VOLUME 3 | ISSUE 1

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

A CRITICAL ASSESSMENT OF THE SUPREME COURT'S DECISION IN NIA v. ZAHOOR AHMAD SHAH WATALI (APRIL 2019) AND ITS EFFECT ON THE BAIL PROVISIONS UNDER UAPA

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Abstract:

UAPA has drawn criticism for its ambiguous language and propensity to curb civil liberties. In the Watali case, Zahoor Watali and others were accused of violating anti-terrorist laws which sends a dissuasive message to anybody or any organisation that is opposed to or not in line with the interests of the State by guaranteeing a 180-day jail sentence based on allegations and inadmissible proof. The authoritarian impulse's level of lawlessness puts India's constitutional democracy at jeopardy. It should be unlawful to follow the Supreme Court's ruling in the Watali case. Strict interpretation is necessary in this regard where Watali ruling needs to be changed. Furthermore, in a broader framework, it is important to integrate the application of both national security and human rights legislation.

Introduction:

Much like every other anti-terror law ranging from TADA, POTA to MACOCA which have been criticised for its draconian provisions and total disregard of human rights, UAPA inherits a similar faith[2].It came under Anti-Terror Law in 2004 when chapter on punishing terror activities was incorporated by way of amendment. Further amendments occurred in 2008 in the wake of Mumbai attack wherein substantial and procedural provisions were added to expand scope of terrorism, thereafter in 2012 wherein financial transactions pertaining to terror funding were incorporated and in 2019[3] wherein power to identify individual as a terrorist was added.

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[2] Abhishek Bhardwaj, *Anotomization of the Draconian Unlawful Activities (Prevention) Act*, 2.3 Burnished Law 2587, 2582-5334 (2021)
[3] Anushka Singh, *Criminalising Dissent: Consequences of UAPA*, Economic and Political Weekly16, 14-18 (2012)

Some of the criticism amongst others are vague terms, provision to declare an individual as terrorist prior to trialand even before filing of FIR. Most importantly, its potential to be used as means to suppresscivil liberty and dissent. However, with recent death of social activist Stan Swamy[4] as an undertrial prisoner, and other cases[5] wherein accused have been acquitted or discharged after a long period of incarceration, it has brought UAPA's misuse under socio-legal radar.Amongst other, the criticism significantly also pertains to bail provisions of UAPA.

While the principle in Criminal Jurisprudence is that "Bail is the rule, and Jail is the exception", its application seems to be constantly juxtaposed by nature of bail provisions under Anti-terror Laws. Section 43D (5) strictly deals with non-grant of bail to the accused wherein prosecution mustconvince the Court that there are reasonable grounds to believe that accusations are *prima facie true.*However, the Watali judgementhas elevated the difficulty for accused to get bail to the point of violating fundamental rights.Therefore, the following chronological analysis will determine the extent to which the ratio of NIA v Watali[6] and the system it creates makes it an unconstitutional legal proposition.

Factual introduction:

Watali case pertains to Zahoor Watali and others who were allegedly involved in unlawful activities and terror funding. They were charged under Section 120B/121/121A of IPC and section 13/16/17/18/20/38/39/40 of UAPA and accordingly arrested. Watali who is accused no. 10 moved a bail application before the District and Session Court which was rejected due to seriousness of allegations. Thereafter, accused no.10 filed an appeal in High Court which set aside the designated Court's order and granted bail. This was challenged by NIA in Supreme Court wherein the Designated Court's judgement was affirmed.

Reversing the Burden of Proof and elevating the standard:Law or Flaw?

A bare statutory comparison of bail provisions undersection 43D(5) of UAPA[7]and section 37 of NDPS[8]reveals that, while in the latter the burden of proof is on the accused to show that prima facie he/she is not guilty, however the former despite of being an anti-terror law does not set such pre-conditions and onus remains on prosecution to persuade the court that there

[4]Rhea et al. *Death of 84-year old activist turns spotlight on India's anti-terrorism Laws,* CNN, July 16, 2021.
[5]Abhinav Sekhri, *How The UAPA is Perverting The Idea of Justice*, Article14, 16 July, 2021
[6]National Investigation Agency v Zahoor Ahmad Shah Watali (Arising out of SLP(Crl.) NO.7857 of 2018)
[7]UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 (INDIA)
[8]THE NARCOTICS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

is reasonable ground to believe that the allegations are 'prima facie true'. However, the legal reasoning in Watali pivotally shifted the legal position.The judgement while deliberating on the expression of *"prima facie true"*held thatall information in FIR, case diary, charge-sheet under section 173 and all other materials which contain allegations towards the accused must on its face be treated as correctand it invites the force of contradiction from accused. Firstly, there is a clear shift in burden of proof as it eventually becomes liability of accused to refuteall charges "until proven not guilty".This reasoning has been substantiated and borrowed from anti-terror laws such as TADA and MCOCA which have been repealed for its characters of lawlessness.Furthermore, the Court held that once charges are framed then the Court shall presume the presence of factual ingredients as alleged towards accused and makes it difficult for accused to prove that he/she is not guilty. Surprisingly, as a command to the sub-ordinate courts, the court inserted this standard of presumption at the stage of hearing bail after filing of chargesheet under section 173.Analytically, the case of **Ranjit sing Brahmajeet sing Sharma**[9]which the Court has used to supports its reasoning is a MCOCA case and the reasoning about Court's expected approach in that case is based on the legislative intention of section 21(4) of MCOCA[10].Analytically on the other hand, the yardstick mentioned in the statute only demands reasonable ground for court to be convinced that accusations are *"prima facie true".* This is a concerning application of Judicial mind with an attempt to only elevate the stringency even beyond what the legislative has intended. Therefore, with such prejudicial application of mind coupled with the burden to proof 'not guilty' on accused and the cakewalk duty of Prosecution to meet the lenient standard of 'prima facie', coupled with the acceptability of all natures of evidence, it would be impossible to get bail under section 43D5) of UAPA. Perhaps, the court has handed over the accused to the police on a golden platter with no scope of bail.

All evidence to be accepted and Bar on discussing the admissibility of evidence:

The court has also held that the question of accepting or discarding an evidence is a project to be conducted at trial stage and therefore, all available information which contains the allegations towards the accused presented by the investigation agency needs to be read in totality. Referring back to the above-mentioned paragraph on treatment of FIR and all other evidence as prevailing, an additional power has also been attached to all these evidence in

[9]RanjitSingBrahmajeetsing v State of Maharashtra &Anr; 2005 5 SCC 294
[10]Maharashtra Control of Organised Crime Act (MCOCA), 1999 (India)

regard to bail i.e., they are all immune from the application of Judicial mind for determining its admissibility. This is also the crux of this case in relation to the impugned judgement, that by determining admissibility of evidence at the bail stage, the High Court has conducted a mini trial which could be pre-mature and might prejudice the trial. The reasoning of the Supreme Court is good and perhaps relevant in law; however, they fail to realize that the solution about restricting the Court from examining the admissibility of evidence is ironical and will frustrate the objective of expedient trial. Firstly, because even the Prosecution will take time to present all information. Secondly even if the Court is barred from interfering, since the burden has now shifted on accused, he/she will fight tooth and nail to rebut all charges. More so when the allegations derived from inadmissible evidence will also need to be refuted. Therefore, even the fight for bail in itself becomes a mini trial only with more advantages on the Prosecution's end. Analytically, the court has failed to acknowledge the ground reality of the investigating agencies wherein they constantly bargain for time to produce case diary and other evidence when a bail application is moved. Now, with the Supreme Court's order, the sub-ordinate Courts will be compelled to wait for submission of all evidence to determine the bail in totality, coupled with the slow wheels of justice. Secondly, the lawful maximum period of detention under section 43D(2b)is 180 days, and post which default bail can be applied under section 167 (2)(a) of CrPC by accused prior to filing of chargesheet, as an exercise of fundamental right as held by the Supreme Court in **Bikramjit Singh v State of Punjab**[11]. While this is a silver lining against the backdrop of the strict provisions under section 43D(5). The real question is, given the conviction rate of hardly 30% at maximum, is it justified for innocents to languish behind bars for six months based on the mere charges of UAPA? Moreover, with the embargo in section 43D(4) of UAPA, even if a person apprehends arrest under this act, he/she cannot seek for anticipatory bail under section 438(1) of CrPC[12]. Therefore, beyond all reasonable doubts, it is clear that enhanced by this court's reasoning, UAPA has the potential to be employed as an instrument to suppress dissent and deter critiques with a 6 month of horrifying Jail experience by virtue of FIR and devoid of seriousness of allegations.

Scrutiny through the lenses of Article 21:

There is perhaps an unequivocal understanding that reasonable curb on freedom of speech and expression under Article 19, was within the legislative intention while formulating of

[11](2021) 1 SCC(Cri) 85
[12] THE CODE OF CIVIL PROCEDURE, 1973

UAPA. However, the scenario this case has created with a greater tilt towards the state, it is essential to determine whether these provisions will survive Article 21. In this regards, Justice P Bhagwati in the celebrated case of Maneka Gandhi[13]established that any law should pass the test of just, fair and reasonable under the ambit of Article 21 for it to be constitutionally valid. Firstly, the reasoning of the Court which further solidifies the firmness of UAPA creates a system which eliminates the scope of justice for any accused. Its detachment from the considerations of fundamental rights is evident with the recent orders passed by Bombay High Court[14]wherein bail on humanitarian ground was protected from being challenged on the yardsticks of Watali judgement and bail was granted on Medical ground by notwithstanding the rigours of UAPA[15]. By virtue of Article 141also bars all sub-ordinate courts across the country to apply their Judicial mind freely, coupled with an additional liability of negligible scope to get bail. Secondly, the tilt is greater towards the state because: the burden of proof has shifted on the accused to deny the accusations coupled with granting credibility to all related nature of information presented by prosecution despite its inadmissibility. All this goes to show that the convenience can only be enjoyed by the investigation agency and the accused inevitably will receive shorter end of the stick. Consequentially, it becomes impossible to manage bail despite the high acquittal rate. All this reasonings collectively direct the analysis towards the conclusion that the dicta in Watali judgement is unjust, unfair, unreasonable and arbitrary. While the Supreme Court's essential function is to also protect fundamental rights, the Watali judgement has diluted that equation. Therefore, it violates right tolife and liberty under Article 21. In worst case scenario, a prospective justification remains that when the accused is convicted without prior bail, his/her existing detention duration is deducted from the period of imprisonment and eventually injustice is neutralized. However, this analysis does not respond to the circumstance when without any prior bail and long undertrial detention, accused is acquitted. How will the detention be justified? Therefore, with high acquittal rate of approximately 70%[16], it would be right to assert that the process becomes the punishment.

Post-Watali judgement: Consequences and Conclusion

By virtue of Article 141, all sub-ordinate Courts are legally bound to follow the legal proposition in Watali. The consequence of this is clear in some of the orders regarding

[13]AIR 1978 SC 597
[14]Surendra PandalikGadling v Senior Inspector Police & National Investigation Agency (Bombay High Court)
[15]Dr. P.V. Varavara Rao v National Investigation Agency (Bombay High Court)
[16]Sushal et al. National Crime Records Bureau, 2.1 NCRB,1-83 (2019)

rejection of Bail. The most significant amongst others is the death of social activist Swamy who died during the pendency of his Bail application. This clearly exposes the abusive system of criminal Jurisprudence in India. Secondly, the rejection of Sudha Bharadwaj's bail[17] based on inadmissible evidence reveals the disregard of rule of law. Although it might not be the Judicial intention, but with Watali judgement in force, indefinite amount of liberty and power has been granted to investigation agencies while bargaining for non-grant of bail in Court. Simultaneously, it has discounted the strength of Judicial Review under bail provisions of UAPA. However, in recent times the Apex Court has created various legal propositions under UAPA's bail provision which are supportive of an individual's fundamental liberties [18] [19]. However that itself, exposes the systematic inconsistency of Judicial interpretation of law in Supreme Court.

Conclusion:

It can be asserted that Watali judgment is wholly unconstitutional. It sends a deterring message for any individual or group who are against or not aligned with State's interest with an assured 180-day detention in jail based on allegation and inadmissible evidence. The degree of lawlessness of this authoritarian impulse threatens India's Constitutional democracy. In this regards, strict interpretation is essential. Watali judgement requires a revision. Furthermore, on a larger context, human rights and national security laws should be integrally reconciled and applied collectively.

[17] PurvaChitnis, *Elgar Case: Lawyer-Activist Sudha Bharadwaj Denied Bail by High Court,* NDTV, August 29th, 2929.
[18] 2021 SCC Online SC 50
[19] 2022 SCC Online SC 50