
(2021) 08 KL CK 0022

In the High Court Of Kerala

Case No : Criminal Appeal No. 105 Of 2021

Riyas A @ Riyas Aboobakkar @ Abu Dujana

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 04-08-2021

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 173
Unlawful Activities (Prevention) Act, 2019 — Section 38, 39, 43D(5)
Indian Penal Code, 1860 — Section 120B

Citation : (2021) 08 KL CK 0022

Hon'ble Judges : K.Vinod Chandran, J;Ziyad Rahman A.A, J

Bench : Division Bench

Advocate : Biju Antony Aloor, K.P.Prasanth, T.S.Krishnendu, Hijas T.T, Shafin Ahammed, Archana Suresh, P.Vijayakumar, Arjun Ambalapatta

Final Decision : Dismissed

Judgement

Vinod Chandran, J.

1. The appeal is filed against the dismissal of a bail application in S.C.No.No.3/2019/NIA by the 18th accused. The offence alleged are under 120B

IPC and Sections 38 and 39 of Unlawful Activities (Prevention) Act, 2019 ['UA(P)A' for short]. The appellant was arrested on 30.04.2019 and is

continuing in judicial custody since then, excepting five days when he was sent to police custody on appropriate orders. The present application is the

fourth bail application filed by the appellant.

2. We heard Sri.B.A.Aloor, learned Counsel appearing for the appellant and Sri.Arjun Ambalapatta, learned Senior Public Prosecutor, NIA.

3. The learned Counsel for the appellant points out that there are 18 accused, some of whom are absconding, some convicted and the others prefer

detention in custody. It is pointed out that the entire allegations commenced from the registration of a crime in Chandera Police Station, Kasaragod.

The appellant has been roped in invoking Section 120B, unjustifiably since there is no evidence of the appellant having participated in any conspiracy.

The appellant is not a member of any terrorist organization and there is not even an allegation that the appellant acted with the intention to bring

Islamic State to India. In the charge-sheet, there is no no allegation of threats being levelled against any of the witnesses and the appellant would

comply with any stringent conditions imposed by this Court and would faithfully attend before Court when summoned. The incriminating material

available, according to the prosecution, are 40 documents and the statements given by CW-21 to CW-29. The investigation has been carried on from

2016 to 2019 and no material is available with the prosecution which would even prima facie establish the accusation against the appellant. The

appellant has not moved out of India and his Passport does not show any visit to an Islamic State or Sri Lanka. It is alleged that the entire allegation

against the appellant hinges on a conspiracy hatched, which led to suicide bombings carried out in the neighbouring Sri Lanka. The appellant relies on

Union of India v. K.A Najeer [(2021) 3 SCC 713] and submits that he is under custody from 29.04.2019 and his statement was

recorded on 13.05.2019 while continuing in custody.

4. The learned Special Prosecutor points out that though the investigation commenced from Crime No.534 of 2016 of Chandera Police Station,

registered on the complaint of the father of A1; that A1, his wife and child are missing after they left for Bombay. Investigation revealed a criminal

conspiracy for commission of unlawful activities, membership and support to a proscribed terrorist organization, the Islamic State of Iraq and Syria

(ISIS). There are 40 persons arraigned in the list of accused and A2 was also incorporated in the list of accused. The trial against A2 is completed

and her conviction under Section 38 of UA(P)A has been confirmed by the Hon'ble Supreme Court and the sentence of 7 years of rigorous

imprisonment, as granted by the trial Court, is restored and affirmed. Many of the accused left the country and joined ISIS by travelling to the areas

controlled by ISIS in the Nanagarhar province of Afghanistan or Syria. A16 and A17 were booked in the course of investigation and a supplementary

charge-sheet was filed against them before the Special Court. On getting reliable information that A1 and A8, who joined ISIS in Syria, are in

continuous contact with friends/relatives and are attempting to motivate youth in Kasargod and Palakkad districts to actively support the cause of ISIS,

further investigation was carried out. A18, the appellant herein, was thus arraigned along with A19 to A21 by report dated 29.04.2019. The NIA Court

has thrice rejected the bail applications and there is no scope for consideration of his subsequent application.

5. We get the details of the earlier bail applications from the impugned order itself. Twice applications were filed at the stage of investigation, which

were rejected and the third application filed after submission of the final report under Section 173 Cr.P.C. was also dismissed. No challenge was

made from any of these orders. We notice the Full Bench decision of this

Court in *Younus Aliar v. Sub Inspector of Police* [2016(3)KLT 877]. The Full Bench answered a reference and held that when once the NIA Court

or the appellate Court forms an opinion that there are reasonable grounds for believing that the accusation against the accused person is *prima facie*

true on the basis of the case diary or the report made under S.173 of the Cr.PC, the same is not liable to be overlooked while dealing with a

subsequent bail application or appeal; unless there are further materials or circumstances relied upon in support of that application. It was held that

when subsequent bail applications are filed during the course of investigation, the entire case diary can be perused to consider the new materials or

circumstances pointed out in the subsequent bail application and this would take in consideration of any matter left unconsidered in the earlier round.

However, when a final report has been filed under S.173 Cr.PC and a bail application or appeal has been rejected after that, finding a *prima facie*

case to reject grant of bail under the proviso to S.43D(5), then a subsequent consideration would stand excluded. It was also observed that if there is a

further investigation ordered and a further report filed, which is then treated as the final report then that could also be subjected to fresh scrutiny for

grant of bail. The Full Bench, also observed that these principles are in furtherance of the right of the accused as protected in terms of the judgments

of the Hon'ble Supreme Court interpreting Articles 21 and 22 of the Constitution of India. *K.A Najeeb (supra)* was a reiteration of such principles and

the power of Constitutional Courts to grant bail; even melting down the rigour of the proviso under S.43D(5) was emphasized; when there is no

likelihood of trial being completed within a reasonable time and a period of incarceration already undergone has exceeded a substantial part of the

prescribed sentence. None of these aspects arise in the case of the appellant as of now.

6. The allegations against the appellant are listed out in the impugned order, which are extracted below:

â?¢ He has been in on line contact with A1 and other absconding accused since 016. The audio clips, chats, etc. are relied on by the prosecution apart from the

statements of approvers.

â?¢ He has been following the audio clips of A1, including the 50th audio clip which he had circulated on social media platform, and also audio clips that would promote suicide attacks.

â?¢ He had instigated others to carry out terror attacks in India and did several acts to further the activities of ISIS in India.

â?¢ He has been following the speeches/videos of Azhran Hashim, supporter of ISIS in Sri Lanka for more than a year.

â?¢ He has been influenced by speeches of Zakir Naik.

â?¢ He was ready to carry out a suicide terror attack in Kerala for furthering the activities of ISIS as directed by the absconding accused.

â?¢ The 19th and 20th accused have confessed before the Judicial First Class Magistrate under Section 164 Cr.P.C in which they have clearly explained the role of the

petitioner to join ISIS and further its activitiesâ??

7. The prima facie finding of the Court below, while dismissing the application, found in the order dated 24.05.2019 is also extracted herein below:

â??The audio clip relied on by the prosecution and contained in the pen drive submitted to the court for the purpose of this petition was taken from the Mobile

Phone used by the petitioner. The audio clip is allegedly that of Abdul Khayoom, an accused in the Valapattanam ISIS case. The voice clip justifies suicide attacks

and urges Muslim Youths to be part of it. The fact that the voice clip was found in the mobile phone of the petitioner will indicate that he is interested in the

ideologies of ISIS. The investigation also has revealed that the phone contained

images circulated to celebrate the suicide attack in Sri Lanka on the Easter day ie 21.4.2019. That apart, the witnesses, who were questioned by the investigation officer, have spoken about the peculiar nature of the petitioner and also his affinity

towards ISIS. A few witnesses have stated that the petitioner had urged them to follow the ideology of ISIS. Thus, he was actively propagating the ideology of ISIS.

The Case diary also reveals his close association with the group supporting the ideology of Zahran Hashim who was responsible for the bomb blast in Sri Lankaâ??.

8. We are of the opinion that the appellant having not travelled outside India is insignificant and irrelevant insofar as the ingredients of the charges

levelled against him under the UA(P)A. The material recovered during investigation, specifically the data recovered from the mobile phone of the

accused, points to a larger conspiracy for spreading the tentacles of ISIS; which is still under investigation. The appellant was hoarding books and

materials, which indicate active support and propagation of the ideology of ISIS. These were noticed at the earlier instance to find a prima facie case

against the appellant herein.

9. The materials to be used in trial against the accused are mobile phones, SIM Cards, air gun, personal diaries and other books seized from the house

of the appellant by the investigation team. The appellant has been in constant contact through social media platforms with absconding A1. The NIA in

its objections specifically refer to the 50th audio clip which A1 had circulated in encrypted social media 'Telegram Messenger', instigating Muslims to

carry out terror attacks within India. The accused-appellant has also been chatting online with absconding accused Abdul Khayoom @ Abu Khalid,

who is charged in the ISIS Valapattanam case. There is also evidence of the appellant having planned to carry out a suicide attack in Kerala for

furthering the activities of ISIS in Kerala. There is no allegation, as submitted by the learned Counsel for the appellant, that he is actively involved in

the explosion carried out at Sri Lanka. The allegation is that the accused was following the speeches/videos of Zahran Hashim, the mastermind of the

2019 Easter day suicide attacks in the island nation exhorting violent 'jihad'.

10. The appellant, along with A19 and A20, has been propagating the ideology of ISIS to further the objectives of the proscribed organization. The

appellant is also charged with organizing conspiracy meetings in Kochi City on 26.10.2018 for furthering the activities of ISIS, wherein he had

motivated and sought support from co-conspirators in committing terrorist attacks inside Kerala identical to that carried out in Sri Lanka. A19 and A20

have disclosed these facts in the statements made before the Magistrate, recorded under Section 164 of Cr.P.C. They have been made approvers by

granting pardon and they have clearly spoken of the role of the present appellant. The said statements have been perused by us.

11. In the above circumstances, we find the Special Court is justified in rejecting the application for bail. We find justification for both findings. First on

the subsequent application being not maintainable, when after filing of charge-sheet an earlier application for bail stood rejected as has been held by

the Full Bench of this Court in Younus Aliyar (*supra*). On merits too, having found the accusations against the appellant to be *prima facie* true, we find

the Special Court justified in rejecting the prayer for bail under Section 43D(5) of the UA(P)A.

The appeal would stand rejected.