

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN. V

WEDNESDAY, THE 30TH DAY OF SEPTEMBER 2015/8TH ASWINA, 1937

CRL.A.No. 728 of 2015

S.C.NO.200/2015 of SESSIONS COURT, THALASSERY, DATED 08-07-2015
CRIME NO. 780/2014 OF KADIRUR POLICE STATION, KANNUR

APPELLANT(S)/ACCUSED NOS. 9 & 10:

1. SINIL, AGED 34 YEARS,
S/O.NARAYANAN, PLUMBER, SINIL NIVAS,
KUNNUMMAL, THOLAMBRA P.O., MALOOR,
KANNUR DISTRICT.
2. BIJESH POOVADAN @ BIJU, AGED 31 YEARS,
S/O.BALAKRISHNAN, MEETHALA THACHARATH, KAVILMOOLA P.O.,
MALOOR, KANNUR DISTRICT.

BY ADVS.SRI.K.GOPALAKRISHNA KURUP (SR.)
SRI.P.N.SUKUMARAN
SRI.ABHISHEK KURIAN

RESPONDENT(S):

1. CENTRAL BUREAU OF INVESTIGATION,
SPECIAL CRIME BRANCH,
THIRUVANANTHAPURAM REPRESENTED BY DEPUTY
SUPERINTENDENT OF POLICE.

*ADDL.R2.IMPLEADED

ADDL.R2. SUNIL KUMAR E.,
AGED 34 YRS, S/O.CHATHUKUTTY,
ELAMNDHOTTATHIL HOUSE, PATTIYAM, KATHIRUR,
KANNUR DISTRICT

*ADDL.R2 IS IMPEADED AS PER ORDER IN CRL.M.A.NO.5000/2015 DATED 30.09.2015 IN
CRL.A.NO.728/2015.

R1 BY ADV. SRI.P.CHANDRASEKHARA PILLAI, SC, C.B.I.
ADDL R2 BY ADVS. SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16.09.2015 ALONG
WITH CRL.A.NO.729/2015, THE COURT ON 30-09-2015, DELIVERED THE FOLLOWING:

Mrcs

K.T. SANKARAN & RAJA VIJAYARAGHAVAN.V, JJ

Crl.A.728 & 729 of 2015

Dated 30th September, 2015

JUDGMENT

Raja Vijayaraghavan.V.

“CR”

1.Crl.A.No.728 of 2015 has been filed u/s 21(4) of the National Investigation Agency Act r/w S. 439 of the Code of Criminal Procedure (hereinafter referred to as the “Code”) by accused Nos.9 and 10 in S.C.No.200 of 2015 of the Sessions Court, Thalassery, aggrieved by the common order dated 8.7.2015 in Crl.M.P.No.2113 of 2015 of the said Court as per which the bail application filed by the aforesaid appellants was dismissed by the learned Sessions Judge.

2.Crl.A.No.729 of 2015 has been filed by the accused

Nos.5 to 7 and 14 to 16 in the same Sessions case aggrieved by common order dated 8.7.2015 in Crl.M.P. No 2139 of 2015 dismissing the bail application filed by them.

3.As the appellants in both the cases stand charged in the same crime and the facts as revealed from the prosecution version are one and the same, the appeals are heard and disposed of by a common judgment.

4.One Elamthottathil Manoj, a 42 year old Physical Training Instructor of Rashtriya Swayam Sevak Sangh, was waylaid while he was coming in a Maruthi Omni Car with CW 49 Pramod, and was murdered allegedly by CPI(M) workers on 1.9.2014 at about 11.00 a.m. Crime was registered by the Kadirur police as Crime No.780 of 2014 u/s 143, 147, 148, 324,

307 and 302 r/w S.149 IPC, S. 3 and 5 of the Explosive Substances Act and S.13(a) of the Unlawful Activities (Prevention) Act (hereinafter referred to as the UA(P) Act) based on the statement given by one Sasidharan.

5. Investigation was taken over by the CBI, Spl. Crime Branch, Thiruvananthapuram, on 28.10.2014 as per separate notifications issued by the State and Central Government. Crime was re-registered by the CBI as R.C 10/S/2014/CBI/SCB/Tvm for offence u/s 120-B r/w s.143, 147, 148, 149, r/w 302, 201, 202, 212, 324 and 307 of the IPC and s.16(a) r/w 15(1)(a)(i) and s.19 of the Unlawful Activities (Prevention) Act, 1967, s.3 and 5 of the Explosive Substances Act and s.27 of the Arms Act, 1959.

6. The appellant Nos. 1 and 2 in Crl.A.728 of 2015 were

arrested on 20.11.2014 and 21.11.2014 respectively and they were remanded to judicial custody. The 1st appellant in Crl.A.729 of 2015 was arrested on 22.11.2014, the 2nd appellant on 13.10.2014, 3rd appellant on 17.10.2014, the 4th appellant on 22.11.2014 and the 5th appellant on 31.10.2014 and they were remanded to judicial custody and they are still undergoing pre-trial detention.

7.The CBI, on completion of investigation, concluded that the participation of 19 persons were made out and a charge was laid before the jurisdictional Court against 19 accused with a prayer seeking permission to conduct further investigation in identifying the others which according to the Investigating Agency, had a part to play in the conspiracy to execute the crime. The final report was laid before the Court on 7.3.2015 against 19 accused for offences punishable

under section 120-B r/w s.143, 147, 148, 149, r/w 302, 201, 212, 324 and 307 of the IPC and s.16 (a) r/w s.15(1)(a)(i) and s.19 of Unlawful Activities (Prevention) Act, 1967 and s.3 and 5 of Explosives Substance Act, 1908 and s. 27 of Arms Act, 1959.

8.It has to be mentioned that the final report reveals a general charge against the 19 accused who are alleged to have committed the offence. The accused have also been separately charged on 12 other counts as well.

9.The charge laid by the CBI before Court in so far as it concerns the appellants herein are as below:-

(a). During the year 2014, a criminal conspiracy was hatched by Vikraman (A1) and other unknown persons to eliminate

Elamthottathil Manoj, the deceased, who was involved in several cases against CPI(M) workers including the murder attempt on Sri.P.Jayarajan, the Kannur District Secretary of CPI(M). Conspiracy was to eliminate Manoj with the assistance of Vikraman (A1), a known criminal and a member of CPI(M) party.

(b).In pursuance to the above , on 1.9.2014, at about 9.30 a.m, 16 accused out of the charged 19 accused, formed themselves into an unlawful assembly armed with deadly weapons like country bombs, koduval, dagger etc., waited in a house under construction near the scene of crime for the arrival of Manoj, the victim who was likely to travel on the road from his residence at Kizhakke Kadirur towards Ukkas Motta.

(c).At 10.58 Hours, the accused received information about the departure of Manoj from his residence and they took up vantage positions near to the scene of occurrence. Manoj, the victim, along with Pramod - CW49, arrived at the scene in a blue Maruthi Van bearing registration No.KL58 G 4530 which was driven by Manoj. Pramod was being given a free lift to the town by Manoj.

(d).When the vehicle approached Pattuvathu valavu, the scene of crime, Vikraman (A1) hurled a country bomb towards the vehicle which exploded as a result of which the vehicle got damaged and Manoj lost control. Manoj and Pramod sustained injuries and the vehicle came to a standstill on hitting an electric post which stood on the left side of the road.

(e). The loud explosion caused by the bomb terrorized the people of the locality.

(f). A4 - Prabhakaran, A5 - Shibin, A7 - Vinod @ Andan Vinu, A8 - Riju, A9 - Sinil, A10 - Bijesh Poovadan, A13 - Vijesh @ Muthu, A14-Vijesh @ George, A15 - Manoj @ Naikutty Manoj, A16 - Shabith, A17 - Nijith @ Nith, A18 - Siraj @ Kurukkan Siraj & A19 - P.P.Rahim @ Jakka Rahim, rushed towards the vehicle and covered it from the front and rear. The injured Manoj tried to prevent the accused from opening the door by holding on to it.

(g).Prabhakaran - A4 armed with a long sword approached the deceased and cleared the broken windshield of the vehicle with the long blade of the weapon and inflicted a stab injury on the chest of Manoj. He also inflicted a cut injury on the right wrist of Manoj. When

Manoj let go of his hold on the door of the vehicle, the other accused opened the right door of the vehicle and dragged out the seriously injured Manoj from the vehicle.

(h). Thereafter, A4 - Prabhakaran, A13 - Vijesh, A17 - Nijith, A18 - Siraj and A19 - Rahim hacked him indiscriminately with deadly weapons on vital parts of his body with the intention of murdering Manoj. This was witnessed by CW49 - Pramod who was injured with splinters of the bomb explosion and was trapped inside the vehicle.

(i). A1 - Vikraman, who also sustained injuries in the explosion, along with A2 - Jithesh and A6 - Sujith joined the attackers and inflicted injuries. The other accused guarded both the entries of the road to prevent any passers by from reaching the scene of

occurrence. When the victim was almost dead, A17 - Nijith, with a steel dagger slit the throat of Manoj to ensure his death.

(j). When CW49 - Pramod attempted to make good his escape, A1 - Vikraman attacked him with a chopper as a result of which CW49 sustained injuries on his right shoulder. But he managed to escape. When the locals started to come to the scene of occurrence another bomb was exploded by A16 - Shabith as directed by A1 - Vikraman to deter and scare away the public from coming to the scene.

(k). After the attack, the assailants left the place leaving the weapons with A14 - Vijesh who made arrangements to dispose of the weapons.

The rest of the allegations are with regard to the conduct of the accused after the incident

and the same is not required to be considered
at this stage

10.The appellants preferred bail applications before the learned Sessions Court after submission of the charge sheet and sought for bail on various grounds. As per the impugned judgment, the learned Sessions Judge, after a threadbare analysis of the charge and its contents and taking note of the statutory provisions came to the conclusion that there are reasonable grounds to believe that the accusations against all the petitioners are prima facie true and held that they are not entitled to be released on bail. The above orders are under challenge.

11.We have heard Sri. K. Gopalakrishna Kurup, learned Senior counsel appearing for the appellants in the appeals as instructed by Sri P.N. Sukumaran, Sri P.

Chandrasekaran Pillai, learned standing counsel for the CBI, and Sri. S. Rajeev appearing for and on behalf of Sunil Kumar. E, the brother of the victim who filed application to get himself impleaded as additional respondent for opposing the prayer of the appellants.

12.Sri.Gopalakrishna Kurup, the learned Senior counsel appearing for the appellants, invited our attention to the report made u/s 173 of the Code laid by the CBI before the Sessions Court and also the witness statements and contended as follows:

(a). Even if the entire allegation of the prosecution is believed to be true no offence under the Unlawful Activities (Prevention) Act is made out against the appellants.

(b). A perusal of the final report would reveal that no

specific overt acts are attributed against the appellants herein . They have been roped in with the aid of S 149 of the IPC . According to the learned senior counsel, the allegations would reveal that only accused No.1 , 2 , 4 , 13, 17, 18 and 19 were directly involved in the incident and had thrown bombs and/or inflicted injuries on the deceased Manoj and CW49 – Pramod.

(c). The witness statements when read along with the charge laid would reveal that there are no sufficient materials to connect the appellants with the crime.

(d). The learned Sessions Judge has not properly analysed the various materials and have erroneously concluded that there were sufficient materials before Court to come to a conclusion that the case of the prosecution is prima facie true.

(e). As there is no allegation against the appellants that they had used any weapon or explosive

substance or that they had inflicted any injury to either the deceased Manoj or CW49 - Pramod, the stringent provisions contained in the UA(P) Act concerning grant of bail cannot be made applicable to the appellants.

(f). The learned Senior counsel also relied on the judgment of the Apex Court in **Shaheen Welfare Association v. Union of India (1996 (2) SCC 616)** to bring home the point that the case of the appellants fall into a different category taking into consideration the gravity of the offence and their involvement and their application for bail is liable to be liberally construed.

(g). The long incarceration suffered by the appellants was projected as a sufficient reason to pass appropriate orders releasing them on bail .

(h). The learned Senior counsel also invited our attention to the judgment in Ramachandran A @

Raman v. Central Bureau of Investigation, Tvm and Another (2015 (3) KHC 678 [DB] in which a Division Bench of this Court (in which one of us was a party) had granted bail to accused Nos.3, 11 & 12.

13.The contentions of the learned Senior counsel was vehemently opposed by Sri.Chandrasekhara Pillai, the learned Standing Counsel for the CBI. It was submitted by the learned counsel that the appeal itself is not maintainable and the judgment of a Division Bench of this Court in **Prakasan C. v. State of Kerala (2015 (1) KLT 234)** upholding the maintainability has been stayed by the Honourable Supreme Court as per order dated 17.8.2015 in S.L.P.No.12398 of 2015. It is contended by the learned counsel that there are serious allegations against the appellants and the contention of the learned counsel that there are no overt acts attributed

against the appellants in the final report is incorrect as the appellants had participated in the gruesome act by being present at the scene of occurrence. According to the learned counsel, the materials collected during investigation established their complicity in clinically executing the brutal crime in prosecution of which , bombs were exploded and deadly weapons were used. The intention of the accused constituting the unlawful assembly was to strike terror in the people and they had actively participated to assassinate the victim in prosecution of the common object. According to the learned counsel, the Sessions Judge has meticulously considered all the relevant aspects and interference is unwarranted . It was further contended that the provisions contained in s.43(D) of the UA(P) Act will act as a bar in granting bail to the appellants. The learned counsel also pointed out that the statutory presumption u/s 43

(E) of the UA(P) Act will apply in so far as the appellant No.4 in Crl.A.729 of 2015 is concerned as the weapons of offence were recovered on the basis of the disclosure statement given by him.

14.Sri.S.Rajeev, the learned counsel who appeared for the brother of the victim supported the argument of the learned counsel appearing for the CBI and contended that there are in fact two conspiracies, one which took place in the year 2014 between the 1st accused and some unknown persons and the second conspiracy between CPI(M) sympathizers and the identified accused in the charge sheet. According to the learned counsel, the offence was committed in accordance with a pre-planned conspiracy and there is no difficulty in concluding that the appellants are all participis criminis. They were actually present in the scene of crime and their acts were in furtherance of

the common object of the unlawful assembly. Their guilt is co-extensive with that of the other accused and the gravity of the offence is not diminished in any way. The learned counsel submitted that the 1st accused had approached this Court by filing Crl.M.C.No.6110 of 2014 seeking to quash that part of the FIR incorporating the sections of the UA(P) Act and also the report incorporating the section but this Court as per order dated 3.2.2015 in the case reported as **Vikraman v. State of Kerala (2015 (1) KHC 611)** has held that the provisions will apply and the challenge was thwarted. That be the case, the contention raised by the learned Senior counsel that the provisions of the Act will not apply cannot be sustained. The learned counsel also relied on **Nabeesathu Sudheer @ Mondi Sudheer V State of Kerala (2014 (2) KLT 853)** to buttress his contentions.

15. The learned Standing Counsel appearing for the CBI had raised a contention that in view of the fact that the judgment of this Court in **Prakasan C. v. State of Kerala (2015 (1) KLT 234)** has been stayed by the Apex Court as per order dated 17.8.2015 in SLP No. 12398 of 2015, this Court will not be justified in considering the bail application. We note that the impugned order of the learned Sessions Judge was passed on 8.7.2015 and the appeal has been preferred before this Court on 16.7.2015. The Apex Court has stayed the operation of the order in Crl.A.1084 of 2014 and we do not think that there is any embargo in considering the bail application since it concerns the liberty of the individuals. Hence we are of the considered view that the application for bail can be considered on its merits.

16.The next question is whether in the light of the facts as borne out from the final report under S 173 of the Code and witness statements and after considering the submissions of the learned counsel appearing for the opposing parties the common order refusing grant of bail to the appellants is liable to be interfered with.

17.In so far as the contention of the learned counsel appearing for the appellants that the offence under the Unlawful Activities (Prevention) Act will not be attracted in the facts of the instant case is concerned, we are of the view that the said matter has been finally settled by the judgment rendered by a single Judge in **Vikraman v. State of Kerala (2015 (1) KHC 611)**. In the said judgment, the contention of the 1st accused in the instant case that incorporation of provisions of the UA(P) Act was inapplicable was

repelled by a single Judge of this court holding that on the materials on record, the Court will be justified in coming to a finding that the alleged act of offence will attract the definition of terrorist activity under S.15 of the UA(P)A. The final report consolidates the above conclusion and we are not inclined to take a different view of the matter after having heard the opposing counsels. In that view of the matter, the contention raised by the learned counsel appearing for the appellants cannot be countenanced.

18.The appellants are alleged to have committed offence u/s 15(1)(a)(i) r/w s.16 & 19 of the UA(P) Act in addition to various offence punishable under the Indian Penal code, the Explosive Substances Act, 1908 and also the Arms Act. While considering the application for bail in a case where allegation of commission of offence under the UA(P) Act is made,

S.43D(5) will be attracted.

19.We shall extract Section 43D(5) & (6) for easy reference:

Section 43D - Modified application of certain provisions of the Code

(1).....

.....

(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 under section 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.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

20.A bare reading of sub-section (5) of Section 43D

shows that apart from the fact that Sub-section (5) bars the Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-section (5) of Section 43D puts a complete embargo on the powers of the Court to release an accused on bail. It lays down that if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UA(P) Act is prima facie true, such accused person shall not be released on bail or on his own bond. This position is further made clear by Sub-section (6) of Section 43D, which lays down that the restrictions, on granting of bail specified in Sub-

section (5), are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on granting of bail. (see para 21 and 22 of **Ramachandran A. @ Raman v. Central Bureau of Investigation, Tvm and Another (2015 (3) KHC 678 [DB]**)

21.The concept of the proviso to Section 43D(5), was lucidly explained by a Division Bench, of the Gauhati High Court in **Jayantha Kumar Ghosh V State of Assam (2010 (4) GLT, 1)** and in the said judgement their lordships had occasion to explain the breadth and scope of the expression “prima facie” and the expression “true”, which appear in the proviso to Section 43D(5). The relevant observations, made in this regard, read as under:

73. Thus, the expression, 'prima facie true'. would mean that the court shall undertake an

exercise to determine as to whether the accusations, made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the court assumes the contents of the complaint to be true and correct and, then, proceed to decide as to whether the allegations, made in the complaint make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the court to determine the truthfulness or veracity of the accusations. However, when the word, 'prima facie', is coupled with the word, 'true', it implies that the court has to undertake an exercise of cross-checking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made are inherently improbable, or wholly unbelievable, it may be difficult to say that a case, which is prima facie true, has been made out.

74. The term 'true' would mean a proposition that the accusation brought against the accused person, on the face of the materials collected during investigation, is not false. The term false again would mean a proposition, the existence of which cannot be a reality. While arriving at a finding whether there are reasonable grounds for believing that the accusation against the accused is prima facie true or false, the Court can only look into the materials collected during investigation; and, on its bare perusal, should come to a finding that the accusation is inherently improbable. However, while so arriving at a finding, the Court does not have the liberty to come to a conclusion, which may virtually amount to an acquittal of the accused.

22. In other words, on a bare reading of the materials, as may have been collected during investigation, if the Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations made against the accused are prima facie true, the Court will not be empowered to release the accused on bail. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are wholly improbable. When the materials, on examination by the Court, are found to be not wholly improbable and the Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter VI of the UA(P) Act, are prima facie

true, such materials would be enough to attract the bar imposed under the proviso to Section 43D(5). To arrive at the said conclusion the Court is required to examine the materials collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Court, on undertaking such an exercise, finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the case would be treated as a case, which is sufficient for the Court to form an opinion that there are reasonable grounds to believe that the accusations made against the accused, are prima facie true. This is the mandate

under S 43 D (5) of the UA (P) Act.

23. Before embarking to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true, we think it appropriate to answer the contention raised by the learned Senior counsel basing on the Judgment of the Apex Court reported in **Shaheen Welfare Association V Union of India (1996 (2) SCC 616)**. The learned Senior counsel has categorized the 19 accused who have been arrayed in the report filed u/s 173 into three categories . Accused No 1, 2, 4, 13, 16 , 17 , 18 and 19 fall into the first category of assailants against whom specific overt acts have been alleged in the final report . The appellants in these appeals, according to the learned Senior counsel fall into the second category as no specific overt acts are alleged against them and the only

allegation is that they had rushed to the car after the explosion had taken place to prevent the injured from escaping and also had guarded the entry points to prevent passersby from approaching the scene of occurrence. The third category of the accused are accused No 3 , 11 and 12 , who have been roped in on the allegation that they had harbored the 1st accused and had provided assistance to him to obtain medical treatment . It was pointed out that the 3rd category of accused had already been granted bail by this Court as per judgement in **Ramachandran A @ Raman V Central Bureau of Investigation , TVM and Another (2015 (3) KHC 678)**.

24.In **Shaheen Welfare Association V Union of India (1996 (2) SCC 616)**, the Honourable Supreme Court had issued guidelines for being applied while considering the bail applications of

accused who were languishing in Jails for long periods after being involved in TADA offences. It was held as follows in para 13 of the judgement .

13. For the purpose of grant of bail to TADA detenus, we divide the under trials into three classes, namely,

(a). hardcore under trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular;

(b). other under trials whose overt acts or involvement directly attract S.3 and / or 4 of the TADA Act;

(c). under trials who are roped in, not because of any activity directly attracting S.3 and 4, but by virtue of S.120B or 147, I.P.C. and;

(d). those under trials who were found possessing incriminating articles in notified areas and are booked under S.5 of TADA.

25. According to the learned Senior counsel, the

appellants in these cases will fall under category (c) as their activities are not those attracting chapter IV or VI of the UA (P) Act. We have extracted the charges above and we are of the considered view that the role played by the appellants is not of any lesser gravity as contended by the learned Senior counsel. Charge No 1 , 2, 3 , 4, 5 and 11 concerns the appellants and charge No. 6 concerns accused No 16 , who is the appellant No. 6 in Crl.A.No.729 of 2015.

26.The allegation in the charge, as we discern it, is that the participating accused in the crime which included all the accused except A3, A11 and A12, had rushed towards the vehicle in which deceased Manoj and CW49 - Pramod were travelling and covered it from the front and rear, to prevent Manoj from escaping from the scene. While the incident was taking place,

the other appellants had guarded both the entries of the road to prevent any passers from reaching the scene of occurrence. We also notice that S.149 is also included in the charge. S.149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly when an offence is committed by any member of such an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. It will therefore, be futile to contend that the gravity of the offence committed by the appellants was of a lesser magnitude when compared to that of the accused who had wielded the deadly weapons and had thrown the explosives. The said contention is therefore rejected .

27.We shall now consider the facts involved in the appeals separately.

28.Crl.A.728 of 2015 - Accused Nos.9 and 10 are the appellants in this appeal. As stated above, they had surrendered before the Court on 20.11.2014 and were remanded to judicial custody.

29.The prosecution asserts in the final report filed u/s 173 that the above accused along with 14 others had assembled in the house under construction of one Riju, immediately prior to the occurrence, and on getting information about the passage of deceased Manoj through the road , took up position by the side of the road , with bombs and deadly weapons to annihilate him. When Manoj and Pramod had reached the scene of crime in the Maruti Omni Van, the first Accused Vikraman hurled a bomb at the Van resulting

in the driver losing control of the vehicle and the same hit on an electric post and came to a standstill . Some of the accused who were members of the unlawful assembly, in prosecution of their common object rushed towards the Omni Van and covered the vehicle from all sides , so as to enable the accused to hack Manoj to death. Some of the accused had also guarded the entry points to the road to prevent passers by from coming to the scene . After inflicting Manoj with several injuries , the accused No 16 exploded another bomb which was in his possession to strike terror and to prevent people from coming near to the scene.

30.The appellants, who are accused Nos. 9 and 10, were identified by CW 16- Sujesh during the test identification parade, as among persons fleeing from the scene of crime after the occurrence, which,

according to the prosecution, is a relevant circumstance pointing to their involvement. The 161 statements of CW97 - Santha , CW100 - Jaleel and CW96 – Prameela are relied on by the prosecution to *prima facie* show that certain persons had assembled in the house under construction in the days preceding the incident and also on the date of incident. The prosecution also places reliance on the 161 statements of CW70 - Shaji Vachali and CW71 - Rajesh P.V to bring out the fact that several motor cycles were parked in another house of Riju, allegedly the owner of the house under construction where the accused had assembled immediately prior to the incident. The prosecution places reliance on the CDR analysis of the respective mobile numbers to bring out certain circumstances as to their involvement in the crime. The learned counsel appearing for the appellants controverted the contentions of the learned

standing counsel and contended that the materials are not reliable and insufficient to bring home the guilt. It was pointed out that none of the witnesses have spoken about the appellants in specific terms and their continued detention is unwarranted. He has also argued that the statement of CW- 16, Sujesh that he had occasion to see A9 and A10 at the scene of occurrence does not inspire confidence. At this stage, we are of the considered view that after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, the accusations made against accused Nos.9 and 10 as regards commission of offence u/s 16 (a) r/w S.15(1)(a)(i) are *prima facie* true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P.No 2113 of 2015 of

the Sessions Court , Thalasserry.

31.Crl.A.729 of 2015 - This appeal is preferred by accused Nos.5 to 7 and 14 to 16. The roles played by all the appellants in the crime except for accused Nos.14 and 16 are identical to the appellants in Crl.A.728 of 2015. They also participated in the commission of the crime and were present at the scene of occurrence and their involvement is as detailed in para 29 above .

32.(Appellant No.1) Shibin - Accused No. 5 -

To bring out the involvement of the appellant herein, the prosecution relies on CW 15 - Mahesh, who in the test identification parade conducted on 23.12.2014 identified the appellant as one of the persons who were seen proceeding through the by-lane near to the house of Mayan master and according to him some of

them were carrying weapons. The prosecution also relies on the 161 statements of CW118 - Shagil, CW97 - Santha, CW100 - Jaleel, CW96 - Prameela, CW54 - Lalitha, CW60 - Sasidharan and CW106 - Thahir , CW158 - Srilesh , CW153 - Vijesh, CW151 - Prajeesh, CW 154 - Sumesh, CW155 - Sreenesh and CW150 - Rigil to bring out the fact that on the preceding days of the occurrence there were bristling activity in the house of Riju which was under construction in the vicinity of the scene of occurrence, that A5-Shibin was seen in the house of Nalini along with Muthu (Accused No.13) and George (Accused No.14) and also that the 5th accused was seen at Ukkas Motta, near the scene of occurrence along with other accused. According to the prosecution, these are relevant circumstances which would go a long way in bringing out the complicity of the 1st appellant (accused No.5). The learned Senior counsel

vehemently contended that the circumstances attempted to be brought out through these witnesses are trivial. At this stage we are of the considered view that after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, the accusations made against accused Nos.5 as regards commission of offence inter alia u/s 16 (a) r/w S.15(1)(a)(i) are prima facie true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5).

33.Appellant No.2 - Sujith @ Achar (Accused No.

6) - The prosecution allegation is that the aforesaid appellant had participated in the commission of the crime. CW15 - Mahesh and CW16 - Sujesh have identified A6 - Sujith @ Achar during the test identification parade. Both the witnesses have stated

that when they had reached the scene of occurrence on hearing the explosion, they had chanced across 5 - 6 persons proceeding through the by lane near to the house of Mayan master and some of them were carrying weapons. The prosecution also relies on the 161 statements of CW97 - Santha, CW100 - Jaleel, CW96 - Prameela, CW54 - Lalitha, CW60 - Sasidharan and CW106 - Thahir, CW157 - Manoharan, CW129 - Asokan, CW130 - Sareesh, CW121- Anilkumar, CW120 - Vipin, CW114 - Shaiju, CW113 - Sarathchandran, CW112 - Balan, CW80 - Akhil, CW136 - Rajith and CW78 - Raneesh to prove the various circumstances which, according to them, will prove the guilt of the 2nd appellant. These witnesses are cited to prove the presence of the appellant near the scene of occurrence, that a hide out was arranged, that the accused was transported to the hide out and that he was found along with the

principal accused after the commission of the crime. The learned Senior counsel vehemently contended that the circumstances attempted to be brought out through these witnesses are not sufficient enough to come to a prima facie conclusion as regards involvement of the appellant No.2. At this stage, we are of the considered view that after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, the accusations made against accused Nos.6 as regards commission of offence u/s.16 (a) r/w s.15(1) (a)(i) are prima facie true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P. No 2139 of 2015.

34.Appellant No.3 - Vinu @ Andan Vinu (Accused

No. 7) - The aforesaid appellant is alleged to have participated in the commission of the crime and the general allegation in para 29 concerns him on all fours . CW15 - Mahesh , CW16 - Sujesh and CW21 - Pramith have identified A7 - Vinod during the test identification parade as one among the persons who were found fleeing from the scene of occurrence after the commission of the crime. The 161 statements of CW97 - Santha, CW100 - Jaleel , CW96 - Prameela and CW54 - Lalitha are relied on by the prosecution to prima facie show that certain persons had assembled in the house under construction in the days preceding the incident and also on the date of incident. Prosecution also relies on the 161 statements of CW60 - Sasidharan, CW61- Savilesh , CW62 - Mohammed Rafi and CW106 - Tahir to bring out that certain persons had fled from the scene of occurrence after the incident to probabalise the circumstances

projected by the prosecution. They also rely on the 161 statements of CW69 - Ramesan, CW70 - Shaji Vachali, CW71 - Rajeesh P.V., CW133 - Sajith A. and CW143 - M.P.Biju to bring out the involvement of the 7th accused. Reliance is also placed on the CDR analysis of the mobile phone to bring out the circumstance that there was a phone call from the mobile phone of the appellant. The learned counsel appearing for the appellant would controvert the contentions and contend that the materials collected by the prosecution will not connect the appellant with the crime. At this stage, we are of the considered view that after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, the accusations made against accused Nos.7 (appellant No3) as regards commission of offence *inter alia* u/s 16 (a) r/w S.15 (1)(a)(i) are *prima facie* true and that such materials

are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P. No. 2139 of 2015.

35.Appellant No.4 - Vijesh @ George (Accused No.

14) - The prosecution allegation is that accused No.14 had participated in the commission of the crime . The prosecution also alleges that recovery of the weapons used by the assailants were effected at the instance of the 14th accused u/s 27 of the Indian Evidence Act. It is the case of the prosecution that after fatally wounding Manoj, when the assailants left the place, the weapons were left with accused No.14 who put the same in a gunny bag and hid the bag at a place near to the scene of occurrence. Later at night, the weapons were shifted to a nearby marshy land by the side of a canal. According to the prosecution, the

appellant had given a statement to the Investigating Officer based on which the choppers used by the assailants were recovered at his instance on 27.11.2014 at 13.25 hours.

36. Section 43E of the Act provides that in a prosecution for an offence u/s 15 of the Act, if it is proved that the arms or explosives or any other substances specified in the aforesaid section were recovered from the possession of the accused and there is reason to believe that such arms and explosives or such substances of a similar nature were used in the commission of offence, the Court shall presume unless the contrary is shown that the accused had committed such offence. The presumption u/s 43E of the Act is mandatory which can be rebutted by the accused at the stage of trial. This is a very incriminating circumstance which will go a long way in

coming to an opinion, *prima facie*, that the accusations against the said accused are true. The 161 statements of CW97 - Santha, CW100 - Jaleel , CW96 - Prameela and CW54 - Lalitha are relied on by the prosecution to *prima facie* show that certain persons had assembled in the house under construction in the days preceding the incident and also on the date of incident. Prosecution also relies on the 161 statements of CW60 - Sasidharan, CW61- Savilesh, CW62 - Mohammed Rafi and CW106 - Tahir to prove that certain persons had fled from the scene of occurrence after the incident to probabalise the circumstances projected by the prosecution. The prosecution relies on the 161 statement of CW4 - Nithin and CW5 - Vijil to bring out the fact that the appellant had purchased mobile phones from those witnesses. The prosecution also relies on the 161 statements of CW151 - Prajeesh, CW153 - Vijesh and

CW158 - Srilesh to bring out certain circumstances which reveals the participation of the accused in the crime. The learned Senior counsel would contend that no person had identified the appellant during the test identification parade and that was a circumstance pointing towards his innocence. Taking into consideration the various materials produced by the prosecution, and after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, we are of the view the accusations made against accused Nos.14 (appellant No.4) as regards commission of offence inter alia u/s .16 (a) r/w s.15(1)(a)(i) are prima facie true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P. No 2139 of 2015 .

37.Appellant No.5 - Manoj - (Accused No 15) -

The aforesaid appellant was present at the scene of occurrence and had participated in the commission of the crime. CW16 - Sujesh in the test identification parade, had identified the appellant as one of the persons who were seen fleeing from the scene of occurrence. The 161 statements of CW97 - Santha, CW100 - Jaleel, CW96 - Prameela and CW54 - Lalitha are relied on by the prosecution to prima facie show that certain persons had assembled in the house under construction in the days preceding the incident and also on the date of incident. Prosecution also relies on the 161 statements of CW60 - Sasidharan, CW61- Savilesh, CW62 - Mohammed Rafi and CW106 - Tahir to bring out that certain persons had fled from the scene of occurrence after the incident to probabalise the circumstances projected by the

prosecution. They also placed reliance on the 161 statements of CW77 - Rineesh, CW120 - Vipin and CW121 - Anilkumar to bring out certain incriminating circumstances connecting the 15th accused. At this stage, after perusing the materials revealed from the final report and the statement of witnesses and assuming the same to be true, we are of the view that the accusations made against appellant Nos.5 as regards commission of offence inter alia u/s .16 (a) r/w s.15(1)(a)(i) are prima facie true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P. No 2139 of 2015.

38.Appellant No.6 - Shabith (Accused No. 16) -

The prosecution alleges that the aforesaid appellant had specific role to play in the commission of the

crime which is elaborately detailed in para 29 above. The specific allegation against the above appellant is that after inflicting Manoj with severe injuries, the appellant exploded another bomb which was in his possession to strike terror and to prevent people from coming near to the scene. The appellant was identified by CW 15 – Mahesh, and CW 16- Sujesh during the test identification parade, which according to the prosecution, is a relevant fact, pointing to the involvement of the appellant. The 161 statements of CW97 - Santha , CW100 - Jaleel, CW96 - Prameela and CW54 - Lalitha are relied on by the prosecution to prima facie show that certain persons had assembled in the house under construction in the days preceding the incident and also on the date of incident. Prosecution also relies on the materials borne out from the 161 statements of CW60 - Sasidharan, CW61- Savilesh, CW62 - Mohammed Rafi and CW106

- Tahir to prove that certain persons had fled from the scene of occurrence after the incident to probabalise the circumstances projected by the prosecution. The 161 statements of CW77 - Rineesh, CW157 Manoharan, CW121 Anil kumar, CW120 Vipin, CW129 - Asokan, CW114 Shaiju, CW113 - Sarathchandran, CW112-Balan, are relied on by the prosecution to bring out the fact that the appellant was provided with a hide out and that certain persons had harbored him. The statements of CW78 is relied on to bring out that the appellant was seen in the company of Vikraman - A1, on 1.9.2014 in the ancestral house of A12 Ramachandran. After considering the relevant inputs , we cannot agree with the learned Senior Counsel that the appellant has been falsely implicated and that the circumstances projected will not point to his involvement. We are of the considered view that after perusing the materials revealed from the final report

and the statement of witnesses and assuming the same to be true, the accusations made against appellant No.6 as regards commission of offence u/s 16 (a) r/w s.15(1)(a)(i) are prima facie true and that such materials are sufficient enough to attract the bar imposed by the proviso to S.43D(5). Hence, we are not inclined to interfere with the order passed by the learned Sessions Judge in Crl.M.P. No 2139 of 2015.

39. We do not agree with the contention of the learned Senior Counsel that the long period of incarceration suffered by the appellants are to be regarded as sufficient enough reason to enlarge them on bail. In **Abdul Sathar @ Manzoor V Supdt. Of Police NIA, New Delhi and others (2014 (1) KHC 572)**, a Division Bench of this Court in which one of us (K.T.Sankaran, J.,) was party , held as follows:

" It is true that the freedom of movement of a citizen is a precious fundamental right. The freedom of movement and the right to live peacefully of the citizens of the country in general are also precious rights. The law imposes certain restrictions on the rights of persons who indulge in certain criminal acts which would have impact on the fundamental, statutory and civil rights of the citizens at large. When pitted against the rights of the citizens at large, the individual right of a citizen is of less importance. That is why a provision like sub-section (5) of S.43D was introduced in the Unlawful Activities (Prevention) Act, by Act 35/2008. It is not the number of days that a person stays in jail which becomes relevant for the purpose of considering whether he is entitled to bail. It is magnitude of the offence and the impact of granting bail to him that matters. Statutory provisions like sub-section (5) of S.43D of the Unlawful Activities (Prevention) Act would also become relevant and decisive in the matter of granting bail".

40. The nature and gravity of the offence, its impact on the society, the mode in which the same was

committed, the weapons used for the commission of the offence and the bar to release on bail as stipulated in S. 43 D (5) of the UA (P) Act deters us from enlarging the petitioners on bail at this stage. The fact that the final report has been laid is no ground to release the appellants on bail in view of the statutory embargo.

41. We make it clear that the observations made by us touching the various aspects of the case, during the consideration of the appeals, are for the limited purpose of consideration of the merits of the bail applications filed by the appellants and the same are not to be taken as conclusive. Our views are tentative and the opinion expressed for the purpose of S. 43 D (5) of the UA (P) Act are not our final opinion on the merits and the case of the appellants shall be considered at the trial untrammelled by the

observations and findings arrived at above.

42.In the result, we are of the considered view that in the facts and circumstances and taking note of the allegations against the appellants in the report filed u/s 173 of the Code, no grounds have been made out by the appellants warranting interference with the order passed by the learned Sessions Judge.

43.Accordingly, all the appeals shall stand dismissed .

Sd/-

K.T. SANKARAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

Mrcs

//true copy//

P.S. To Judge