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# FROM “BAIL IS THE RULE” TO ROLE BASED INCARCERATION: THE CHANGING BOUNDARIES OF LIBERTY UNDER UAPA

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Christo Varghese, BA LLB (Hons.), Tamil Nadu National Law University

## ABSTRACT

The Unlawful Activities (Prevention) Act (UAPA), 1967, poses a major threat to the long standing “Bail is the Rule, Jail an Exception policy”. This article will look at the changing jurisprudence of bail in India with particular reference to *Gulshifa Fatima v. State* (2026). The Court has created a gap between the “ideological drivers” and “local level facilitators” in criminal conspiracy cases by the introduction of a theory known as hierarchy of roles. In this paper, it can be analyzed how Section 43D (5) of the UAPA interacts with Article 21 constitutional guarantees. It also examines how the precedents apply to the issues of extended incarceration. In the end, the paper concludes that although role-based differentiation is a means of judicial discretion, it needs to be balanced with the imminent risk of pre-trial punishment to protect the sanctity of individual liberty.

**Keywords:** UAPA, Section 43D (5), ideological drivers, local level facilitators, hierarchy of rules.

## INTRODUCTION

The conflict between national security and individual liberty is the most obvious phenomenon in the vistas of bail jurisprudence. Historically the Indian legal system has regarded the right to bail as one of the most important guarantees against the arbitrary deprivation of liberty. But this case has been overruled by the Hon'ble Supreme Court in *Gulshifa Fatima v. State*<sup>1</sup> has added a subtle layer into such a discourse; the theory of the hierarchy of roles.

In refusing to bail Umar Khalid and Sharjeel Imam and affording bail to 5 others who were also accused in the offence the Court was now no longer dealing with a homogenous treatment of conspirators but now was dealing with a special reception of a special treatment of the other conspirators. This article aims at examining the effects of this role-based approach on the procedure defined by law and determining whether this kind of distinction is constitutional fairness or a new boundary of indefinite detention when it comes to national security trials.

## BRIEF OF THE CASE

The case arose from the allegations of criminal conspiracy against seven individuals and their involvement in the violence that occurred in North East Delhi in 2020. The persons alleged to have been involved were charged under various provisions of the Indian Penal Code, 1860 and Unlawful Activities (Prevention) Act, 1967. The Trial Court as well as the High Court have dismissed the bail application moved by each of the accused on the ground that there was a prima facie case.

When the bail application came before the Hon'ble Supreme Court, all of the accused other than Umar Khalid and Sharjeel Imam were given bail. The decision of the Division Bench was based on the "hierarchy of roles" played by each of the accused, giving rise to differential treatment. The Court, while denying bail, opinionated Umar Khalid and Sharjeel Imam as "ideological drivers" while other five co-accused as "local level facilitators". The Court also explained that reading Sections 15 and 18 of the Act<sup>2</sup>, "terrorist act" is not limited to death and destruction but also involves acts which disrupts civic life. In addition to that it was also held that prolonged trial does not guarantee bail in every circumstance under Article 21, thereby

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<sup>1</sup> *Gulshifa Fatima v. State* (NCT of Delhi), 2026 SCC OnLine SC 10.

<sup>2</sup> Unlawful Activities (Prevention) Act, 1967, §§ 15, 18.

refrained to override stringent bail conditions in UAPA.

## **BAIL JURISPRUDENCE**

The term “bail” is derived from a French word “bailier” which means to “give or deliver”. A person is presumed to be innocent in law till the Court finds him to be guilty. He has rights like every other citizens. Bail is the mechanism by which such people can be released from the custody.

Bail is defined under Section 2 (1) (b) of Bharatiya Nagarika Suraksha Sanhita (BNSS), 2023<sup>3</sup>. It defines as: “(b) “bail” means release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond;” The person applying for bail is an accused of the charges and he is released by the Court on certain conditions. These conditions can be based on self-assurance or someone else being a surety for the accused.

Bail is generally given to a person under trial when the Court has been given assurance of the presence and full co-operation of the accused during trial. The Supreme Court in *Sanjay Chandra v. CBI*<sup>4</sup> held that bail is to be given to a person when such a person can assure his appearance in Trial. In addition, the Court has also acknowledged the fact that keeping a unconvict in detention is violative of his personal liberty enshrined in the Constitution. The conditions are imposed so that the person don’t tamper with the evidences or witnesses when released, or the person don’t flee from trial. When in the opinion of the Court there is absence of such risks, then it ought to grant bail to such a person.

## **DENIAL OF BAIL**

The courts generally grants bail because of the presumption of innocence. Keeping an under trial in detention for long time in itself punitive in nature. The purpose of bail is that none should be punished by being in detention unless proven guilty before the Court. But in certain cases the courts may rethink about granting bail to the person.

The Court may deny bail when it is of the view that when such an accused is released, it can be detrimental for the further procedures of the case. The Supreme Court in *Gudikanti*

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<sup>3</sup> The Bharatiya Nagarika Suraksha Sanhita, No. 46 of 2023, § 2(1)(b).

<sup>4</sup> *Sanjay Chandra v. CBI*, (2012) 1 SCC 40

*Narasimhulu v. Public Prosecutor, High Court of A.P.*<sup>5</sup> held that denial of bail to an accused is not for punitive purpose but for the interest of the individual involved and the society. The Court also cautioned that it must be considered that whether the release of such an accused on bail can lead to interference to the witnesses and tampering of evidences. Similarly in *Siddharam Satlingappa Mhetre v. State of Maharashtra*<sup>6</sup> the Supreme Court has observed that the criminal offence committed by a person is against the whole society, so when such a person is released, the order must have a perfect balance of individual liberty and interest of the society.

The charges on the accused is also an important factor to be considered while giving bail to an accused. The Supreme Court in *Mansoor Alam v. State of U.P.*<sup>7</sup> denied bail after taking into account the criminal antecedent of the accused, even though the said accused has undergone 8 years of imprisonment.

Both the accused who were unsuccessful in getting bail are the prime accused of the crime. The crime committed by them is serious in nature. Their acts were detrimental to the security and integrity of the nation. Allowing them bail relief could be against the interest of the society. In such cases, the courts have the power to reject the bail application.

The object of stringent provisions in UAPA is to deter such acts which when committed can cause disruption to the security and integrity of the nation. It can cause disruption to the civic life of the members of the society. The freedom of the individuals can have restriction for the interest of the society. Agreeing that the freedom the individual is to be zealously protected, the Supreme Court in *Mansoor v. State of U.P.*<sup>8</sup> held that the collective interest of the society can outweigh the rights of individual. This is done so that the society may not lose its faith on the institutions of the state. It is true that keeping an under trial in detention for long period (6 years in this case) is in violation of his fundamental rights, but the interest of the society can override such right of individual.

## **BAIL IN UAPA**

Procedure for bail is laid down under Section 43D (5) <sup>9</sup>of the Act. According to the said

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<sup>5</sup> Gudikanti Narasimhulu v. Public Prosecutor, High Court of A.P., (1978) 1 SCC 240

<sup>6</sup> Sushila Aggarwal v. State (NCT of Delhi), (2018) 7 SCC 731

<sup>7</sup> Mansoor Alam v. State of U.P., (2015) 4 SCC 731

<sup>8</sup> Masroor v. State of U.P., (2009) 14 SCC 286

<sup>9</sup> The Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5).

provision, two conditions are to be fulfilled while granting bail to a person charged under UAPA. First is to provide the prosecutor an opportunity for hearing. Second is that the Court after perusal of the report under 173 CrPC<sup>10</sup> or case diary is prima facie satisfied that the accused is not guilty of the offence.

The defence of reasonable doubt cannot be a reason to grant bail under this provision. A prima facie satisfaction of the court based on the report or diary can lead to rejection of bail application. The Supreme Court while denying the bail application in *Harpreet Singh Talwar v. State of Gujarat*<sup>11</sup> held that under Section 43D (5) proof beyond reasonable doubt is not required under the provision. Again the Supreme Court in *National Investigation Agency v. Zahoor Ahmad Shah Watali*<sup>12</sup> held that the Court only have to take into account the totality of the investigating agency. Degree of satisfaction of the Court is lighter in these cases. If the prima facie opinion, after analyzing the document in totality, is true then the Court can deny bail. Besides that it was cautioned that the courts should not conduct a “mini trial” at the stage to determine the admissibility of evidences.

The duty of the Court in this stage is not to decide the bail application based on the reliability of the individual evidences. The report and the evidences submitted by the prosecution are the only materials which are to be analysed. There is no need to look into the genuineness of the materials presented by the prosecution. If the Court forms an opinion that the case of prosecution is true, then bail is to be denied. On bare reading of the phrase “prima facie opinion” it reveals that there is no need to examine whether the accused is guilty or not. Only an opinion formed is enough for the Court to deny bail of the accused.

While deciding on any such case, the courts have consistently analysed the legislative intent behind such provision of law. It was nowhere the intent of the legislature that the accused can be granted bail only on the presumption of doubt. Foreseeing the complexity of the case and the chances of the accused to obstruct further investigation, it wanted the accused to be in jail till the completion of trial.

For any crime there has to be *mens rea* and *actus reus*. The former means guilty mind and the latter means guilty act. Any person who is accused of crime must possess guilty mind and must

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<sup>10</sup> Code of Criminal Procedure, 1973, § 173.

<sup>11</sup> *Harpreet Singh Talwar v. State of Gujarat*, (2014) 14 S.C.C. 368 (India).

<sup>12</sup> *NIA v. Zahoor Ahmad Shah Watali*, (2019) 5 S.C.C. 1.

commit guilty act. If there is presence of both the conditions then only a person can be held to be guilty. Even an attempt to commit a crime is an offence in itself. But for the offence under UAPA, a person can be held guilty even in the stage of preparation. Individual can be detained even in the stage of preparation. There is no need for the act to be done by the accused. It is more of preventive in nature.

## **DIFFERENTIATION OF ROLES**

Criminal Conspiracy is the participation of two or more people in commission of an offence. This is defined under Section 61 of Bharatiya Nyaya Sanhita, 2023<sup>13</sup>. It is different from other crimes as in the former only meeting of minds is enough for becoming an offence unlike other crimes. It an agreement of two or more minds to commit and offence or an act in an illegal manner. But it is difficult to prove this agreement and hence, Section 8<sup>14</sup> of Bharatiya Sakshya Adhinyam, 2023 considers an overt act done after the said meeting of mind as an evidence for conspiracy.

In Criminal Conspiracy individuals take up different roles with the agreement for a common object. Though the acts may be different, but the ultimate goal of the said acts have to be common to attract criminal liability. Provision under Section 43D (5) of the Act nowhere requires that all the conspirators have to be punished equally. It provides that a prima facie satisfaction of the report of the said accused by the prosecution is the threshold for denying bail.

The provisions of the law never agrees with homogenous treatment of all the accused. The phrase “such person” means that the legislation does not intend those accused against whom the prosecution could not make a prima facie case to be in detention. The Hon’ble Court has taken this view of differential role by the accused persons.

The Court found Umar Khalid and Sharjeel Imam to be “ideological drivers”, while other co-accused as “local-level facilitators”. In the opinion of the Court the role of Umar Khalid and Sharjeel Imam to be managerial in level. The idea behind creating such a hierarchy was not to absolve other co-accused from liability but to distinguish on the basis of role played by each in

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<sup>13</sup> Bharatiya Nyaya Sanhita, 2023, § 61.

<sup>14</sup> Bharatiya Sakshya Adhinyam, 2023, § 8.

the conspiracy. Thus, granting bail to five co-accused while rejecting for other two was in consonance to the bail procedure provided in the said act.

### **CONSTITUTIONAL SAFEGUARDS AND “HIERARCHY OF ROLES”**

The Constitution under Article 21<sup>15</sup> prevents any interference to life and liberty unless through the “procedure established by law”. But people misinterpret and fail to distinguish between “procedure established by law” and “due process of law”. Formers means that all the procedures have to be fulfilled for interference on life and liberty while the latter means that not only the procedures have to be fulfilled but even the procedure has to be just in nature. The courts in these cases will only be looking on the procedure rather than weighting the just and fairness of the law.

This does not mean that the legislature can make any procedure of law. That ought to be just and fair. The Supreme Court in *Maneka Gandhi v. Union of India*<sup>16</sup>, held that such procedure cannot be arbitrary in nature. Again the Supreme Court in *Rekha v. State of Tamil Nadu*<sup>17</sup> held that the procedural safeguards are to be strictly followed and they cannot be diluted on the basis of the alleged offence of individual. Even if the individual is in detention for any alleged heinous offence, the procedural safeguards of the law is to be followed.

In the case in hand, UAPA is a statute which is made for special category of offences. It contains a lot of stringent laws for the greater protection of society, which in anyway is not in derogation of Article 21. The procedure for bail is that in prima facie opinion of the Court is that the accusations against the accused are true. The Court has followed this procedure and denied bail for the two accused while rest were released. The accusations on the said two accused were prima facie found to be true by the Court.

### **PROLONGD INCARCERATION**

The period of detention of the accused exceeded 5 years. Still the trial against them is in process. They have neither been found guilty nor held innocent. Such a long period of detention is against the principle of constitution which guarantees liberty to its citizens. Article 21 of the Constitution also covers in its ambit the right to speedy trial. Courts in a number of occasions

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<sup>15</sup> INDIA CONST. art. 21.

<sup>16</sup> *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

<sup>17</sup> *Rekha v. State of Tamil Nadu*, (2011) 5 S.C.C. 244 (India).

have held that the accused have a right to speedy trial and they cannot be detained for long period of time.

The provisions of UAPA contains a lot of hurdles for bail. The Supreme Court in *Union of India v. KA Najeeb*<sup>18</sup> has held that statutory restrictions cannot make the Constitutional provisions illusory. The courts cannot deny bail because of statutory restrictions and delay in proceedings.

In the present case, the Court accepted the precedent of the Supreme Court but the silent meaning which it conveyed was more emphasized. There was no mechanical rule laid out by the Court in that case that every accused who served a long term in jail as an under trial should get bail. The Court relied on the precedents established by *Gurwinder Singh v. State of Punjab*<sup>19</sup> and *CBI v. Dayamoy Mahato*<sup>20</sup> where it was held that it was not a mechanical rule to grant bail in delay of trial and also that the totality of circumstances is to be examined.

The Court said that the delay in trial cannot be the sole reason for bail. Such a reason cannot mechanically grant bail to the accused. The Court further held that the nature of the case also has to be analysed. The case is of complex nature which requires a lengthy trial. Many witnesses and evidences have to be examined. Though not complete, but there has been some delay caused due to accused themselves. In such a situation the Court can deny bail to accused.

The intent of the legislature was that the courts may not grant bail based on reasonable doubt as in other cases. This legislation deals with offences which are so serious in nature that the accused person when released may cause greater harm of the society. Such release may risk the lives of others. This is the reason that legislature never wanted the person booked under this Act be released in bail on mere reasonable doubt. Special provision was made which is unlike the provisions related to other crimes so that it cater the need of the state in deterring the commission of such acts and fulfil the true intent of the law.

## CONCLUSION

The decision of the Supreme Court in the case of *Gulshifa Fatima v. State* is a significant turn in the interpretation of stringent laws and Right to Liberty. By moving away from homogenous

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<sup>18</sup> Union of India v. K.A. Najeeb, (2021) 3 S.C.C. 713.

<sup>19</sup> Gurwinder Singh v. State of Punjab, (2024) 4 S.C.C. 333.

<sup>20</sup> CBI v. Dayamoy Mahato, (2025) 12 S.C.C. 45.

treatment and adopting “hierarchy of role” theory, the Court has laid down a new standard for bail. While allowing bail to “local level facilitators” the Court upheld the principle of “Bail is the Rule, Jail an Exception”.

The role based classification risks justifying the incarceration of some accused. The challenge remains to the courts to decide how these stringent laws do not violate constitutional safeguards. While the State’s interest is paramount in nature, the judiciary has to ensure that this does not become a tool for pre-trial punishment. By maintaining a balance between collective safety and individual freedom, the courts must remember liberty is the one of the foundations of a democratic republic country and its deprivation has to be a rare exception, and in accordance to justice and fairness.