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2nd Year, BA LL.B.**A JUDICIAL PUSHBACK TO A DRACONIAN LEGAL REGIME****Abstract**

The homage and purpose of our legislature is to enact laws in the interest of the people of our nation, such that they uphold the fundamental rights of the citizens. However, draconian laws like Unlawful Activities (Prevention) Act possess a threat to the liberty of an individual. One such provision of this act is Section 43(D)(5)¹, which inflicts harsh conditions for the grant of bail and violates Article 14 i.e. right to equality and Article 21 i.e. right to life and personal liberty of our Indian Constitution. The way this section has been drafted seems at first glance to grant a bail to an accused, but if we go on reading further in this section, we will arise at the hypothesis that a court can deny bail of an accused on the grounds that the accusation seems to be prima facie true. So in a way this provision opens more doors for denying bail instead of granting bail. This is an infringement of a basic human right of bail. When the legislature enacts such kind of brutal laws which deprives a citizen's liberty, people always then establish high hopes and expectations from our judiciary to come forward and protect us from such punitively driven draconian law. The Delhi High Court stood in favor of such expectations and on June 15 2021, the division bench led by Justice Siddharth Mridul and Justice Anup Jairam granted bail to three student activists namely-

¹ Available at-<https://www.mha.gov.in/sites/default/files/A1967-37.pdf> (last accessed- July 21,2021)

Devangana Kalita, Natasha Narwal and Asif Iqbal Tanha who were booked under UAPA and were in jail without trial for a year in connection of their roles in Delhi Riots 2020. The Court did not find any allegations that would constitute a terrorist act under Section 15, to raise fund for a terrorist act under Section 17 and to conspire for a terrorist act under Section 18 of the UAPA.

Background of the Case

In total there were four FIRs registered against Devangana Kalita and it was the fourth FIR which was filed on March 6, 2020 in which she was granted bail by the Delhi High Court. There are three FIRs filed against Natasha Narwal and the third FIR was filed on the same date as of Devangana. Natasha was arrested for the third FIR while she was already in jail. On May 20, 2020 Asif Tanha was arrested on charges of rioting with deadly weapon and was accused of attempt to murder². It is pertinent to note that these three student activists were arrested under FIR 59/2020. The bench not only granted bail to the three student activists but along with it gave many significant decisions.

Three Key takeaways from the Decision

First, the court analyzed in depth the provisions inculcating terrorist acts and conspiracy acts. They were very careful to differentiate terrorist acts defined under section 15 of UAPA from any other heinous crime. In *Hitendra Vishnu Thakur and others v State of Maharashtra*³, the court declared that a terrorist act must be beyond the scope of an ordinary crime and cannot be dealt under any ordinary penal law. This scope of terrorist attack leads to challenging the sovereignty and integrity of the nation, create a fear amongst the people, shows the failure of a democratic government and demoralizes security forces⁴. The division bench declared that the definition of terrorism under UAPA is somewhat wide and indeterminate. Thus it can be applied casually to offences for which provisions are mentioned under Indian Penal Code. They ruled that UAPA should be applied narrowly and fairly to fit specific acts of terrorism. The act of terror must have an intense impact on the defence of India, subjected under the central law. Law and order is within the state and defence of India is under union subject, hence central government is responsible for defence of India, they enacted UAPA which is administered by central government. So any usual ordinary

² Available at-[Five Questions on the Shameful Proceedings Against Natasha Narwal, Devangana Kalita, Asif Iqbal \(thewire.in\)](https://thewire.in) (last accessed- July 19, 2021)

³ Available at-<https://indiankanoon.org/doc/1275754/> (last accessed- July 21,2021)

⁴ Available at-<https://indiankanoon.org/doc/31276692/> (last accessed- July 22,2021)

crimes should be dealt with by the state government according to the provisions of Indian Penal Code.

Secondly, they declared that the right to protest is a fundamental right and it cannot be called a terrorist act. Moreover, the intent of the trial for this case is not to decide whether they assembled legally or violated Article 19(1)(a) and Article 19(1)(b). The intent of the trial is to know whether the specific allegation according to the charge-sheet fulfills the elements of a terrorist act under section 15, or an act to raise funds for a terrorist act under section 17 and to commit an act of conspiracy to commit terrorist act under section 18 of UAPA. Since at prima facie the allegations against the accused could not fulfill the elements of the mentioned sections above, the activists were granted bail under section 439 Cr.P.C.

Thirdly, the bench also highlighted erudite general principles of bail. To grant a bail, the court always keeps in mind the nature of accusation, extremity of the punishment and evidence according to the accusations. The court also looks at whether a person would leave the country when on bail, whether the accused would repeat the offence, indulge in evidence tampering etc. The court must not refuse bail on the basis of the conduct in the past or a person who is yet to be convicted for imprisonment. It becomes extremely important to understand that a grant of bail is not denied just because the offence is too grave. The court also highlighted the intuition of V.R. Krishna Iyer, that keeping an accused presumed innocent in custody without trial leads to physical and psychological deprivations of life in jail, prevents the accused for preparation for his defence and this pre-detention impacts the innocent members of the family. Alleged Popular Front of India member K.A. Najeeb was jailed for over 5 years under UAPA⁵. In this case, a bunch of PFI activists were elected and K.A. Najeeb was one of them. The only difference was the other activists were arrested in 2015 and convicted in the same year but Najeeb was just arrested and his trial was slow which is clear with the fact of being jailed for 5 years. The bench in this case declared that another 206 witnesses are yet to be examined and examining all the witnesses until K.A. Najeeb is incarcerated in custody, depriving him of his right to speedy trial. In case of Asif Iqbal Tanha's as well there are 740 witnesses listed by prosecution and it may take years and years for those 740 witnesses to be heard in the court of law, thus he cannot be kept under detention for that long. The

⁵ Available at <https://www.scconline.com/blog/post/2021/02/01/najeeb-ka-accused-of-chopping-off-kerala-professors-palm-over-objectionable-question-gets-bail-read-why-supreme-court-upheld-bail-despite-finding-charges-against-him-a-serious-threat-to-soc/> (last accessed- July 22,2021)

Delhi High Court in this case raised the question whether incarceration of the accused is necessary or not. By examining the application for bail, the bench declared that retrenchment of liberty during a trial shall be limited to those cases only where it is absolutely essential which the court in this trial did not find to be so and it was also not legitimately found that the accused would threaten the witnesses or hamper with the evidence. Thus the accused cannot be incarcerated. Adding on to this, the court also analyzed case diary and footages stored in the pen drive and found that the presence of accused during the protest did not instigate hatred speech that would provoke the community⁶

Conclusion

This draconian legal regime whose root lies in section 43(D)(5), infringed the three student activists from all their basic rights and most importantly it harmed their liberty. Under UAPA an accused is detained only for 90 days, but these guilt-free activists were illegally detained for a year in jail. The decision of Delhi High court bench raised hopes that the wheel of justice now is on the right path but soon later the Supreme Court ordered that the decision must not be treated as a precedent. The line between constitutionally guaranteed freedoms and terrorist activities is being blurred because certain provisions under UAPA which are against the justice system followed by India. This judgment should make the citizens aware about how the gaps are being created between them and their constitutionally guaranteed fundamental rights by such draconian laws. This draconian law is used in a large number of cases that have very little to do with law and hence is not less than dictatorship. This decision plays a very significant role as it raised questions on harsh elements like raising funds for a terrorist act to which the court declared that just raising funds for a protest cannot constitute raising funds for a terrorist act. By using such harmful provisions many guilt-less activists have been in custody and still remain for many years. If one is not supposed to follow the merits and quality of the evidence in one way i.e. whether a person is innocent or not, we also should not follow the question of whether a person is guilty or not. Suspicions and inferences can never be charges showing evidence of an act of terror. The state should prove at prima facie that the charges under the charge-sheet is true without requesting from court to establish conclusions on the basis of suspicions and inferences. We are going through unprecedented times when such laws are being used to stiffen dissent and crush the freedom of

⁶ Available at -<https://indiankanoon.org/doc/35382900/> (last accessed- July 22,2021)

speech. In such draconian laws, the process itself is a punishment as the accused remains behind the bars for years and years without being proven guilty. Therefore the time has come for us to examine such laws and see whether such laws are still needed and whether such laws are according to principles and basic structure of our Constitution.



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