

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrlM No. 975/2022 In
CrlA(D) No. 35/2022
c/w
CrlM No. 964/2022 In
CrlA(D) No. 34/2022

Union Territory of J&K

...Appellant(s)

Through: Mr. M.A.Chashoo, AAG.

Vs.

Javid Ahmad Shah & Ors.

...Respondent(s)

Through: None.

CORAM:

HON'BLE MR. JUSTICE ALI MOHAMMAD MAGREY, JUDGE
HON'BLE MR. JUSTICE MD. AKRAM CHOWDHARY, JUDGE

JUDGMENT
01.09.2022

Per Chowdhary, J.

CrlM No. 975/2022 & CrlM No. 964/2022

1. These are the applications filed on behalf of Union Territory of J&K seeking condonation of delay of 145 days and 70 days respectively in filing appeals. Both the applications are allowed on the grounds urged therein. Delay is thus, condoned and the main appeals are taken on board for final consideration.

CrlM No. 975/2022 and CrlM No. 964/2022 are disposed of accordingly.

CrlA(D) No. 35/2022 & CrlA(D) No. 34/2022

2. By way of this common judgment both the appeals are proposed to be disposed of as both the impugned orders arise out of the same case.
3. Through the medium of the above titled appeals, appellant-UT of J&K seeks setting aside the orders dated **11.02.2022 and 26.02.2022** (hereinafter referred as ‘impugned orders’) passed by the Learned Special Judge (Designated Court for UAPA cases Under NIA Act) Anantnag, where-under bail has been granted in favour of the respondents herein, in two separate applications arising out of same case registered vide **FIR No. 68/2021** at Police Station Devsar, for the commission of offence punishable under **Section 13 of Unlawful Activities (Prevention) Act (UAPA)**.
4. The main ground raised by the appellant for setting aside the impugned orders is that the court below while deciding the bail applications has not appreciated the fact that there was sufficient evidence connecting all the accused including respondents herein with the commission of offence. Furthermore, it is averred that the incriminating material in the case-diary explicitly establishes the case against the accused persons and their *prima facie* involvement with the commission of offences. According to the appellant, Section 43-D of UA(P) Act expresses bar on granting bail to the accused persons when there are reasonable grounds for believing that the accusations against such persons are *prima facie* true, however, the court below despite that had passed the impugned orders.
5. Mr. Chashoo, learned AAG, while arguing the case submitted that the accused -respondents should not have been enlarged on bail in

the larger interest of UT and prays for setting aside the impugned orders, which orders according to him, are against the larger interest of UT.

6. Heard learned AAG, perused the record and considered.
7. Briefly stated facts of the case are that on 20.11.2021, Police Station Devsar received an information through reliable sources that a person namely Mudasir Jamal Wagay, who was an active militant of HM outfit got killed during encounter with the security forces. After this news spread in the village, a person namely Mohammad Yousuf Ganai provoked the villagers to perform “Gaibana Namazi-Jinaza” (funeral prayers in absentia) of the said killed militant and upon his provoking the Imam of Masjid Sharief namely Javaid Ahmad Shah offered the Jinaza and during Jinaza the sentiments of the persons who were part of the said assembly got incited by urging them to continue struggle till freedom. Based on this information, case was registered vide FIR No. 68/2021 at Police Station Devsar and the investigation was set in motion. Statements of witnesses were recorded and during the investigation ten accused persons including respondents herein were found involved in the case who were accordingly arrested for their involvement in the commission of offence under Section 13 UA(P) Act registered with Police Station Devsar. Charge sheet in the instant case is yet to be filed.
8. Upon perusal of the impugned orders, in terms of which the respondents herein were admitted to bail, it transpires that the court below while granting bail had observed and held that in view of the nature of accusations and the severity of punishment in case of conviction and the nature of supporting evidence, *prima facie*

satisfaction of the Court in support of the charge, reformatory theory of punishment, and larger mandate of the Article 21 of the Constitution of India, the dictum of Apex Court in the case of **Dataram Singh VS. State of U.P and Another**, reported as (2018) 2 SCC 22 and without expressing any opinion on the merits of the case, found the case fit for grant of bail, and accordingly, bail was granted in favour of the respondents herein subject to certain conditions contained in the impugned orders.

9. The legislative policy under Section 43-D(5) of UA(P) Act is that no person accused of an offence punishable under Chapters IV and VI of the Unlawful Activities (Prevention) Act shall, if in custody, be released on bail, if the court is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. Both these Chapters deal with the accusation of terrorist activities.
10. Hon'ble Apex Court in a case titled **Union of India Vs. K.A.Najeeb** reported as AIR 2021 SC 712, while granting bail in a case of Unlawful Activities (Preventive) Act, held in para 20, relevant part whereof is extracted as under:-

“.... Unlike the NDPS where the competent Court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit another offence while on bail; there is no such pre-condition under the UAPA. Instead, Section 43 – D (5) of UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with

evidence influencing the witnesses or chance of the accused evading the trial by absconsion etc.”

11. No individual can be deprived of his fundamental right of liberty guaranteed under Article 21 of Constitution of India. The court below was right in its observations made in the order impugned while deciding the application and admitting the appellant to bail.

12. It would be apt to say that right of personal liberty is most precious right, guaranteed under the Constitution. A person is not to be deprived of his personal liberty, except in accordance with procedures established under law and the procedure, as laid down in the case **Maneka Gandhi vs. Union of India** reported as **1978 AIR SC 597**, is to be just and fair. The personal liberty may be curtailed where a person faces a criminal charge or is convicted of an offence and sentenced to imprisonment. Where a person is facing trial on a criminal charge and is temporarily deprived of his personal liberty owing to criminal charge framed against him, he has an opportunity to defend himself and to be acquitted of the charge in case prosecution fails to bring home his guilt. Where such person is convicted of offence, he still has satisfaction of having been given adequate opportunity to contest the charge and also adduce evidence in his defense.

13. In another case titled **Kashmira Singh Vs. State of Punjab** reported as **1977(4) SCC 291**, the Hon'ble Apex Court has observed as under:-

“...It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified ?....”

14. Offering of funeral prayers of a killed militant by the public at large, even at the instance of the respondents herein, who are stated to be elderly people of their village, cannot be construed to be anti-national activity of that magnitude so as to deprive them of their personal liberty as guaranteed under **Article 21** of the Constitution of India.

15. In our considered opinion, nothing incriminating against the accused-respondents has been found during the investigation of the case so as to deny them bail, the respondents herein were rightly admitted to bail by the trial court. Needless to state that in such an eventuality, the bar as contained in Section 43-D of UA(P) Act, is also not attracted. We, thus, found no ground for interference with the impugned orders, same are upheld. Resultantly, both the appeals are, **dismissed**.

16. Registry to place a copy of this judgment on each file.

(MD. AKRAM CHOWDHARY) (ALI MOHAMMAD MAGREY)
JUDGE JUDGE

Srinagar
01.09.2022
Muzammil. Q

Whether the order is reportable: Yes / No