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ANALYZING BAIL JURISPRUDENCE UNDER UAPA IN REFERENCE TO WATALI CASE AND POST-WATALI TRENDS

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INTRODUCTION

The word ‘Bail’ is not defined in any of the laws in India neither in ordinary criminal law nor under special laws. Black’s Law Dictionary defines ‘bail’ as ‘Procuring the release of a person from legal custody, by undertaking that he shall appear at the time and place design himself to the jurisdiction and judgement of the court.’¹ The law pertaining to bail has its own philosophy and hold a significant place in the administration of justice and its concept materializes from the conflict between the state power to restrict liberty of the accused and the principle of presumption of innocence in favour of that person.

The jurisprudence of bail or the rationale behind granting bail is based on the formulation of Article 21 of the Constitution which states that liberty can be deprived only through the procedure established by law and the law and procedure both must be just, fair and reasonable.² The significance of this article in terms of bail is that it makes the deprivation of liberty, fleeting and an issue of grave concern and allows only to the extent of meeting the standard community good and compelling interest of State.

In the ever-appreciated words of Justice Krishna Iyer- “*The issue of ‘Bail or Jail’-at the pretrial or post-conviction stage-although largely hinging on judicial discretion, is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.*”³ Bail should always be construed as balancing the individual liberty of a person with the larger societal interest rather than using it as a tool to punish people by detaining them unnecessarily. The consequences of pre-trial detention

¹ BLACK’S LAW DICTIONARY 181 (3rd ed. 1933).

² Maneka Gandhi v. Union of India, AIR 1978 SC 597.

³ Gudikanti Narasimhulu v. Public Prosecutor, 1978 SCC (1) 240.

are grave and the accused is being deprived physically and psychologically which are usually more as compared to what is generally imposed on defendants who has been convicted. *“The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”*⁴

However, there is reversal of the general principles of criminal law in special legislation like UAPA which makes them special or different from the ordinary law of the land. Under this law, jail is the rule and an accused is presumed to be guilty unless proven innocent. This presumption is antithetical to the tenets of criminal jurisprudence but has always been justified by the state on the ground of national security and larger public interest.

Recently, the decision of the Apex Court in Zahoor Ahmad Shah Watali case⁵ attracted a lot of criticism owing to its narrow interpretation of section 43D(5) which almost rendered the grant of bail impossible in UAPA cases. This paper seeks to analyze the bail jurisprudence under terror laws like UAPA with the help of decided cases with specific reference to Watali and the impact of the restrictive interpretation adopted on subsequent cases.

RESEARCH QUESTIONS

- What makes bail difficult under UAPA and how is it different from ordinary criminal law?
- How UAPA is being used as a tool to achieve political ends?
- What is the fallacy of the term ‘prima facie’ under section 43D (5) of UAPA?
- What is the effect of Watali on the judgment of subsequent cases?

OBJECTIVES

- To analyze the bail jurisprudence under UAPA and to find out how is it different from ordinary law.
- To find out the problems in the interpretation of the vague and ambiguous term like ‘prima facie’.
- To analyze the post watali trends in reference to grant of bail in cases registered under UAPA.

⁴ Moti Ram v. State of M.P., AIR 1978 SC 1594.

⁵ National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.

BAIL JURISPRUDENCE UNDER UAPA

In ordinary criminal law, it has always been reiterated that ‘Bail is rule and jail an exception and the court further emphasizing on this rule observed that the purpose of bail is to ensure that the accused individual will attend at the trial, not as a form of punishment or prevention. The Apex Court in this case made it clear that “*The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.*”⁶ Since, the objective of granting bail is to secure the appearance of the accused in court at the time of trial and to ensure fair trial therefore, the restriction on liberty would only be justified if it poses a flight risk, evidence tampering and witness intimidation.

The court in *State of UP v. Amarmani tripathi*⁷ laid down certain conditions to be considered while deciding an application for bail which are as follows – “(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 charge; (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 tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. In addition to this well settled considerations section 43D(5) of UAPA provides for another ground for the court to refuse bail and it is in addition to the restriction under the code or any other law for the time being in force.”⁸ The restricted interpretation of this provision by courts has resulted in reversal of the general criminal law and made the grant of bail under UAPA an exception.

Section 43D (5) is the most contentious provision in the act as it mandates the court to not to release the person on bail if it has reasonable ground to believe that the allegation against the accused is prima facie true on examining the case diary or report made under section 173 CrPC. This provision was introduced through the amendment in 2008⁹ in the aftermath of Bombay terror attack case and is applicable only to cases falling under Chapter IV and VI of the Act i.e, terrorist activities and terrorists organization. The proviso to this section almost turned down the principle of ‘presumption of innocence’ which gives an upper hand to the state machinery.

⁶ Sanjay Chandra v. Central Bureau of Investigation, AIR 2012 SC 830.

⁷ State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21.

⁸ Unlawful Activities (Prevention) Act, 1967, § 43D(6), No. 37, Acts of Parliament, 1967 (India).

⁹ Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, Acts of Parliament, 1967 (India).

Patterns of larger use of the UAPA suggest its targeted application by the state. The law enables prolonged pre-trial custody of individuals through drawn-out investigation and exceedingly limited grounds to secure bail. UAPA accused are very often acquitted in their trials due to insufficient evidence, yet, forced to remain in custody, often for years. This ensures the legal process itself becomes punishment. This Committee reiterates the urgent need for a comprehensive review of the UAPA.¹⁰

The Watali judgement by the Apex Court prohibits the court from considering the merits or demerits of the evidence when deciding on a bail request and would also refrain from exploring the conclusions that the prosecution has reached from the evidence and other materials presented to the court.¹¹ This decision made this draconian law the most feasible tool for the executive to thwart the grant of bail and to keep the accused in jail for indefinite period. Therefore, it becomes important to discuss this case in detail before moving into the intricacies of the provision and the fallacy of 'prima facie'.

STATISTICS – A PUSH FOR RECONSIDERATION

According to government statistics, 3,579 of the nearly 4,250 UAPA cases that were scheduled for inquiry between 2014 and 2020 are still outstanding. 4,101 cases remained open as of the end of 2020, 1,818 of which had been waiting for an investigation for more than three years. 2020 saw the charge-sheeting of 398 UAPA cases, of which 63.56 percent were filed within a year and 27.88 percent between one to two years. Similar to that, as of 2017, 43.02 percent of these cases had been pending for one to three years.¹²

A total of 72.4% of cases were dismissed or acquitted between 2014 and 2020, while 27.5% resulted in convictions. In these seven years, 57 persons have been released, 253 have been found guilty, and 493 have been acquitted. This appallingly low UAPA conviction rate suggests that the law is being abused.

¹⁰ <https://theleaflet.in/wp-content/uploads/2022/10/uncertain-justice-citizens-committee-report-on-north-east-delhi-violence-2020.pdf>.

¹¹ Union of India v. K.A. Najeeb, (2021) 3 SCC 713.

¹² Shaoni Das, *The Unlawful Activities (Prevention) Act and a long way to justice* [May 7, 2022] <https://theleaflet.in/unlawful-activities-prevention-act-and-a-long-way-to-justice/>.

UAPA – A TOOL TO ACHIEVE POLITICAL ENDS

The security law in India has undergone a significant evolution since the time before independence. The Naxalite movement in central India, political uprisings in Punjab, militant activity in Jammu and Kashmir, insurgent organisations in the north-eastern states, and other internal disputes posed a serious threat to national security throughout the post-independence era. Anti-terror laws were required by this domestic crises to protect India's sovereignty and territorial integrity.¹³

Therefore, maintaining a balance between enhancing national security protections and upholding citizens' rights is a requirement sine qua non in a democratic system like India. However, the state should be careful not to go into repression and authoritarianism while protecting the territorial integrity and sovereignty of the State as well as the safety of its residents. The Unlawful Activities Prevention Act of 1967 has received a lot of criticism for being an oppressive law that goes against the spirit of democracy and violates fundamental rights. It is also used as a tool by the government to suppress political dissent by criminalizing it.

Political justice, in theory, is concerned with defending the state from external and internal adversaries who have established bases within the borders of a state for operational convenience. In reality, a social class with established authority or even a group of party leaders may view themselves as the state in order to further their own goals. The second sort of political justice inevitably draws the ire of historians or modern critics because it is nearly always brutal on top of being unscrupulous in practise.¹⁴

The Unlawful Activities Prevention Act of 1967 has also received a lot of criticism for being an oppressive law that goes against the spirit of democracy and violates fundamental rights. By eliminating the line between criminal activities and political dissent, it is argued that this criminalizes political dissent. The act gives the government a great deal of unrestricted power by using various overly general and ambiguous terms and phrases. Certain terms in the Act, such as *affecting the interests of India* and *if the government believes* give room for subjective interpretation and, as a result, egregious misapplication of the provisions because the term

¹³ Radhika, *Evaluating the Unlawful Activities (Prevention) Amendment Act, 2019* (2020) <https://sprf.in/evaluating-the-unlawful-activities-prevention-amendment-act-2019/>.

¹⁴ Otto Kirchheimer, *Political Justice; The Use of Legal Procedure for Political Ends* 26 THE MODERN LAW REVIEW, (Jul., 1963).

"interests" is not defined and also excessively enlarge the authority of the government. This provides the government the authority to repress any dissent, no matter how small.¹⁵

There are examples of people connected to organisations that oppose the ruling regime have been charged under UAPA. For instance, the Delhi Police detained Imran Kirmani, a Kashmiri aeronautical engineer for alleged ties to LeT, a group that is prohibited and included in the Act's First Schedule. He was acquitted after spending five years of his life in jail. Amitabh Bagchi, a member of the Politburo of the Communist Party of India (Maoist), was also arrested under the UAPA, in spite of the fact that no firearms were found on him, as part of an effort by the executive to ban critical thinking. His indictment was justified by the literature that was found on him and the knowledge that he belonged to a banned organization.¹⁶ It is clear from the above stated facts that it is being used to repress dissent through harassment and intimidation, endangering press freedom and public discourse as well as criminalising the exercise of civil liberties.

Examining the UAPA's provisions, the low conviction rate, and reports of abuse of the law's provisions show that, like TADA and POTA before it, the UAPA has also shown to be a tool of oppression in the hands of the government used to stifle dissent and pursue political rivals under the guise of fighting terrorism and illegal activities. It is fascinating to observe that nearly all significant counterterrorism laws have been introduced in a hurry and in response to large acts of mass violence both domestically and overseas. The definition of the mentioned offences share the characteristic of being broad and comprehensive. It enables even routine criminal activity to fall within their purview.

Arun Ferreira, Sudha Bharadwaj, Vernon Gonsalves, Varavara Rao, Anand Teltumde, Gautam Navlakha, and other well-known human rights advocates, civil society leaders, activists, and even student protestors have all been detained under the UAPA and sedition laws over the course of the past four years, in particular. These activists were detained in relation to their suspected participation in the remembrance event for Bhima-Koregaon that took place on January 1, 2018.¹⁷ Aside from these, a number of activists, academics, and leaders of the right to information have

¹⁵ Tanishk Gautam & Josheca Mukerji, *Critical Analysis of Unlawful Activities Prevention Act, 1967*, 26 *Supremo Amicus* [524] (2021).

¹⁶ Anushka Singh, *Criminalising Dissent – Consequences of UAPA* (Sept 22, 2012) <https://www.epw.in/journal/2012/38/commentary/criminalising-dissent.html>.

¹⁷ Niranjan Sahoo and Jibrán Khan, *UAPA and the growing crisis of judicial credibility in India* (Nov 21, 2020) <https://www.orfonline.org/expert-speak/uapa-growing-crisis-judicial-credibility-india/>.

been charged with violating the UAPA and sedition laws, including Assamese activists Akhil Gogoi and Jamia Milia Islamia University students Safoora Zargar and Pinjra Tod who participated in demonstrations against the contentious Citizenship Amendment Act (CAA). Umar Khalid, a student activist, was also detained for his alleged involvement in the Delhi riots that took place earlier this year.

Although UAPA cases have increased significantly in recent years, misuse of the law has existed for much longer and has occurred throughout all regimes and types of governments. The UAPA's lack of a legal process for those classified as terrorists—individuals or organizations—to contest their identification as such is particularly alarming.

THE (IN)FAMOUS CASE OF NIA v ZAHOOR

AHMAD SHAH WATALI

The accused 'Zahoor Ahmad Shah Watali' was arrested under UAPA on allegation of terror funding wherein he acted as a conduit for transferring funds from the terrorist Hafeez Sayid to secessionist/ Hurriyat leaders and helping them in waging war against the Government of India through repetitive attack on security forces and government establishments. The provisions of UAPA invoked by NIA against the accused were "*Section 16 (punishment for terrorist act), Section 17 (punishment for raising funds for terrorist act), Section 18 (punishment for conspiracy), Section 20 (punishment for being member of terrorist gang or organization), Section 39 (offence relating to support given to terrorist organization) and Section 40 (offence for raising funds for a terrorist organization).*"

Order of District and Session Judge rejecting bail –

The court held that in view of stated facts and circumstances, statement of witnesses and other materials produced by NIA, a prima facie case has been made out against the accused and therefore by virtue of section 43D(5)¹⁸, the prayer of accused for bail cannot be granted. The statements recorded under section 161 CrPC on which the court relied were not even tested and therefore could not have been read as evidence. Further, the statement of witnesses (Charlie and Romeo) recorded under section 164 CrPC was also not provided to the accused as per section 207 CrPC.

¹⁸ Unlawful Activities (Prevention) Act, 1967, § 43D(5), No. 37, Acts of Parliament, 1967 (India).

If the idea was to protect the witnesses as per section 44¹⁹ of UAPA then the prosecution could have done it by omitting the name or address of the witnesses from the statement thereby not disclosing the identity of the witnesses. The document no. 132(a) which was relied upon by the NIA to establish the connection of the accused with the terror funding was yet to be established as genuine as it was a loose green sheet containing the signature of the accused at the right hand bottom corner and mere signature cannot be the proof of its contents.

Order of Delhi High Court granting bail –

The high Court granted bail to the accused and asked him furnishing a personal bond of 2 lakh along with two sureties of like amount to the satisfaction of the trial court. The court has reversed the order of the trial court rejecting bail saying that there are no reasonable ground at this stage to form an opinion that the case against the accused is prima facie true. While granting bail, the court imposed certain conditions and in case of any breach, NIA was given an option to apply for cancellation of bail. The HC took into account the proposition that when special laws concerning serious offences are invoked against a person inviting grave consequences then the trial court will scrutinize the evidences with additional care.

This makes it evident that court has always an option to protect the liberty of the person without compromising the interest of the State by invoking the provision of cancellation of bail. Indefinite detention of accused on the pretext of him tampering with the evidence or flight risk which may or may not happen is contrary to the principles of presumption of innocence and violate the fundamental right of the accused.

Order of Supreme Court denying grant of bail -

The Supreme Court reversed the order of Delhi HC and held that the accused is not entitled to bail. It further observed that the court should not have gone into the merits and demerits of the case and examined the admissibility of evidences. The court further held that bail can be denied to the accused under section 43D(5)²⁰ by relying on the materials produced by the prosecution even though there are chances of them being inadmissible as evidence during trial because at the stage of deciding an application of bail, the court should decide on the basis of the materials produced before it on broad probabilities.

¹⁹ Unlawful Activities (Prevention) Act, 1967, § 44, No. 37, Acts of Parliament, 1967 (India).

²⁰ Unlawful Activities (Prevention) Act, 1967, § 43D(5), No. 37, Acts of Parliament, 1967 (India).

THE FALLACY OF ‘PRIMA FACIE’ – A TECHNICALITY TO CUT DOWN THE SUBSTANTIVE RIGHTS

As Annelise Riles²¹ explained in her paper the vice of technicality inculcated in the statute by the executive to mould the law in favour of the State. The technical character of law encompasses three things – Ideology, Actors and problem solving paradigm.

One such technicality enumerated in the law is section 43D (5) of UAPA. The problem with the mandate of section 43D(5) is the construction and determination of allegations to be ‘prima facie’ true. In *Watali*,²² the Supreme Court observed that “*the expression ‘prima facie’ true means that the evidences collected by the investigating agency unless contradicted or disproved must show on its face the complicity of the accused in the commission of the offence.*” The court is required to peruse the case diary or charge sheet while engaging with the question of ‘prima facie’.

The court further held that in order to avoid conducting a mini-trial at the bail-granting stage, the court should just consider the general probabilities of the accused's involvement rather than weighing the evidence's merits or shortcomings. Now, in the absence of examination of evidence how the accused would prove that the evidence presented by the prosecution does not pass the standard of ‘prima facie’.²³ In the wake of such non-examination of evidence, it becomes almost impossible for the accused to secure bail by disproving the case of the prosecution. The Delhi High Court²⁴ while granting bail to *Watali* observed that the examination of evidence is necessary to determine whether a prima facie case exist or not.

The apex court in *Hitendra Vishnu Thakur v State of Maharashtra*²⁵ in reference to TADA observed that the designated court should be cautious while invoking the provisions of TADA because more often than not, the investigating officer chooses to add an offence while opposing grant of bail. Therefore, an onerous duty is cast upon the court to take extra care to scrutinize the material on the record and apply their mind to the evidence and documents available

²¹Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities* (2005) CORNELL LAW FACULTY PUBLICATIONS <http://scholarship.law.cornell.edu/facpub/782>.

²² *National Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1.

²³ Panel Report - Jail is the Rule: Bail Jurisprudence under the UAPA (October 1, 2021)

<https://www.sociolegalreview.com/post/panel-report-jail-is-the-rule-bail-jurisprudence-under-the-uapa#viewer-ch5hf>

²⁴ *Zahoor Ahmad Shah Watali v. National Investigating Agency*, 2018 SCC Online Del 185.

²⁵ *Hitendra Vishnu Thakur v. State of Maharashtra*, AIR 1994 SC 2623.

with the investigating agency before charge-sheeting an accused and should not solely rely on the version presented by the investigating agency.

Moreover, the fallacy also lies in the fact of assuming the determination of prima facie involvement of accused when the investigation is itself in the process and the court is only required to rely upon the material produced by the prosecution which in itself leaves a scope for arbitrary exercise of power in the hands of executives. This provision leads to deference of judiciary to the executive as they are acting as mouthpiece of the State machinery.

The judiciary has received a lot of criticism recently over cases involving UAPA, while being the most important institution for safeguarding and providing prompt remedy of violations of fundamental rights. Several retiring Supreme Court justices have expressed their shock at the upper courts' shocking indifference to flagrant abuses of civil freedoms under the new UAPA system. Such an interpretation against the courts has a strong foundation. Even in cases when there has been no progress in the police investigation or prosecution, the Supreme Court, high courts, and subordinate courts have shown little to no rush to issue bail.

Due to their unreasonably high threshold, these bail requirements make it nearly impossible for an accused person to obtain bail. The requirements for bail are more stringent than those for an acquittal. Because of this, under specific legislation, the accused are typically denied bail and are kept in detention even if they are ultimately found not guilty. Since, Section 43D(5) solely refers to the prima facie requirement, the UAPA prohibits taking the triple test into account. Furthermore, the Supreme Court in the Watali case viewed prima facie under the UAPA significantly differently even though the UAPA imposes the same threshold of prima facie as utilised by the courts in granting bail under the CrPC.

The court in watali held that the phrase 'prima facie' in Section 43D(5) requires that the information gathered by the investigating agency be taken as factual unless it is proven otherwise by additional evidence contained in the chargesheet. At the time of giving bail, the probability, or the improbable likelihood, of its veracity, cannot be taken into account. Additionally, the issue of admissibility is not to be addressed at this time, especially if any collected evidence is not thought to be acceptable as evidence.

A FLICKER OF HOPE - POST WATALI TRENDS

Undoubtedly, the decision of the Supreme Court in *Watali* set a bar so high that it made the grant of bail virtually impossible in UAPA cases. However, this court in *Twaha Fasal v Union of India*²⁶ tried to correct the wrong done by its judgement in *watali* and move beyond the strict construction of UAPA provisions by granting bail to the accused and reading down section 38 and 39 of the act. The court observed that the vague allegations of conspiracy, based on the general behaviour of the accused, or of the materials that might have been recovered from them, is not enough: it is for the chargesheet to establish the *prima facie* existence of the requisite intention, *from* specific overt acts.

Further, in *Union of India v KA Najeeb*²⁷ the court observed that the rigorous provision of the UAPA Act, particularly Section 43D (5) cannot oust the ability of the constitutional courts to grant bail on breach of Part III of the Constitution and when the period of incarceration undergone by the accused has surpassed a considerable part of the sentence then the right of the accused should be safeguarded as right to fair and speedy trial²⁸ is a fundamental right recognized under article 21 of the constitution.

Though the court in this case granted bail to the accused but its acceptance of the rule laid down in *watali* is somewhat problematic as it furthers the idea of grant of bail as an exception in terror cases. It observed that the High Court had re appreciated the entire evidence on record to overturn the Special Court conclusion of their being a *prima facie* case of conviction and concomitant rejection of bail and conducted a mini-trial and determined the admissibility of certain evidences, which exceeded the limited scope of a bail petition.

This approach can be summed up as follows - Given the strict requirements of the UAPA and the near-impossibility of obtaining bail, courts must adhere to two principles if individual liberties are not to be completely supplanted by the demands of anti-terror law²⁹ -

- A strict and narrow construction must be applied to the UAPA's definitional sections. This is what the Bombay High Court did regarding Section 20 of the UAPA in *Iqbal Ahmed*

²⁶ *Twaha Fasal v. Union of India*, (2021) SCC OnLine SC 1000.

²⁷ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.

²⁸ *Hussainara Khatoun v. State of Bihar*, AIR 1979 SC 1369.

²⁹ *Gautam Bhatia, Supreme Court Judgment In Thwaha Fasal UAPA Case- A Flicker of Hope* [November 2, 2021] <https://www.livelaw.in/columns/supreme-court-thwaha-faisal-judgment-bail-in-uapa-cases-active-association-intention-bombay-hc-delhi-hc-184814?infinitemscroll=1>.

Kabir Ahmed, the Delhi High Court did regarding the definition of "terrorism" in Asif Iqbal Tanha, and what the Supreme Court has recently done in Thwaha Faisal.

- The charges on the chargesheet must be specific, factual, and individualised. Inferences or supposition cannot bridge the gap between what someone is accused of doing and the actual circumstances. This is once more shown in the analysis of the Thwaha Faisal ruling.

In Asif Iqbal Tanha , the Delhi HC held that “*there are no reasonable grounds for believing that the accusations against the appellant are prima facie true and the proviso to [section 43D\(5\)](#) would not apply; and we must therefore fall back upon the general principles of grant or denial of bail to an accused person charged with certain offences.*”³⁰ Pre-trial incarceration would undermine the presumption of innocence in addition to causing needless psychological and physical suffering; more importantly, it would substantially impair the appellant's ability to participate in and contribute to the development of his defence during the trial. Imposing necessary conditions on the grant of bail can address the three main objections to bail pending trial, which are evidence tampering, witness intimidation, and absconding.³¹

Further, In Devangana Kalita,³² the court which emphasizing upon the grant of bail observed that even though this involved the court exercising discretion, it was important that this discretion be used wisely and not just automatically or routinely. The nature of the charges, the seriousness of the penalty, and the type of evidence used to support the accusations must all be taken into consideration by the court when deciding whether to grant bail. The court must carefully consider the veracity of the prosecution while rationally evaluating the suspicion of flight risk, evidence tampering, and witness intimidation in addition to being prima facie satisfied with regard to the accusations brought. The character, behaviour, means, position, and status of the accused as well as the likelihood of the crime being repeated must all be taken into account by the court.

CONCLUSION

The majority of definitions and words in legislation like the UAPA were taken from previously abolished laws, and the Parliament took no effort to clarify them adequately, resulting in ambiguous definitions that cover a wide variety of behaviours. The law enforcement agencies may

³⁰ Asif Iqbal Tanha v. State (NCT of Delhi), 2021 SCC Online Del 3253.

³¹ Id.

³² Devangana Kalita v. State (NCT of Delhi), 2021 SCC Online Del 3255.

misinterpret these definitions, which would be a violation of an individual's freedom. One such phrase is 'prima facie' as defined by section 43D (5) of the UAPA, whose strict application has all but prevented the granting of bail in UAPA cases.

The legislation of bail in India is based on the maxim 'Bail is rule, denial is exception,' yet UAPA flips this maxim. Due to the existence of section 43 D, courts are compelled to exercise caution while granting bail. A person may be kept in jail even if there is just a remote chance that he committed the crime. The burden of proof for the prosecution does not correspond to the seriousness of the offence, and the presumption of innocence is unfairly biased against the accused. Sections like 43 D may be essential in the battle against terrorism, but safeguards against the wrongdoing of investigation authorities are also necessary to protect people's right to life.

As per the holdings in *Watali*, the court is required to assume that the prosecution's case is accurate before deciding whether a prima facie case has been established. This represents a serious erosion of judicial authority. The common law's prima facie requirement is a discretionary criterion that enables the judge to determine whether the evidence against the accused is convincing and adequate to support conviction. The prima facie criterion has been stripped of its crucial discretionary essence by the *Watali* decision of the Supreme Court, turning it into a rigid test. By doing so, it makes the error of presuming that the information is accurate unless shown otherwise. This is a significant shift from the idea of prima facie that has been established through decades of related case law. There is nothing in the UAPA to support this constriction of judicial discretion. In fact, *Watali* has had the effect of negating the progressive statutory position adopted in the UAPA wherein the UAPA discarded the almost impossible standard contained in the predecessor anti-terror laws of POTA and the TADA.

Nothing in the UAPA supports this limitation of the court's discretion. *Watali* actually has the effect of undermining the forward-thinking statutory position chosen in the UAPA, which did away with the nearly unattainable criteria contained in the precursor anti-terror statutes of POTA and the TADA. Therefore, in order to grant or deny bail under UAPA, the burden of proof on the prosecution must be high enough to match the seriousness of the charge and the scope of the court's discretion must be broad enough to take into account factors that have been carefully, elaborately, and scientifically determined. When evaluating whether to grant bail requests under UAPA, consideration should be given to the consequences of UAPA and the accused's risk

assessment.

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