

20.02.2024***"Jail, not Bail": Is the SC setting the clock back?******The non-application of constitutional principles to the interpretation of the UAPA bail provisions is a failure of constitutional justice***

The Supreme Court in its ruling on 7th February, 2024 in *Gurvinder Singh v State of Punjab* held that its own well-developed jurisprudence that "**Jail is the rule and bail the exception**" will not apply to those charged under the UAPA. Gurvinder Singh was accused of being a member of 'Sikhs for Justice', allegedly a pro-Khalistani group banned by India, for being in possession of cloth banners with the terms, 'Khalistan Zindabad' and 'Khalistan Referendum 2020'. While dismissing Gurvinder Singh's UAPA bail application, the Court opined that UAPA was an exception to the ordinary criminal law and bail could only be considered if no prima facie case was made out based on records before the court.

The factual matrix did not indicate that the accused were involved in any violent act, but rather were charged under the draconian provisions of the UAPA for associated activities like raising funds for a terrorist act (sec 17), conspiracy to commit a terrorist act (Sec 18) and concealing a person knowing that such person is a terrorist (Sec 19)

The bail for the accused was denied following the precedent of the Supreme Court on bail under UAPA. Admittedly, the UAPA has a particularly draconian provision on bail under Section 43D (5), which states that the Court should not release the accused on bail, if there are 'reasonable grounds for believing that the accusation against such person is *prima facie* true.' This provision has been interpreted in a particularly harsh manner by the Supreme Court in *Zahoor Ahmad Shah Watali v National Investigating Agency*, (2019) due to which bail shall be denied if the accusation appears to be prima facie true based on materials on record.

However the rigours of Watali have been tempered by subsequent judgments of the SC itself, which the Bench comprising of Justices MM Sundaresh and Arvind Kumar appear to not have taken into account. What is particularly troubling is that the present ruling goes out of its way to ringfence the UAPA from the jurisprudence of the Indian Supreme Court which has sought to dilute its harshness by applying constitutional principles to the UAPA. In *Union of India vs Najeeb* (2021), the Supreme

Court granted bail under the UAPA, on the ground that the right to speedy trial is a constitutional right under Article 21. However, Justices Sundaresh and Kumar distinguish Gurvinder's case from Najeeb's case arguing that while in Najeeb's case, trial was yet to begin, in Gurvinder's case trial was under way with 22 witnesses being examined. However the Court misses the wood for the trees as the ratio in Najeeb's case is that 'statutory restrictions like Section 43D(5)', do not 'per se oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution.' In the Supreme Court's opinion, '... the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence'.

Similarly, the judgment of the Division Bench of the High Court of Andhra Pradesh in '*Devender Gupta v. National Investigating Agency*' (2014), which is cited by the Supreme Court in this case is important for the proposition that the Court should 'strike a balance between the mandate under Section 43D(5) on one hand and the rights of the accused on the other particularly after the charge sheet is filed'. One of the ways the balance is sought to be struck in this judgment is by laying down factors which could constitute that a case in 'prima facie true' and hence bail should be denied. However, these factors are not applied to the fact situation and analysed with a view to ascertaining if there is 'prima facie' truth to the charges.

In a final troubling conclusion, the Supreme Court privileges the UAPA over the Constitution, when it holds that 'bail is the rule, jail is the exception...while dealing with bail applications under UAP Act.' By so stating the Court reverses a core principle of constitutional justice articulated by the very same Court under the leadership of Justice Krishna Iyer.

Ten days later on February, 17th of 2024, a Session Court in Delhi, denied bail to Sharjeel Imam who was accused of 'unlawful activity' under Section 13 of the UAPA as well as sedition under Section 124-A. The Sessions Court seemed to follow the template set by the Supreme Court of reversing existing precedent. Even though Sharjeel Imam had completed four years in jail and Section 124-A (sedition) was suspended, the Court while acknowledging that due the suspension of Section 124-A, 'it cannot take into consideration Section 124-A', nevertheless goes on to illogically assert that, 'but if the acts and actions of the applicant are considered, in a normal **dictionary meaning** they can be termed seditious'.(emphasis supplied) It is deeply troubling that inspite of credible and strong documentation by the Delhi Minorities Commission that the violence was clearly preceded by a number of speeches by BJP leaders openly maligning anti-CAA protesters, the Court chooses to blame Sharjeel Imam for the violence without any evidence of the same. The conclusion that one seems to be left with is that when it comes to what the IPC calls 'offences against the state', the law will be bent to serve the interest of the state. Or as K.G. Kannabiran succinctly put it, "the law defines the offence, the state decides the offender"!

However, the ruling in Gurvinder Singh deserves greater censure than the session court ruling in the case of Sharjeel Imam, because it is a judgment coming from the highest court in the land and the Supreme Court cannot shirk its responsibility to uphold the Constitution and apply constitutional principles to laws like the UAPA.

The Gurvinder Singh judgment joins the sad list of precedents which besmirch the reputation of what has been called the world's most powerful constitutional court. The Supreme Court has given in to the state's blackmail that when it comes to any allegation related to the support for terrorism, the Constitution ceases to exist. One might indeed be forgiven for thinking that as far the Supreme Court is concerned, it has sworn to 'bear true faith and allegiance' to the executives charter, namely the UAPA and not the Constitution. This judgment weakens the democratic justice system and people's faith in justice.

One hopes against hope that the Court rediscovers its role as a constitutional court and begins to apply constitutional principles in its interpretation of the UAPA and tempers the rigour of the law with a constitutional logic.

The factual matrix of the case is itself an eloquent if tragically ignored plea for the repeal of a law which criminalises the right to speech and association as well as an immediate suspension of its harsh bail provisions.

Under this law, hundreds of innocent citizens across the country are being arrested and incarcerated for exercising their constitutional right to expression, association and assembly, against the government. Too many lives have been destroyed by the UAPA and these lives stand as testimony to the pressing need for its repeal. As the PUCL Report on the UAPA showed starkly, with a conviction rate in UAPA cases less than 3%, of all those arrested, the use of UAPA is shown to be clearly targeting dissenters and people raising questions about the State.

The question is however at what cost?? The end result is that persons arrested under UAPA spend many years in jail only to be declared innocent in the end and released. Who is to compensate these people? Shouldn't action be taken against the police officials, across the chain of command, for abusing and misusing the UAPA? This is the larger issue of constitutional morality before all of us – the Supreme Court included – and should be kept in mind when deciding bail cases.

20.02.2024

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