
(2010) 10 KL CK 0061

In the High Court Of Kerala

Case No : Criminal Appeal No. 2009 of 2010

Mohammed Nainar and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 173, 378, 378(3)
National Investigation Agency Act, 2008 — Section 21, 21(1), 21(2), 21(4)
Penal Code, 1860 (IPC) — Section 120B, 121A, 124A, 465, 471
Unlawful Activities (Prevention) Act, 1967 — Section 13(2), 18, 3, 39, 43D(5)

Citation : (2011) CriLJ 1729 : (2011) 1 KLJ 68

Hon'ble Judges : Pius C. Kuriakose, J;P.S. Gopinathan, J

Bench : Division Bench

Advocate : T.K. Kunhabdulla, for the Appellant; S.U. Nazar, Sr. Public Prosecutor and T.P.M. Ibrahim Khan, Asst. S.G of India, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Gopinathan, J.—These appeals are preferred u/s 21 of the National Investigation Agency Act, 2008, herein after referred to as Act 34/2008. The Appellant in CrI.A. 1939 of 2010 is accused No. 12 in S.C. 1 of 2010 on the file of the Special Court for the Trial of National Investigation Agency cases (NIA Cases), Kerala, Ernakulam. The Appellants in the other appeal are accused Nos. 6 and 18. They are being prosecuted by the second Respondent for offences u/s 3 read with Section 13(2), 18 and 39 of the Unlawful Activities Prevention Act, 1967, amended by Act, 2004 and Section 120B, 121A, 124A, 465 and 471 of the Indian Penal Code. Accused No. 6 was arrested on 31.10.2008, Accused No. 12 was arrested on 25.10.2008 and Accused No. 18 was arrested on 1.11.2008. Ever since arrest, they are in custody. Accused No. 6, 12 and 18, along with other accused, preferred CrI. M.P. 947 of 2010 seeking an order to release them on bail. By the impugned order dated 18.8.2010, the above application was dismissed. Assailing the above order, these appeals were preferred.

2. Section 21 of the National Investigation Agency Act reads as follows:

21. Appeals -

(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under Sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in Sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days.

3. The impugned order being one rejecting application for bail, it is appealable u/s 21(1) and 21(4). Such appeal is to be heard by a Bench of two Judges of the High Court u/s 21(2). Therefore, these appeals were posted before us.

4. The learned Counsel for the Appellant, the learned Public Prosecutor representing the first Respondent State and the Assistant Solicitor General representing the second Respondent were heard.

5. The allegation against the Appellants are that the Appellants joined as member in the conspiracy arranged for facilitating terrorism and thereby waging war against the Nation and in furtherance of their common intention and knowledge, they along with the other accused aided and assisted in facilitating terrorism by attending the classes arranged for the above purpose at Neerchal, Poothappara and also abetted accused Nos. 7, 8, 9 and 15 to attend the classes at the above places and at Jammu and Kashmir and they facilitated Accused 7, 8, 9, 10 and 15 to associate with LeT and get trained in arms and ammunition with the intention of facilitating terrorism and to commit terrorist activities and they also decided to make fake identity cards to conceal their identity with the intention to design and wage war against the Government.

6. Sri. T.K. Kunhabdulla very vehemently submitted that the Appellants were falsely implicated and they were not at all connected with any offence alleged and they are in custody for about two years and that the special court was not

justified in declining bail.

7. The learned Assistant Solicitor General, appearing for the second Respondent vehemently opposed the application for bail stating that the Appellants are involved in terrorist activities joining hands with Lashker-e- Toiba, a banned terrorist organization having base in Pakistan and their activities are threat to security, unity and integrity of the Nation and that there are reasonable grounds for believing that accusation against the Appellants is prima facie true and in the light of the proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, the Appellants are not entitled to be released on bail.

8. For a correct appraisal, a reading of Section 43D(5) along with its proviso would be relevant. It reads as follows:

Section 43D(1) to (4) omitted as not relevant.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release.

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made u/s 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

9. In view of the above provision, we find that the Appellants are not entitled to be released on bail, if the Court on perusal of the case diary or the report of the investigating officer made u/s 173 of the Code of Criminal Procedure finds that there are reasonable grounds for believing that the accusation is prima facie true. The above legal position is not disputed by Sri. T.K. Kunhabdullah, the learned Counsel appearing for the Appellants.

10. The question then remains is whether the statement of the witnesses prima facie establish that the allegation is true or not. The learned Assistant Solicitor General took us through the statement of witness Nos. 43, 44, 47, 48, 144, 179 and 182 and also the statements of additional witnesses 11, 12 and 13. Going by the statement of the above witnesses, we find that there are reasonable grounds for believing that the accusation against the Appellants is prima facie true. On the other hand, the learned Counsel for the Appellants vehemently argued that even allowing the Appellants to face trial, there would not be any evidence to sustain a conviction against them and that the Appellants are amenable to any condition that may be imposed. We find that in a case like this, for considering whether the Appellants are entitled to be released on bail, the court need not search to see whether there would be evidence against the Appellants to convict them after trial. We don't prefer to go into the merits of the case at this stage as it may prejudice the Appellants. Suffice to mention that going by the statements of the witnesses mentioned above, we are persuaded to believe that the

accusation is prima facie true. We cannot shut our eyes against the terrorist activities affecting the security, unity and integrity of the Nation. Imposing conditions may not be of any effect. In view of the proviso to Section 43D(5) quoted above, the Appellants are not entitled to be released when there are reasons or grounds for believing that the accusation is prima facie true. An identical matter had been considered by the Apex Court in *State Vs. Jaspal Singh Gill*, . It was a SLP preferred against an order granting bail by the High Court. The Apex Court while cancelling the bail order, has held that the Respondent therein should not have been enlarged on bail in the larger interest of the State. Going by the allegations against the Appellant we find that the allegations are of highest magnitude and punishment assigned is of extreme severity. Exercise of the judicial discretion in granting bail in cases like this had been laid down by the Apex Court in *Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh*, . In Para 6, Krishna Iyer, J. held:

Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erie J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the court may reasonably presume some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. (Mod. Law Rev. p. 50 *ibid*, (1952) I.E. & B1). Lord Campbell C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

"I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tied, and because the detention is necessary to ensure his appearance at trial It is a very important element in considering whether the party, if admitted to bail would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important; the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case, the charge is that of wilful murder, the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

Again, at para 7, it is held:

It is thus obvious that the nature of the charge is the vital factor and the nature

of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

11. Bearing the above principle in mind and having due regard to the nature and magnitude of the crime and the manner in which it was designed and executed as well as the forces behind, we find that by imposing conditions, we may not be able to secure the presence of the Appellants to face trial and receive sentence or to prevent the Appellants, if released on bail, from interfering with the prosecution witnesses or intercepting with the process of justice. Therefore, imposing conditions may not yield any effect. The trial court was justified in declining to grant bail. We find no reason to interfere with.

12. The learned Counsel for the Appellant submitted that accused No. 17 was granted bail in Crl. appeal No. 957/2001 by another Bench. We have gone through the judgment dated 13.9.2010 in that appeal. Cogent reasons are stated therein. The allegation against the accused No. 17 was that he harboured accused No. 15. The Division Bench found nothing to show that while accused No. 17 harbouring accused No. 15, accused No. 17 was aware that accused No. 15 was involved in terrorist activities. Here, the nature of allegations are entirely different. Therefore, the Appellants herein cannot be equated with accused No. 17 for the purpose of granting bail.

13. It is also seen that the first accused was granted bail by the committal court during the investigation stage for failure of the prosecution to file charge sheet within the time limit stipulated u/s 167(2) Code of Criminal Procedure, probably subject to modification by Section 43D of the Unlawful Activities (Prevention) Act, 1967 as amended by Act 35 of 2008. That ground is not available to the Appellants herein.

14. Learned Public Prosecutor Sri. S.U. Nazar submitted that in two other cases, bail applications were filed before this Court and it was posted before separate Single Judges and the applications were considered and disposed of as if the Single Judge has got power to dispose of the bail applications. According to the learned Public Prosecutor, the same is against the mandate of Section 21 of Act 24/08 and that only a Bench of two judges alone can hear such petitions as appeals. One case is reported in Abdul Halim v. State 2010 (3) KLT 524. Anr. one is order dated 14.10.2010 in Shammi Firoz v. National Investigation Agency Bail Application No. 6203 of 2010. Going by the above decisions, it didn't appear that those bail applications were instituted against the order dismissing the petition seeking bail.

15. On the other hand, it appears that those bail applications were filed as if fresh petitions for bail. Going by the above orders, we see that no objection regarding the maintainability of those petitions before the learned Single Judge was raised. On the other hand, those petitions were argued on merits and disposed of. However, Sri. S.U. Nazar, the learned Public Prosecutor, sought for an authoritative pronouncement. Having heard either side, we notice that there

is a little confusion as to whether an appeal against an order refusing or granting bail shall be heard by a Bench of two Judges or not. Sub-section (1) of Section 21 would stipulate that notwithstanding anything contained in the Code of Criminal Procedure, an appeal shall lie from any judgment, sentence or order not being an interlocutory order of a special court to the High Court both on facts and on law. Sub-section (2) would stipulate that an appeal under Sub-section (1) shall be heard by a Bench of two Judges of the High Court. Sub-section (4) would stipulate that notwithstanding anything contained in Sub-section (3) or Section 378 of the Code of Criminal Procedure, an appeal shall lie to the High Court against an order of the special court granting or refusing bail. The stipulation contained in Sub-clause (2) is seen made applicable only for appeals against orders under Sub-section (1) of Section 21 and not for orders under Sub-section (4). If such an interpretation is given, it is not necessary to have an appeal against the order refusing or granting bail be heard by a Bench of two Judges of the High Court because an order granting or refusing bail would come under Sub-section (4) of Section 21 and though it is an appealable order, there is no specific mention about the forum for hearing such appeal. But, on a careful reading of Sub-clause (1)(2) and (4) together, we find that Sub-clause (4) of Section 21 is only of a clarificatory nature. It only clarifies that order refusing or granting bail is also appealable. We are persuaded to find so, because Sub-section (1) of Section 21 is a notwithstanding provision as against all the provisions in the Code of Criminal Procedure and Sub-section (4) is a notwithstanding provision only against Section 378(3) of the Code of Criminal Procedure. Since Sub-section (1) of Section 21 would operate as against all the provisions of the Code of Criminal Procedure, in the strict sense, Sub-section (4) is only a surplus provision. It can work or operate nothing in addition to Sub-section (1). That is why we styled it as a clarificatory provision to Sub-section (1). On a considered view, we find that "order" mentioned in Sub-clause (1) of Section 21 would also cover an order granting or refusing bail. In this view of the matter, we find that an order granting or refusing bail by a special court is appealable to High Court u/s 21(1) and (4) and such appeal shall be heard by a Bench of two Judges as provided by Sub-section (2). Such appeal shall not be heard by a Single Judge.

16. On a careful consideration of the effect and impact of Section 21 as regards the jurisdiction of the High Court in granting bail, we find that Section 21 confers only appellate jurisdiction on a Bench of two Judges of the High Court. Original jurisdiction is with the Special Court. It means that only after exhausting the original jurisdiction vested with the Special Court, the appellate jurisdiction can be invoked. Therefore, an accused seeking bail in cases investigated by the National Investigation Agency constituted under Act 34/08 has to first apply for bail before the special Court and cannot straight away apply to the High Court which is only an appellate forum, through a bail application as done in *Abdul Hatim v. State* and *Shammi Feroz v. National Investigation Agency*. The procedure adopted by this Court in the above cases is opposed to Section 21 of Act 34/08 and has no sanction of law. The point raised by the learned Public

Prosecutor is answered accordingly.

In the result both the appeals are dismissed.