Unlawful Activities Prevention Act, 1967, seeking setting aside of impugned order dated 24.03.2022 passed by the Court of Sh. Amitabh Rawat, Ld. Additional Sessions Judge-03, Karkardooma District court (Shahdara district), Delhi, whereby the Appellant's Application for grant of Regular Bail was dismissed in case FIR No. 59/2020, PS. Crime

Branch (investigated by the special cell) registered under section 120B read with 124A, 302, 207, 353, 186, 212, 395, 427, 435, 436, 452, 454, 109, 114, 147, 148, 149, 153A, 34 IPC, Sections 3 and 4 of the Prevention of Damage to Public Property Act (PDPP) Act, 1984, Sections 25/27 Arms Act, 1959 and Sections 13, 16, 17, 18 of the Unlawful Activities (Prevention) Act 1967 (hereinafter, UAPA).

2. By way of the impugned judgment dated 24.03.2022, the Ld. Trial Court returned a finding that there were reasonable grounds for believing that the accusation against the appellant were "prima-facie true" on the perusal of the charge-sheet and accompanying documents for the limited purpose of bail and as such the embargo created by Section 43D(5) of UAPA as well as section 437 of the Criminal procedure Code squarely applied for grant of bail to the appellant and thus, the prayer for grant of regular Bail was declined.

3. It is this impugned order, which is subject matter of Appeal before this court, wherein the appellant besides praying for setting aside of the impugned order dated 24.03.2022 is also praying for release on regular Bail in the instant FIR No. 59/2020, PS. Crime Branch.

BACKGROUND TO THE CASE

4. Briefly stated, the aforesaid FIR came to be registered by the Crime Branch on 06.03.2020, alleging that the riots which took place in North East Delhi between 23.02.2020 and 25.02.2020 were the result of a pre-planned conspiracy between the Appellant along with his associates from

different organizations, who have all planned and carried out the said conspiracy which culminated in the said Riots. It has been alleged that the appellant had made provocative speeches at different locations and made an appeal to people to come out and block the streets, during the visit of US President Donald Trump, so as to publicize, at an international level, that minorities were being targeted and discriminated against in India.

5. Further, the Appellant and his associates also conspired to bring women and children onto the streets in several parts of Delhi with the intention of causing riots, pursuant to which, on 23.02.2020, women & children gathered under the Jaffrabad metro station to block roads with the object of inconveniencing people, escalating tensions and ultimately inciting riots. On the same day, children were taken out of some schools for minorities in a pre-planned fashion. Moreover, firearm, petrol bombs, acid bottles, stones with slingshots to pelt them etc. were gathered at several places such as Maujpur, Kardampuri, Jaffrabad, Chandbagh, Gokulpuri, Shiv Vihar and their neighbouring areas.

6. The said riots which ensued between 23.02.2020 and 25.02.2020, not only rocked Delhi but the entire country and almost 751 FIRs in relation to the said Riots was registered in different police stations of Shahdara and North East districts of Delhi, in which an estimated 53 people were killed (including one police official), besides causing damage to public property running into several crores and a sense of fear and panic prevailed in the mind of the general public during the said period and the

scars still remain in the mind of the public at large.

7. That the Appellant herein was arrested on 13.09.2020 by the Investigating agency, having joined after being called for investigation. The first charge-sheet came to be filed on 16.09.2020 against 15 accused persons. The Ld. Sessions Court, vide order dated 17.09.2020, took cognizance of all offences mentioned in the said charge-sheet against the said 15 accused persons, except Sections 124A/153A/109/120B which requires sanction from the State Government.

8. Thereafter, a supplementary charge-sheet was filed on 22.11.2020 against three accused persons including the present Appellant, who has been named as Accused No. 18. The Ld. Sessions Court took cognizance of all offences elaborated in the supplementary charge-sheet dated 22.11.2020 vide order dated 24.11.2020, except offences under Sections 124A, 153A, 109 and 120-B of the IPC which required sanction from the State Government. Further, a second supplementary charge-sheet was filed in the present FIR on 23.02.2021, pertaining primarily to technological evidence related to offences stated in the FIR in question. Vide order dated 02.03.2021, the Ld. Sessions Court took cognizance of the second supplementary charge-sheet. The said order also noted that sanction under Section 196, Cr.P.C. had also been received in relation to all 18 accused persons and consequently, cognizance was also taken of offences under Sections 124A, 153A, 109 and 120-B of the IPC.

9. A third supplementary charge-sheet was filed in the present FIR on 02.03.2022, primarily related to CCTV footages of cameras of out-door enclosures; further evidences relating to conspiratorial meetings held on 22.02.2020 & 23.02.2020; result of Forensic voice examination report; evidence of disruption of essential services, Evidence & circumstances relating to speech by the Appellant at Amravati (Maharashtra), damage and destruction of property & loss of revenue etc.

10. In the interregnum the Appellant filed an Application seeking Regular Bail before the Ld. Trial Court, which came to be dismissed vide the impugned order dated 24.03.2022, which is the subject matter of the present Appeal.

CONTENTIONS

11. Both the parties have been heard at considerable length on several dates, wherein this court was taken through the charge-sheets filed as well as the contention of the parties.

12. Mr. Trideep Pais learned Senior Counsel appearing on behalf of the Appellant vehemently contended that the Trial Court had erred in rejecting the Bail Application of the Appellant by holding that he was one of the key conspirators of the riots which occurred in North-East Delhi in February 2020. He submits that the impugned order has been passed on the presumption that the prosecution's case, however unsubstantiated, is correct and cannot be looked into at the stage of bail. He further submits

that the Ld. Trial court while deciding the standard of *'prima facie True'*, although has acknowledged the fact of inconsistencies in the statement of witnesses, however, has refrained from applying its mind to the broad probabilities and the test of bail under prevailing law.

13. The Ld. Sr. Counsel sought to attack the impugned order by submitting that there was no physical evidence retrieved from the Appellant or otherwise which could connect the Appellant to any violence that ensued in North East Delhi. There were no disclosure statements, which could be attributed to the Appellant and no incriminating recoveries, including weapons, arms, ammunition etc. have been recovered from him or from any witnesses at his behest. The Ld. Sr. Counsel highlighted that although the prosecution has recorded statements of over 800 witnesses, the case against the Appellant is sought to be sustained on the strength of statements of a few witnesses, most of whom are protected witnesses, whose statements even taken at face value, do not disclose the commission of the alleged offences, and are in any event, self-serving, hearsay, and contain marked improvements from previous statements of other witnesses or from their own previous statements. According to him, the aforesaid witness statements are replete with material inconsistencies and inherent contradictions and in any event do not support the case of the prosecution, which is not substantiated by any independent, cogent or scientific evidence.

14. It has been argued that, contrary to settled law, the prosecution

has sought reliance on witness statements, who have deposed as to the incidents between over a month to eleven months after the date of the alleged incidents. Thus, this delay has to be viewed in the backdrop of the claim made by some witnesses that despite being present at the place where the conspiracy was being hatched and believing that riots were being planned, they chose to remain silent through this period. The Ld. Sr. Counsel claimed that throughout the investigation, witness statements have been used as a tool to fill gaps in the prosecution's false narrative. As such, the witness statements, in addition to being wholly unreliable, are insufficient to indicate that the Appellant committed any proscribed act whatsoever and despite having noted these contentions, the Ld. Sessions Court, has refused to enter questions of glaring inconsistencies and has mechanically accepted the witness statements.

15. The appellant has submitted that although the Ld. Sessions Judge has returned a finding that the bail order has been rejected on a cumulative reading of the statements of all witnesses and other events presented in the charge-sheet, however it is the submission of the appellant that even on such a cumulative reading of the material presented by the prosecution, no case is made out against the Appellant. It is further contended that several of the witnesses named in the impugned order as being witnesses testifying against the Appellant qua hatching of a conspiracy, do not speak of the Appellant at all and impute various statements and acts to persons other than the Appellant. Therefore, it was entirely erroneous to deprive the Appellant of bail on the basis of such statements.

16. The Ld. Counsel while contending inconsistencies in the statement of the witnesses has tried to illustrate with reference to the allegation qua the Appellant, wherein he has been alleged to have conducted a 'secret meeting' at a 'secret office' bearing E-1/13, New Seelampur, Delhi on the intervening night of 23.01.2020 - 24.01.2020 with co-accused persons Natasha Narwal, Gulfisha, Devangana Kalita, Tasleem and others. According to the Ld. Sr. Counsel, while on the one hand, it is the prosecution's case that the Appellant is the 'silent whisper' who was conniving enough to exit New Delhi on 23.02.2020 just before the alleged violence erupted to create a 'perfect alibi' for himself, the cumulative reading of the charge-sheet and the witness statements relied upon qua the said 'secret meeting' puts forth a narrative where the Appellant candidly makes vivid descriptions of planned violence calling for 'spilling of blood' before complete strangers in what was a 'secret meeting'. Carrying the false narrative to absurdity, it is also contended that the Appellant for a photograph clicked with the participants of the 'secret meeting' which was uploaded on social media and continued to remain online till the investigating agency chanced upon it after many months of registration of FIR and several co-accused persons having been arrested.

17. It has been also submitted that the charge-sheet is replete with such instances where accused persons are sought to be portrayed as conspirators and/or instigators on the strength of concocted witness statements containing references to their presence at a particular location, even when the same is not corroborated by any cogent evidence and is

contrary to the true facts. According to Ld. Senior Counsel, initially, it was the prosecution's case, as contained in the charge-sheet filed in another FIR 101/2020, P.S. Khajuri Khas, that the Appellant participated in a meeting with co-accused persons Khalid Saifi and Tahir Hussain in an office at Shaheen Bagh on 08.01.2020, on which date the said three persons conspired to cause 'riots' at the time of the visit of US President Trump. However, the falsity of the said allegation was exposed by the fact that the first reference to US President Donald Trump's visit was only made on 14 January 2020. It bears mention that after the said glaring discrepancy was pointed out in media reports, which raised grave doubts on the veracity of the case of the prosecution in its entirety, the prosecution conveniently and deliberately skirted the correlation between the purported meeting dated 08.01.2020 and the plan for riots during US President Donald Trump's visit, in the supplementary charge-sheet filed in FIR 101/2020 PS Khajuri Khas as well as the charge-sheets filed in the present FIR.

18. It has also been contended that the statements made by one witness SATURN in the present FIR, who is a named witness in FIR 101/2020, and the brazen contradictions there within were specifically highlighted to the Ld. Sessions Court. However, without any judicial application of mind, the Ld. Sessions Court has gravely erred in finding that it is "clear" that the Appellant, Khalid Saifi and Tahir Hussain did meet at the PFI Office at Shaheen Bagh on 08.01.2020. It is the submission of the Ld. Sr. Counsel that discrepancies in the statements of the said witness was not

considered in its right perspective, which strike at the root of his credibility.

19. The Ld. Sr. Counsel for the Appellant thereafter contended that there are marked inconsistencies in the statement of the witness *HELIUM* given under Section 161 Cr.P.C. on 15.09.2020 and statement given under Section 164 Cr.P.C. on 07.11.2020 relating to presence of the Appellant and his father at Jantar Mantar on 10.02.2020 in an event organized by PFI relating to sensitizing of Bangladeshis about the new citizenship law and as to who told that Bangladeshi women should be brought in large numbers. Similarly, the statement of the witness *CRYPTON* has been argued to be highly belated & not worthy of consideration.

20. The Ld. Sr. Counsel has further contended that the statements made by witnesses *ROMEO* and *JULIET* were entirely unreliable insofar as both the said witnesses only made vague statements about the Appellant having given provocative speeches without detailing the time, date, location, or contents of such speeches. The witness Romeo alleges in his statements under Section 161 Cr.P.C. given on 24.06.2020 and under Section 164 Cr.P.C. given on 25.06.2020 that the Appellant gave provocative speeches at Shaheen Bagh and also incited people against the mediators appointed by the Hon'ble Supreme Court of India. He further states that whenever the Appellant and others got off the stage, they incited others and said that Muslim areas have to be separated from the country. It has been contended that there is no specificity as to when such incitement occurred and the presence of the Appellant on the days when the said mediators

visited Shaheen Bagh is not shown through any corroborative material.

21. It was further argued that the statement of witness BOND is ex-facie unreliable and false, and even taken on face value, the statement does not disclose the commission of any alleged offence. While noting the Appellant's contention that BOND's statement was delayed, the Ld. Sessions Court failed to appreciate that the statement is hugely delayed insofar as his Section 161 Cr.P.C. statement was recorded only on 12.08.2020 and his statement under Section 164 Cr.P.C. was recorded only on 13.08.2020, i.e, one month before the Appellant's arrest. It has been contended by the Ld. Sr. Counsel that BOND's statements were procured so that links may be fabricated between the appellant and co-accused persons, which cannot be established from any credible, or scientific and independent evidence. Further, his statement cannot be relied upon as although according to this witness it is the Appellant who directed Sharjeel Imam and others to start chakka jam, however the same is belied by contemporaneous electronic record, where Sharjeel Imam has categorically said chakka jam was his own idea. In any case, the Ld. Counsel argued that chakka jams does not tantamount to violence and there is no connection between the Appellant and any chakka jams.

22. The statement made by another protected witness ECHO, was sought to be read, which according to the Ld. Senior counsel does not disclose the commission of any alleged offence and is ex-facie unreliable and false. According To him, the Ld. Sessions Court failed to note the contradictions in Echo's statements, which show the procured nature of

the witness. For instance, in his statement under Section 161 Cr.P.C. this witness claims that Gulfisha and her team had, upon the Appellant's telling, asked women and boys to carry chilli powder, bricks, acid bottles etc., although there is no whisper of any meeting in his statement under Section 161, Cr.P.C nor any speech by the Appellant. Yet, in his statement under Section 164, Cr.P.C., he miraculously remembers a meeting of 23.01.2020-24.01.2020 which was attended by the Appellant and even remembers that the Appellant allegedly said "*chakka jam hi aakhri raasta hai*", "*khoon bahana padega".* Next, the Ld. Sr. Counsel has taken us to the statement of witness *DELTA*, which according to him does not disclose the commission of the alleged offence, even at its fullest force. According to him, although the witness claimed that *"Umar Khalid also came at the protest site and gave speeches against the government"*, however the witness did not call the speech inflammatory or provocative, nor has the prosecution placed any material in support thereof.

23. The Ld. Sr. Counsel has sought to argue that the main aim of citizens protesting against the Citizenship Amendment Act was to retain the unity and integrity of India. The protestors wish to be a part of the country and were opposing an allegedly discriminatory criteria of granting / denying citizenship to a certain class of persons. It was in no way an act against the sovereign. In any case, it was not perpetrating violence which section 15 UAPA contemplates. He stressed on the point that 'Terrorist act' as defined under section 15 of UAPA is not made out in the present case. Reference was made to a judgment of the Supreme Court

wherein the word "terrorism" was discussed and it was held that terrorism does not merely arise by causing disturbance of law and order or of public order. In fact, terrorism is an act that travels beyond the capacity of ordinary law agency to tackle under ordinary penal law; it is an attempt to acquire power or control by intimidation and cause fear in large section of people. The case of ***Kartar Singh v. State of Punjab (1994) 3 SCC 569***, was sought to be relied upon, wherein the Hon'ble Supreme Court although upheld the constitutional validity of TADA but clarified that terrorism is a grave emergent situation created by external forces or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity.

24. The Ld. Sr. Counsel vehemently argues that the Appellant was not in North East Delhi between 22.02.2020 - 25.02.2020 and is neither visible in any CCTV footage nor has any witness (public or police) made any statement about his presence at the incident of purported violence between 22.02.2020 - 25.02.2020 and the prosecution has resorted to fill the lacunae of the case against the Appellant by invoking the vocabulary of *'conspiracy of silence', 'silent whisper'* and *'mastermind'.* According to him, the material presented in support of the Appellant allegedly being a part of a purported criminal conspiracy, even at its fullest force and on a prima facie evaluation, falls short of any criminal offence, much less an offence under Section 18 UAPA and is as such not good and sufficient to warrant the denial of bail.

25. The Ld. Sr. Counsel while buttressing the case of bail of the appellant has argued that the material on records does not disclose an offence and it is marred by several inconsistencies, improvements and brazen conjectures which strike at the root of their credibility and sufficiency. Thus, as per his submission no prima facie case is made out against the Applicant under any sections of the UAPA or any other offence alleged by the prosecution either. Even otherwise, even assuming that the present proceedings are to be tested on the anvil of Section 43D(5) UAPA, it was submitted that the Appellant, who has spent two years in custody, is entitled to bail. He submitted that the test for bail under UAPA can be found in ***National Investigation Agency v. Zahoor Ahmad Shah Watali (2019) 5 SCC 1*** and as such it was the duty of the Court to examine whether the prosecution's case is "good and sufficient" on its face to establish a given fact or the chain of facts constituting the stated offence, *unless rebutted or contradicted.* It was argued that, while a Court cannot discard a document on the touchstone of *admissibility*, a Court is duty bound to assess the *broad probabilities* and apply its mind and examine whether the material is *good and sufficient* to make out an offence. This would necessarily involve an assessment of *reliability* of the material as well. To contend otherwise amounts to saying that the hands of a Court of law are tied and a charge-sheet filed by the prosecution must be accepted as the gospel truth, even if a statement is ex-facie false or unreliable.

26. The Ld. Sr. Counsel has strenuously argued that in order to understand the scope of *"reasonable grounds for believing that the*

accusation against the accused is prima facie true or otherwise", the ***Watali*** judgment relied on the decision of the Hon'ble Supreme Court in ***Ranjitsingh Barhmajeetsingh* v. *State of Maharashtra (2005) 5 SCC 924*** which dealt with the test for bail under MCOCA and holds that "*If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed".* As such, it was submitted by him that the impugned order of the Ld. Sessions Court rejecting the Bail Application of the Appellant fails to appreciate this test laid down in ***Watali*** and consequently erroneously dismissed the bail application filed by the Appellant.

27. It was further argued that the contention of the prosecution that the test of bail under UAPA is more stringent than other legislations such as the NDPS Act is incorrect. It was submitted that in such other enactments, the burden on the accused is to show that he is "not guilty" of an offence, which is a higher threshold - this has also been observed by the Hon'ble Supreme Court in ***Union of India v. K.A. Najeeb (2021) 3 SCC 713*** and ***Thwaha Fasal v. Union of India (2021) SCC On Line 1000***.

28. It has also been argued that to prove criminal conspiracy, the prosecution must establish that there was meeting of minds between co-accused persons to do an unlawful act as the offence of criminal conspiracy requires some kind of physical manifestation of agreement. According to the Ld. Sr. Counsel, while a conspiracy can be proved by direct or circumstantial evidence, it is settled law that "the relative acts or

conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence." Thus, it was submitted that in the instant case, the prosecution having failed to place sufficient incriminating evidence in support of the alleged criminal conspiracy, much less the Appellant's purported role in the alleged conspiracy on record, the prosecution has sought to artfully arrange unconnected, unrelated, isolated, benign actions and incidents in order to give the same a colour of criminal conspiracy. The Ld. Sr. Counsel illustratively mentioned that the prosecution having failed to show any illegality in the Speech of the Appellant at Amravati on 17.02.2020, has sought to contend that the Appellant's Speech invokes themes, such as the triple talaq, Article 370 of the Constitution of India, etc., which have also been invoked in public speeches by other co-accused. Similarly, the prosecution has sought to arbitrarily and inconsistently draw connections between people for being members of a WhatsApp group. In the same way, the prosecution has sought to selectively place reliance on isolated messages and read them out of context in order to give the same the colour of criminality. The only commonality between accused persons that the case of the prosecution points to is a vehement opposition to the CAA, where also, accused persons differ in their approaches, ideologies and thoughts about their opposition.

29. The Ld. Sr. Counsel, urged before this court to explain that insofar

as the Appellant's purported role in the conspiracy is concerned, the prosecution has *only* placed reliance on and confined its case to the Speech given by the Appellant, Six Statements under Section 164 CrPC (namely of Beta, Neon, Gama, Saturn, Helium and Bond), One Statement under Section 161 (namely of Tariq Anwar), Five Messages sent on the DPSG WhatsApp group by the Appellant, and the evidently unrelated handful of calls which the prosecution is attempting to tie together and is referring to as the "flurry of calls". Thus, it was evident that none of the material allegedly arraigning the Appellant specifically, even insofar as the charge of conspiracy is concerned, discloses any offence, much less under an offence under UAPA and thus each allegation in the charge-sheet is false.

30. The Appellant at the close of argument also filed their written submission, which reiterated their oral arguments and provided a tabular chart, explaining the various dates, alleged involvement of the Appellant as mentioned in the charge-sheet and the appellant's response/explanation to these allegations.

31. The Appellant after giving explanation to the aforesaid allegations as found in the charge-sheet also submitted that as a result of this viciously motivated investigation, the Appellant has suffered prolonged incarceration without having committed any offence. The Appellant is 35 years old. He obtained his Ph.D. degree after a long tussle with the state and is an active member of society involved in social justice activities working on issues involving marginalized communities. There cannot be

any doubt that the Appellant would contribute beneficially to society if allowed to resume normal life. The Appellant, who was arrested on 13.09.2020, has spent two years in custody. It is amply evident, both from the manner in which evidence has been concocted retrospectively and the repeated resort to vicious language without any material, that the Appellant is a victim of identity-based targeting, and an example is being sought to be made out of him in order to curb democratic dissent. The judgment of the Hon'ble Supreme court in ***P. Chidambaram* v. *CBI 2019 SCC Online SC 1549*** has been sought to be relied upon to submit that bail is the rule and custodial detention is the exception. It was also contended that there was no likelihood of speedy trial. In addition to the fact that there are over 800 witnesses, it is the admitted case of the prosecution that the investigation is not yet complete, and several other suspects are being investigated till date. As a matter of fact, as recently as 02.03.2022, i.e., over two years after the incident, the prosecution has filed yet another supplementary charge-sheet. There is no useful purpose that would be served by keeping the Appellant in custody & hence prayed for releasing of the Appellant on regular Bail.

32. The Ld. Senior Counsel for Appellant has also filed a compilation of following judgments: -

Standards for Bail under Unlawful Activities (Prevention) Act 1967

(1) National Investigation Agency vs. Zahoor Ahmad Shah Watali (2019) 5 SCC 1;

(2) Union of India vs. K.A. Najeeb (2021) 3 SCC 713;

(3) Shamil Saquib Nachan Vs The State of Maharashtra (2013 SCC Online Bom 2230;

(4) Saquib Abdul Hamid Nachan Vs the state of Maharashtra (Crl. Bail Application No. 716 of 2014; Bombay High court)

(5) Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra & Anr (2005) 5 SCC 294;

(6) Thwaha Fasal Vs Union of India, (2021) SCC Online SC1000

(7) Jahir Hak Vs State of Rajasthan, 2022 SCC On line SC 441

Analysis of Section 15 of the UAPA - meaning of a "terrorist act"

(8) Hitendra Vishnu Thakur & Ors. vs. State of Maharashtra (1994) 4 SCC 602;

(9) Kartar Singh vs. State of Punjab (1994) 3 SCC 569;

(10) People's Union for Civil Liberties & Anr. vs. Union Paras of India (2004) 9 SCC 580;

"Meeting of Minds" sine quo non of conspiracy; conspiracy cannot be presumed based on few bits here and there relied upon by the prosecution.

(11) Kehar Singh Vs State (Delhi Admin.), (1988) 3 SCC 609

(12) State (NCT of Delhi) Vs Navjot Sandhu, (2005) 11 SCC 600

(13) State (NCT of Delhi) Vs Shiv Charan Bansal & Others, 2019 SCC Online SC 1554

(14) Mohd. Rashid Kunju Vs State of Maharashtra, 2015 ALL MR (Crl) 2138

Constitutional Right to Protect

(15) Mazdoor Kisan Shakti Sangathan vs. Union of India & Anr. (2018) 17 SCC 324;

Speech that is Not Prohibited by Law

(16) Kedar Nath v. State of Bihar AIR 1962 SC 955;
(17) Balwant Singh & Anr. v. State of Punjab (1995) 3 SCC 214;
(18) Clarence Brandenburg v. Ohio 395 US 444 (1969);

Test of Disaffection against India

(19) Priya Parameswaran Pillai v. Union of India (2015) 218 DLT 621;

Triple test for rejecting bail - flee justice, tamper evidence, influence witnesses

(20) P. Chidambaram v. CBI (2020) 13 SCC 337;

Bail is the rule, detention is exception; humane approach to custodial detention

(21) Dataram Singh v. State of U.P. (2018) 3 SCC 22;
(22) Sanjay Chandra v. CBI, (2012) 1 SCC 40;

WhatsApp Group Admin not Vicariously liable for posts by Members

(23) Ashish Bhalla Vs Suresh Chawdhary & Ors, 2016 SCC Online Del 6329
(24) R. Rajendran Vs The Inspector of Police, order dated 15.12.2021 in Crl. O.P (MD) No. 8010 of 2021, Madras High Court;
(25) Kishor Vs State of Maharashtra (2021) Cr LJ 3019
(26) Manual Vs State of Kerala, (2022) 2 KLT 68

33. On the other hand, Mr. Amit Prasad, learned Special Public Prosecutor for the state vigorously defended the judgment of the Ld. Sessions Court. It was submitted that the Appellant was one of the key conspirators of the riots which occurred in North-East Delhi in February

2020. The Appellant is the "*silent whisper*" of the conspiracy and a remote supervision, on the strength of which the Appellant is linked to the alleged conspiracy.

34. According to the Ld. Special Public Prosecutor, the narrative sought to be created by the Appellant cannot be looked into at this stage of bail. He submits that the Appellant has raised *ipse dixit* arguments seeking to conduct a mini trial at the stage of deciding the bail application and to view the appellant's role in isolation in the case of conspiracy which is impermissible in law.

35. The Ld. Special Public Prosecutor defending the impugned order has vehemently argued that the Ld. Sessions Court had rightly dismissed the bail application of the Appellant by a well-reasoned order dealing with each and every speculative arguments raised by the appellant. He says that the impugned order does not suffer from any illegality, so as to merit interference by this Court. He reiterates the submissions made by him before the Ld. Sessions Judge. Additionally, it has been argued that the Ld. Sessions Judge has also dismissed the bail application of co-accused Shifa-ur-rehman and Khalid Saifi, which was argued and heard contemporaneously. According to him, a perusal of these dismissal order would demonstrate the length and breadth of the conspiracy and role played by different entities, WhatsApp groups and individuals in pursuance to the said conspiracy.

36. The Ld. Special Public Prosecutor had vehemently argued that

Delhi Riots 2020 was a large-scale and deep-rooted conspiracy hatched after the passing of the resolution by Cabinet Committee to present CAB in both Houses of Parliament on 04.12.2019. He then referred to the contents of the charge-sheet to allege that prima facie allegations are correct. As part of the conspiracy, 23 (24x7) protest sites (against CAB) were created in Muslim majority areas close to mosques/majaar and close to main roads. Before the major riots of February 2020, a replica of the riots took place in December 2019 on a lower scale but with similar characters and modus-operandi. With the lessons learnt, February riots were planned and executed.

37. It has been contended that the idea was to escalate protest to chakka-jam, once critical mass is generated and at an appropriate time to eventually lead to violence against police and then others. In order to give a secular look, secular names were given to protest sites to give secular color. The conspiracy involved moving from the protest sites to designated location on main roads/highways and blockade causing disruptive chakka-jam, creating confrontational situation, attacking police and paramilitary, spreading communal violence/attacking non-Muslims and damaging public and private property by use of petrol bombs, firearms, deadly weapon, acid bombs, stones, lathi and chilly powder. Finances were also arranged and diverted to protest sites and were utilized in organizing violence. It was also argued that the individual role of conspirators is not to be seen rather a holistic view is to be taken while looking at a prima facie involvement of conspirators in the chain of conspiracy.

38. It was also contended that at the stage of bail, material/evidence collected by the investigating agency in reference to the accusation against the accused, must prevail unless contradicted and overcome or disproved by other evidence and on the face of it, shows the complicity of the Appellant in the commission of the offence. Elaborate dissection of evidence is not required to be done at this stage and the Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the offence. Ld. Special Public Prosecutor, thereafter, argued that in the present case, the bar of Section 43D (5) UAPA for grant of bail would apply as prima facie allegations against the accused are true. Thus, it was argued that there is sufficient material on record to establish that the accusations against the appellant Umar Khalid are prima facie true and hence the present Appeal may be dismissed.

ANALYSIS

39. Before we proceed to analyse the rival submission, it will be beneficial at this stage to recapitulate the principles that a Court must bear in mind while deciding an application for grant of bail. The Hon'ble Supreme Court in the case of ***Prasanta Kumar Sarkar v. Ashis Chatterjee & Anr*** ***(2010) 14 SCC 496***, after taking into account several precedents, elucidated the following:

> *"9… However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and*

strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering 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 accusation;

(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 influenced; and

(viii) *danger, of course, of justice being thwarted by grant of bail."*

40. The above stated principles have been affirmed and restated in a number of subsequent decisions, including in the recent judgments of ***Neeru Yadav v. State of U.P. & Anr. (2014) 16 SCC 508***, ***Anil Kumar Yadav v. State (NCT of Delhi) & Anr (2018) 12 SCC 129*** and ***Mahipal v. Rajesh Kumar & Anr.(2020) 2 SCC 118***. However, when it comes to offences punishable under special enactments, such as the Unlawful Activities Prevention Act, 1967, something more is required to be kept in mind in view of the special provisions contained therein.

41. No doubt, Art. 11(1) of the Universal Declaration of Human Rights states that every person accused of any penal offence is presumed to be

innocent until proven guilty. While this is a rudimentary tenet in criminal law jurisprudence which has also been upheld by the Hon'ble Supreme Court. However, provisions under the UAPA, NDPS, POCSO and certain other special acts contains a contrary presumption, which has an inevitable effect on the scheme of provisions for bail as laid down by the respective statutes. Since, this court is tasked upon to consider the provisions of Bail under the provisions of UAPA, it is pertinent to examine the manner in which discretion is to be exercised by the Courts while granting bail. Under the general provisions for grant of Bail as is to be found under section 437 of the Criminal Procedure Code, a court should have "*reasonable grounds to believe*" that the accused has committed an offence to deny him bail under the Code is juxtaposed to the power of the Court to deny bail under UAPA if the accusation appears to be "*prima facie* true". Thus, the threshold established for denying bail under the UAPA Section 43 D (5) may be profitably quoted as herein below:

> *"(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:*
>
> *Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."*

42. Thus, the stringent conditions for grant of bail in sub-section (5) of Section 43D will apply only to the offences punishable under Chapters IV and VI of the 1967 Act. In the present case, the charge-sheet has been filed under offence punishable under Section 16, 17, 18 of the Unlawful Activities (Prevention) Act 1967, which are a part of Chapter IV and thus will be covered by sub-section (5) of Section 43D. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. Needless to say, obviously, the embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true for an offence under the said Act and as a corollary, if after perusing the charge sheet, if the Court is unable to draw such a prima facie conclusion, the embargo created by the proviso will not apply.

43. Thus, by virtue of the proviso to subsection (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. The word used "Prima-facie" is a Latin expression meaning 'at first sight' or 'based on first impression'.

Thus, according to this court, the accusation against the accused at first sight or first impression has to be true to invite the embargo of section 43D (5) of the Act. Further, these accusation must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is 'prima facie true', is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the Unlawful Activities (Prevention) Act 1967.

44. In the case of ***National Investigation Agency vs. Zahoor Ahmad Shah Watali (2019) 5 SCC 1),*** the Hon'ble Supreme Court has extensively dealt with sub-section (5) of Section 43D of the 1967 Act and has also laid down the guidelines for dealing with bail petitions to which sub-section (5) of Section 43D is applicable. In paragraph 23, the Supreme Court considered the difference in the language used by Section 37 of the NDPS Act governing grant of bail and sub-section (5) of Section 43D of the 1967 Act. Paragraph 23 of the said decision reads thus:

> *"23. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to*

deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "primafacie true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act……."

45. Having said so, the question now arises as to whether there are reasonable grounds for believing that the accusations made against the Appellant are prima facie true. That will have to be answered keeping in mind the totality of materials collected by the police during Investigation. Be it noted that both the parties are relying on several documents/statements forming part of the charge-sheets filed against the Appellant allegedly showing his involvement in the commission of the stated offences.

46. This brings us to the material as has been mentioned against the Appellant in the charge sheet. The role of the appellant could be found from page No. 125 to Page No. 165 of the 1st supplementary charge-sheet filed by the police on 22.11.2020, wherein the Appellant was enumerated as Accused No. 18 and the main conspirator Sharjeel Imam was named as Accused No.17. Apparently, it finds mention in the charge-sheet that:

> *"(i) The Appellant is a 'veteran of sedition' and a 'top most conspirator' in the conspiracy behind the Delhi riots. That his role in the conspiracy first found tangible manifestation on 05.12.2019 when upon his directions, co-accused Sharjeel Imam constituted a WhatsApp group called Muslim Students of JNU (hereinafter "MSJ").*
>
> *(ii) That on 07.12.2019, the Appellant attended an anti-CAA protest organized by 'United against Hate' at Jantar Mantar, New Delhi which was also attended by Sharjeel*

Imam and other members of the MSJ. It is mentioned that the Appellant introduced Sharjeel Imam to Yogender Yadav, who along with the Appellant instructed Imam to mobilize students of JNU, Jamia Milia Islamia, Aligarh Muslim University and Delhi University. Apparently, at this meeting it was decided that these three persons would use social media for large scale indoctrination and mobilization of youths for chakka jams in order to protest against the CAA. A meeting was also planned for the next day.

(iii) That on 08.12.2019, the Appellant attended a meeting organized by 'United Against Hate', as planned the previous day, at 6/6 Jangpura, Delhi where it was decided that the earlier plan of chakka jams would be executed. To this end, it was agreed that like-minded left parties and members of civil society will support each other by every means. Subsequent to this meeting, a WhatsApp group called "CAB Team" was created to organize anti-CAA protests and for mass mobilization of the Muslim community, of which the Appellant was a member.

(iv) That on 10.12.2019, the Appellant attended a protest organized by "CAB Team" at Jantar Mantar.

(v) That on 13.12.2019, the Appellant went to Jamia Millia Islamia University with co-accused Sharjeel Imam and Asif Iqbal Tanha and one Saiful Islam and informed

students that they were his team members. Further, the Appellant stated that he had explained the difference between a 'chakka jam' and a 'dharna' to his team members and at the appropriate opportunity, they would organize chakka jams in Muslim majority areas of Delhi to overthrow the ruling government which is a 'Hindu govt' and is 'against Muslims'. Thereafter, the Appellant directed Saiful Islam and Asif Iqbal Tanha to start a chakka jam at Gate No. 7 of Jamia Millia University and directed Sharjeel Imam to start a chakka jam at Shaheen Bagh.

(vi) That on 15.12.2019, the Appellant again visited Jamia Millia University along with the persons introduced earlier as his team members, gathered a huge number of protestors and instigated the mob which culminated in a riot. Thereafter, Sharjeel Imam, as per the directions of the Appellant, moved to Shaheen Bagh and blocked Road No. 13.

(vii) That on 16.12.2019 as well, the Appellant visited the AAJMI office at Jamia Millia Islamia and directed Asif Iqbal Tanha and Saiful Islam to constitute a student body for anti CAA/NRC protests at Jamia Millia Islamia in an organized and planned way in the presence of many other students inside and outside the office. In pursuance of the said conspiracy, and in accordance with the Appellant's

direction, the JCC was constituted on 17.12.2019. Thus, JCC was the Appellant's brain child.

(viii) That on 19.12.2019, a nationwide call for protest against CAA was made by Hum Bharat Ke Log ("HBKL") to which UAH responded by carrying out a protest, for which permission had been rejected and Section 144, Cr.P.C. imposed. The Appellant, Yogender Yadav and 293 others were detained to 'control the situation'.

(ix) That on 23.12.2019, the Appellant met with co-accused Meeran Haider and Khalid Saifi at Shaheen Bagh.

(x) That on 24.12.2019, a protest was held at Jantar Mantar wherein the Appellant gave a speech. It was decided at this meeting, as part of the common conspiracy, to call a meeting of all organizations/prominent individuals who are "anti- CAA" to form a group for running/creating protest sites in Delhi. Indian Social Institute (ISI), Lodhi Road, Delhi, was zeroed in on as the venue for the first meeting. The conspirators upon realizing the need for a 'secular cover, gender cover and media cover' and to mask the protests with 'a secular facade', worked towards providing a 'mass base, more acceptable civil society participation and exploiting women and children as a shield while facing the police'.

(xi) That on 26.12.2019, a meeting was held at Indian Social Institute, Lodhi Colony which was attended by the

Appellant and others. In this meeting, discussions were held regarding formation of the DPSG WhatsApp group, creation of different protest sites in Delhi, making protest sites more women-centric to avoid police clash, collecting funds for sustenance of protest sites, legal teams for detainees, sending speakers/artists of diverse fields to different protest sites and regular meetings to take stock of the progress on the said issues. The DPSG WhatsApp group was created on 28.12.2019 and those who attended the meeting on 26.12.2019 were added to the group.

(xii) That on 08.01.2020, in pursuance of the common conspiracy, the Appellant met with co-accused persons Khalid Saifi and Tahir Hussan at the PFI office at Shaheen Bagh regarding funding for acid, firearm etc. for engineering riots in parts of north-east Delhi. That a conspiracy was hatched at this meeting to cause riots during the visit of US President Donald Trump, which formed the basis of FIR 101/2020, P.S. Khajuri Khas, wherein the Appellant is also an accused.

(xiii) That on the intervening night of 23.01.2020-24.01.2020, the Appellant visited the protest site at Seelampur and held a secret meeting at the secret office, being E-1/13, New Seelampur, Delhi which was attended by co-accused persons Natasha Narwal, Gulfisha, Devangana Kalita, Tasleem and other associates. In this meeting, the

Appellant directed that the protests should ultimately escalate into riots leading to spilling of blood, in order to bring the government to its knees. The Appellant also directed the other accused persons to induce local women of Seelampur to start stockpiling knives, bottles, acids, stones, chili powder and other dangerous articles to be used for rioting in furtherance of the conspiracy.

(xiv) The Appellant met the people from Jahangirpuri and asked that since Bangladeshi live there, they must be made aware of the CAA and asked to fight against the said law.

(xv) That on 17.02.2020, the Appellant gave aprovocative speech at Yavatmal, Amravati, Maharashtra which depicted his 'conspiratorial mind set'. The transcript of the speech has been filed.

(xvi) That co-accused Asif Iqbal Tanha and Saiful Islam held a meeting on 22.02.2020 following the roadblock at Jaffrabad and stated in the said meeting that the Appellant and Nadeem Khan had instructed them to move towards violence by carrying out chakka jams.

(xvii) That on 24.02.2020, after violence broke out, few members of the DPSG WhatsApp group who were 'disenchanted and disconcerted' with the scale and magnitude of violence, threatened to expose the key conspirators who were responsible for the riots.

Thereafter, alarmed and panicked by these whistle-blowing posts, the Appellant, who was in Bihar since 23.02.2020, and other members of the DPSG WhatsApp group made a 'flurry of phone calls' to each other."

47. We have examined the material forming part of charge sheet. Both the counsels have taken us to the charge-sheets as well as through the material in the form of WhatsApp Messages, Pamphlets, Printed materials, Photographs, CDR, statement recorded of protected witnesses under section 161 as well as 164 of the Criminal Procedure Code. This court is not oblivious of the fact that a charge-sheet is merely an expression of the opinion of the Investigating officer and as such besides the averment made in the charge-sheet, the material available in totality has to be considered while granting or rejecting Bail. However, in the present case, there are two-fold issues to be decided (i) As to whether the impugned order needs any interjection in view of the Appeal filed by the Appellant under section 21(4) of the NIA Act and (ii) as to whether the Appellant in view of the material on records is entitled to the regular Bail.

48. The learned judge of the Special Court in his detailed judgment has explained the role of the Appellant in the entire case from paragraph 12.1 to 12.16. The Ld. Special court has noted that the name of the Appellant finds a recurring mention from the beginning of the conspiracy till the culmination of riots. Prima-facie the Ld. Trial Court has expressed its view in holding that the Appellant was a member of WhatsApp group of

Muslim Students of JNU and he participated in various meetings on 07.12.2019, 08.12.2019, 13.12.2019, 26.12.2019, 08.01.2020, 23/24.01.2020 and 10.02.2020. The ld. Session Court noted that the appellant is also a member of the DPSG group and attended meeting at Indian Social Institute (ISI) on 26.12.2019. He gave reference to Mr. Donald Trump, President of USA in his Amrawati speech on 17.02.2020. He was also mentioned in the flurry of calls that happened post riots, as mentioned above. He was also instrumental in creation of JCC. There are statements of numerous witnesses including protected public witnesses, who have given statements recorded both under Section 161 Cr.P.C & 164 Cr.P.C highlighting the incriminating material against the Appellant. Thus, the court below has noted that a broad reading of all the statements, the role of the accused Umar Khalid in the context of conspiracy and riots was apparent.

49. This court has examined the impugned order passed by the Ld. Sessions Judge and has seen that the Ld. Judge in arriving at the conclusion has also not only enumerated the name of the relevant witnesses qua the Appellant as Tahira Daud, Bond, Saturn, Smith, Echo, Sierra, Helium, Crypton, Johny, Pluto, Sodium, Radium, Gama, Delta, Beeta, Neon, Hotel, Romeo and Juliet, but has extensively dealt with the statements of the Protected witness "GAMA", "DELTA" , "SATURN " , “HELIUM” , "BEETA", "ECHO", NEON, "SMITH", CRYPTON”, HOTEL, ROMEO, JULIET” and also with the contradiction and arguments of the Sr. Counsel appearing for the Appellant, to conclude that

the accusation against the appellant is prima-facie true and as such has rejected the bail application of the Appellant. This court is in full agreement with the findings returned by the Ld. Sessions judge and does not wish to burden this Judgment with reiterating & recording the statements and explanation as given by the Ld. Judge to these statements in the impugned order, while rejecting the Bail Application.

50. The Ld. Sessions Judge has fairly recorded that there are some inconsistencies in the statements of some protected witnesses; however, as rightly held by the court below a finding has to be given on a cumulative reading of statements of all the witnesses and other events presented in the charge-sheet. The Ld. Judge has after noting the facts in great details and even giving due regard to these discrepancies has thus arrived at a finding as clearly mentioned in the impugned order. The Ld. Sessions Judge didn't miss the wood for the trees and has extensively dealt with the contention of the rival parties to arrive at a just decision, which cannot be faulted, especially when at the stage of bail, the Ld. Judge was mandated to only be satisfied to the extent of accusation being “prima-facie true” and not conduct a 'Mini Trial' and return an elaborate findings relating to the veracity of the testimony of each witnesses, whose statements were recorded during investigation.

51. During the hearing, the Ld. Senior counsel for the appellant invited our attention to the allegations as mentioned in the charge-sheet and the explanation by the appellant and even at the closure of the hearing

filed a written submission, wherein again a tabular chart has been filed mentioning the allegation and the appellant's response to the said allegation. The Ld. Sr. Counsel in that context of the matter has strenuously argued that in case these explanation are considered, it would not only squarely prove that there are discrepancy in the statement of the protected witness but would also prove that there is no case made out against the appellant. First & foremost, it has to be understood that the present case is for Bail and not for discharge, where an elaborate discussion on evidence is obligatory on the part of the court. Obviously the veracity of the evidence cannot be tested even at the stage of discharge also as they can be tested only at the time of cross-examination, which is after the culmination of trial. Secondly, it is well-established that detailed examination of evidence and elaborative documentation of the merits of the case are not to be undertaken at the bail stage, which may adversely affect the pending Trial. The explanation as offered by the appellant to the various statements of the protected witnesses cannot be viewed singularly at this stage. A holistic & cumulative approach to the statements recorded & material collected during the investigation vis-à-vis the gravity of accusation against the appellant has to be weighed and a balance has to stricken between the two, in order to arrive at a prima-facie view.

52. It is the primarily contention of the Ld. Sr. Counsel for the appellant that there are no witnesses to support most of the allegations as mentioned in the charge-sheet. In his endeavour to prove the said point,

the counsel took us to the statement recorded by various witnesses to contend that nothing incriminating has been expressed against the appellant. However, we find that in the aftermath of the Citizenship Amendment Bill, which was passed by the Central Cabinet on 04.12.2019, the unfolding of events to be very relevant. Admittedly, a WhatsApp group of Muslim Students of JNU was formed with Sharjeel Imam being its main member in the night of 5/6.12.2019, i.e just 1-2 days after the said passing of the Bill. The Appellant was also the member of the said group. Witness has stated that Muslim Students of JNU was formed and Tahira Daud was added with the main purpose of coordinating in the protest and chakka jam in Delhi and other parts of India and to take participation in such protest, pursuant to which Sharjeel Imam started distributing pamphlets in Masjids against CAA/NRC. Further, on the very next day on 07.12.2019, UAH conducted an agitation at Janta Mantar which was attended by Sharjeel Imam, Umar Khalid, Yogender Yadav and others. Thereafter, again on 08.12.2019, a meeting took place at Jungpura office which was attended among others by Yogender Yadav, Umar Khalid, Sharjeel. Photograph from the said meeting was also filed. The said witness has supported the said meeting and about the instruction of Yogender Yadav and Umar Khalid regarding the complete support in chakka-jam. A Whatsapp group "CAB TEAM" was formed consequently on the same day, whose members included Sharjeel Imam, Umar Khalid, Yogender Yadav, Nadeem Khan, Khalid Saifi. Thus, a collective reading of the events that unfolded on each day after 04.12.2019 cannot be shrugged aside and it cannot be said that nothing incriminating has been

stated against the appellant.

53. The Appellant has sought to argue that the statement recorded of the protected witnesses like BOND, BRAVO, SATURN and JAMES are unreliable & false, besides being recorded in a delayed manner. Although, this court is not to conduct a Mini Trial while interpreting & deciphering the statements of each witness as it would tantamount to expressing an opinion on the veracity of the testimony of the witnesses resulting in scuttling the Trial and adversely affecting either of the parties. However, we find that BOND stated in his statement that Umar Khalid, Sharjeel, Saiful Islam and Asif Tanha had come to Jamia University campus on 13.12.2019 and the appellant told Sharjeel to start chakka-jam at Shaheen Bagh and Asif and Saiful to start chakka-jam at Gate no. 7 of Jamia University. Umar Khalid said that at the right time, they will also start chakka-jam in other Muslim areas of Delhi. He also said that Government is a Hindu Government and against Muslims and they have to overthrow the government and will do so at the right time. The said witness has also stated that JCC used to regularly hold secret meetings and had identified 20-22 spots in Delhi for starting of protest like Shaheen Bagh. Further, the witness SATURN has stated that a meeting took place between Umar Khalid, Khalid Saifi and Tahir Hussain at PFI Office in Shaheen Bagh area. Although, a point has been raised on the basis of CDR analysis that these three never met at the same time, but what we have at first look discerned from all of this so far is that the three of them met and while there seemed no contradiction as far as the factum of

meeting of the trio was concerned, variance was only to the limited extent of the witness stating that he was present inside or outside the office.

54. As regards the statements recorded of other protected witnesses as mentioned in the charge-sheet like SIERRA, SMITH, ECHO, DELTA, GAMA & YANKEE being of questionable credibility and as such unreliable for arriving at a conclusion to hold that the accusation is prima-facie true against the Appellant as contended by the Appellant is also not correct as we find that statement of Smith, Echo and Sierra has confirmed about a conspiratorial meeting, which took place in the intervening night of 23/24.01.2020 at Seelampur, Jafrabad Protest site between Umar Khalid with Pinjra Tod members and others. It was decided to induce local women of Seelampur to start stock piling knives, bottles, acids, stones, chilly-powder and other dangerous articles to be used in rioting as part of a conspiracy. The plan was to escalate the protest to the next level of chakka-jam and then riots. The Ld. Sr. Counsel also highlighted that the statements recorded of protected witness like HELIUM, CRYPTON in support of the incident mentioned in the charge-sheet, cannot be taken into consideration as evidently, they are procured with marked progressive improvement. However, we observe that on 06.02.2020, a protest site was developed at Jahangir Puri and on 10.02.2020, Umar Khalid met with Jahangir Puri residents at a protest called by the Welfare Party of India. Umar Khalid stated that since Bangladeshi live there, they must be made aware of the CAA and asked to fight against the said law, a circumstance which is duly supported by the said protected witness, Helium and

Crypton.

55. It may be reminded that under the UAPA, it is not just the intent to threaten the unity and integrity but the likelihood to threaten the unity and integrity; not just the intent to strike terror but the likelihood to strike terror; not just the use of firearms but the use of any means of whatsoever nature, not just causing but likely to cause not just death but injuries to any person or persons or loss or damage or destruction of property, that constitutes a terrorist act, within the meaning of section 15 of UAPA. Moreover, under section 18 of UAPA, not merely conspiracy to commit a terrorist act but an attempt to commit or advocating the commission or advising it or inciting or directing or knowingly facilitating commission of a terrorist act that is also punishable. In fact, even acts preparatory to commission of terrorist acts are punishable under section 18 of UAPA. Thus, the objection of the appellant that a case is not made-out under UAPA is based on assessing the degree of sufficiency and credibility of evidence not the absence of its existence but the extent of its applicability; but such objection of the appellant is outside the scope and ambit of section 43D(5) of the UAPA.

56. The Ld. Sr. Counsel has also relied on CDR analysis for 10.12.2019 to show that the appellant was not present at Jantar Mantar on that day at any point of time and similarly CDR analysis for 23.12.2019 has been put forth to show that the appellant was present in Shaheen Bagh at 19:14 hours on that date, whereas co-accused Khalid Saifi and Meera

Haider were not present in Shaheen Bagh on that date. CDR analysis of 08.01.2020 has also been sought to be argued to show that the appellant, Khalid and Tahir Hussain were not present in Shaheen Bagh at the same time at any point of time at the PFI office at Shaheen Bagh, whereat the Appellant has been alleged to have attended with regard to funding for acid, firearms etc. for engineering of riots in parts of North-East Delhi. The CDR analysis are a matter of evidence which can be seen at the time of Trial and its veracity can be verified only after cross-examination. This court could very well examine this CDR analysis on a prima-facie basis, provided the accusation of the Appellant was limited to the aforesaid facts only, which is not the case herein. Admittedly the accusation are much beyond the said dates and meetings. In fact, as already stated a cumulative effect has to be seen on the basis of these meetings & statements. It would be in this context, profitable to quote para 52 of the ***Watali Judgment***, which inter-alia states:

> *"52. Learned Attorney General, relying on the underlying principle in **Khoday Distilleries Ltd. and Ors. Vs. State of Karnataka and Ors. (1995)1 SCC 574**, would contend that there cannot be business in crime and, as such, Section 34 of the Evidence Act will have no application. He further submits that the prosecution may use the facts noted in the said document and prove the same against the respondent by other evidence. This argument need not detain us. For, we find force in the argument of the learned Attorney General that the issue of admissibility and credibility of the material and evidence presented by the Investigating Officer would be a matter for trial. Furthermore, indubitably, the*

> *prosecution is not solely relying on the document D-132(a) recovered from the residence of Ghulam Mohammad Bhatt (W29). There are also other incriminatory documents recovered from respondent (Accused No.10) himself during the search, including other independent evidence, which, indeed, will have to be proved during the trial."*

57. Pertinently, this court cannot turn its blind eye to other incriminating materials against the appellant in the present case. The fact that there is no denial that on 17.02.2020 the appellant delivered a speech at Amrawati, Maharashtra referring to the visit of Mr. Donald Trump, President of the United States of America, which according to the prosecution heralded the riots of North-East Delhi. The manner in which the administration initially rejected permission for the appellant's speech and thereafter how the speech came to be delivered clandestinely on that very day is something which gives credibility to the accusation of the prosecution. Further, the CCTV footages filed along with the charge-sheet, its analysis and the flurry of calls amongst the appellant and other co-accused after the riots of 24th of February, 2020 also merits consideration in the background of various meetings, statements of various protected witnesses and the WhatsApp chats filed in the charge-sheet.

58. During the course of argument, issues were raised relating to the content, context and use of certain phraseology in the speech of the appellant, which prima-facie appeared to be incriminating per se & inflammatory. The Ld. Sr. Counsel tried to explain the meaning & import

of "*Inquilabli Salam*" (Revolutionary Salute) and "*Krantikari Istiqbal*" (Revolutionary Welcome) by submitting that these words were used for greeting everyone and inviting the spirit of revolution and that these words were used in his speech in the context of people standing against a discriminatory law and were protesting against it and by no stretch of imagination, the use of the words '*inquilab*', '*krantikari*', or revolution can be termed as a crime. It was also submitted that it was a call for an opposition to an unjust law and in any case the appellant did not call for violence. In the submission of the appellant, these words were used as a call to boycott an unjust law and the speech neither spread terror of any kind nor did it excite anyone present there and merely, a shamiana was set up, where people came and left peacefully and there was nothing provocative about the speech delivered by the appellant and it was only aimed at exposing the non-functioning government and the law targeting one community. However, this court is not impressed by the argument of the Appellant in as much as the call to revolution does not have to affect only the immediate gathering. The call to revolution may affect many beyond those who were visibly present, which is why this court finds it apt to mention Robespierre, who was at the vanguard of the French revolution. This court is of the view that possibly, if the appellant had referred to Maximilien Robespierre for what he meant by revolution, he must have also known what revolution meant for our freedom fighter & first prime minister. The very fact that Pandit Jawaharlal Nehru believed that democracy has made revolution superfluous after independence and how it meant the complete opposite of a bloodless change. Revolution by

itself isn't always bloodless, which is why it is contradistinctly used with the prefix - a **'bloodless'** revolution. So, when we use the expression 'revolution', it is not necessarily bloodless. This court is reminded of that although, the activity of "revolution" in its essential quality may not be different but from the point of view of Robespierre and Pandit Nehru, in its potentiality and in its effect upon public tranquillity there can be a vast difference. The proposition can be viewed from another angle as observed by the Hon'ble Supreme Court in ***Arun Ghosh vs. State of West Bengal (1970) 1 SCC 98,*** wherein at paragraph 3 it is stated:

> *"3. ... Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. ..."*

59. Next, it has been contended by the appellant that there was absolutely no consensus between people who were opposed to CAA. They are divergent people belonging to different schools of thought. Imam criticized a secular movement against CAA and he did not agree with it and the appellant was being lumped with a person who calls for a deeply communal protest against CAA. It was stated that there is no ideological meeting of minds and the lower court has misinterpreted witness

statements to draw a connection between Khalid and the Imam, whereas the two have never even spoken to each other. However, this court finds it a little difficult to accept the subject contention urged by the appellant at this stage. Admittedly, there exist a string of commonality which runs amongst all the co-accused. It is admitted position that both the appellant and Imam are members of the same WhatsApp group. It is also an admitted position that the duo participated in the Jantar Mantar protest. There is statement of various protected witnesses, that speak to the presence of the duo at several meetings including in the one held at the office of PFI. This court cannot test the veracity of witness statements at the stage of bail under the Unlawful Activities (Prevention) Act, 1967. The way, this court reads the judgment passed by the Hon'ble Supreme Court in ***Watali*** supra, is that the court at the stage of bail can only look at material and evidence as stated in charge-sheet without testing its veracity. It can be rebutted only at the stage when there is other evidence, which is axiomatically at the trial.

60. The Ld. Sr. Counsel has also urged that there is no specific proof qua the Popular Front of India, in as much as there is no address nor documents in relation thereto, which as per the prosecution is the place where the conspiracy started. The Ld. Sr. Counsel for appellant highlighted various discrepancies in the statements of a protected witness to show that the statements recorded under Sec. 161 and 164 of CrPC were at variance with each other. The Cell tower locations do not indicate that the two of them were with each other. Thus, to bring home this

argument, Ld. Sr. Counsel referred to the ***Watali*** Judgment to urge that the allegations in the Charge-sheet "*must be good and sufficient on its face*". However, what this Court discerns from all the statements and material on record is that the three of them did meet. Ld. Sr. Counsel for Appellant had submitted that the statements of witnesses are either false, being delayed or contradictory or could be concocted or coerced and should not be relied upon. However, at the stage of bail, the statements of all the witnesses have to be taken at face value and their veracity can be tested only at the time of cross-examination. As to how the material gathered by the investigating agency has to be viewed by the court concerned while adjudicating a bail application, the Hon'ble Supreme Court in the ***Watali*** Judgment mentioned supra gave clear guidance in paragraph 27 of the report, which can be quoted herein below for the sake of convenience;

> *"27. For that, the totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is."*

61. Having heard learned counsel for the parties and having carefully gone through the charge-sheet and taking into consideration the fact that the Appellant was in constant touch with other co-accused persons, including Sharjeel Imam, who arguably is at the head of the Conspiracy; at this stage, it is difficult to form an opinion that there are not reasonable grounds for believing that the accusation against the petitioner is prima facie not proved. The Hon'ble Supreme Court held in the case of ***Ash Mohammad Vs Shiv Raj Singh @ Lalla Bahu & Anr. (2012) 9 SCC 446,*** that the period of custody has to be weighed simultaneously with the totality of the circumstances, evidence available from the records and the criminal antecedents of the accused, if any. Further the circumstances which may justify the grant of bail are to be considered in a larger context of the societal concerns involved in releasing an accused, in juxtaposition with the individual liberty of the accused seeking Bail.

CONCLUSION

62. As per the charge-sheet as discussed above & the materials collated during investigation, if taken at face value, there appears to be a premeditated conspiracy for causing disruptive chakka-jam and pre-planned protests at different planned sites in Delhi, which was engineered to escalate to confrontational chakka-jam and incitement to violence and culminate in riots in natural course on specific dates. The protest planned was "*not a typical protest*" normal in political culture or democracy but one far more destructive and injurious geared towards extremely grave consequences. Thus, as per the pre-meditated plan there was an intentional

blocking of roads to cause inconvenience and disruption of the essential services to the life of community residing in North-East Delhi, creating thereby panic and an alarming sense of insecurity. The attack on police personnel by women protesters in front only followed by other ordinary people and engulfing the area into a riot is the epitome of such pre-mediated plan and as such the same would prima facie be covered by the definition of 'terrorist act'.

63. Further, as per precedents, terrorism is an act done with a view to disturb the even tempo of society, create a sense of fear in mind of a section of society. The argument of the appellant is objectively that although there was a sense of insecurity instilled in public by his speeches but he had nothing to do with it and referred to the charge-sheet to argue that there is no statement of any witnesses, which could be termed as inculpatory against him. However, this court has to see whether the perpetrators individually or in connection with each other are responsible for it. As already mentioned above, different roles were ascribed to different people (accused) in carrying out the said conspiracy. Different protected witnesses have stated the role of the Appellant and other accused persons and about the open discussion on violence, riots, finance and weapons.

64. Further, the weapons used, the manner of attack and the resultant deaths destruction caused indicates that it was pre-planned. Acts which threaten the unity and integrity of India and cause friction in communal

harmony and creates terror in any section of the people, by disturbing the social-fabric is also a priori a terrorist act.

65. The name of the appellant finds recurring mention from the beginning of the conspiracy till the culmination of the ensuing riots. Admittedly, he was a member of the WhatsApp group of Muslim students of JNU. He participated in various meetings at Jantar Mantar, Jangpura Office, Shaheen Bagh, Seelampur, Jaffrabad and Indian Social Institute on various dates. He was a member of the DPSG group. He referred to the visit of the president of USA to India in his Amrawati Speech. The CDR analysis depicts that there had been a flurry of calls that happened post riots amongst the appellant and other co-accused. The cumulative statement of the protected witnesses indicates the presence and active involvement of the appellant in the protests, engineered against the CAA/NRC. Admittedly these protests metamorphosed into violent riots in February 2020, which began by firstly choking public roads, then violently and designedly attacking policemen and random members of the public, whereat firearms, acid bottles, stones etc. were used, resulting in the admitted and sad loss of 53 precious lives and the destruction of property worth several Crores. These protests & riots prima-facie seem to be orchestrated at the conspiratorial meetings held from December, 2019 till February, 2020.

66. As a natural and consequential corollary to the observations as mentioned herein above, the impugned order of the Ld. Session Judge

dated 24.03.2022 does not warrant any interference by this Court and is sustained. As a sequel thereto, the Appeal is dismissed.

67. Further, on the in depth and considered perusal of the charge-sheet, the accompanying documents and in view of the discussions herein above, only for the limited purpose of the present bail; this court expresses the inescapable conclusion that allegations against the Appellant are "prima facie true" and hence, the embargo created by Section 43D(5) of UAPA applies squarely with regard to the consideration of grant of bail to the Appellant. Thus, the Appellant's application seeking regular bail is rejected.

68. Nothing stated hereinabove shall tantamount to an expression of any opinion on the merits of the case.

RAJNISH BHATNAGAR, J

SIDDHARTH MRIDUL, J

OCTOBER 18, 2022
Sumant