

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

CRL.A.No. 846 of 2015

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ORDER IN CRL.M.C 1100/2015 OF THE SESSIONS COURT, THALASSERY DATED 19-08-2015  
CRIME NO. 10(S)/2014 OF CBI/SCB/TVPM

APPELLANT/ACCUSED NO.21:  
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RIJESH @ RIJU AGED 37 YEARS,  
S/O BALAN, KUNNUMMAL HOUSE, EAST KADIRUR,  
THALASSERY TALUK, KANNUR DISTRICT.

BY ADVS. SRI.P.VIJAYA BHANU (SR.)  
SRI.VIPIN NARAYAN  
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:  
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CENTRAL BUREAU OF INVESTIGATION  
THIRUVANANTHAPURAM, SPECIAL CRIME BRANCH  
REPRESENTED BY ITS STANDING COUNSEL, CBI  
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.P.CHANDRASEKHARA PILLAI, C.B.I.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 5.10.2015, THE  
COURT ON 12-10-2015 DELIVERED THE FOLLOWING:

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

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Crl.Appeal.846 of 2015  
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Dated 12<sup>th</sup> October, 2015  
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**JUDGMENT**

Raja Vijayaraghavan.V.

1.This appeal is filed invoking S.21(4) of the National Investigation Agency Act r/w S.43D of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the "UA(P) Act") and S.439 of the Code of Criminal Procedure (hereinafter referred to as "the Code") challenging the order dated 19.8.2015 in Crl.M.C.1100 of 2015 of the Court of Sessions, Thalassery. As per the impugned order, the application for bail preferred by the appellant, who is accused No.21 in R.C.10 (S)/2014/CBI/SCB/TVPM (originally Crime No.780 of 2014 of Kadirur police station), was dismissed by the learned Sessions Judge.

2.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 CW49 - 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, 1908 and S.13(a) of the UA(P) Act based on the statement given by one Sasidharan.

3.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/TVPM for offence u/s 120-B r/w S.143, 147, 148, 149, r/w S.302, 201, 202, 212, 324 and 307 of the IPC and S.16(a) r/w S.15 (1)(a)(i) and S.19 of the UA(P) Act, S.3 and 5 of the Explosive Substances Act, 1908 and S.27 of the Arms Act, 1959.

4.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 the said 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 for offence

punishable u/s 120-B r/w S.143, 147, 148, 149, 302, 201, 212, 324 and 307 of the IPC and S.16 (a) r/w S.15(1)(a)(i) and S.19 of the UA(P) Act, S.3 and 5 of Explosive Substances Act and S. 27 of the Arms Act. In the said final report, the present appellant was cited as CW48.

5.On 9.7.2015, CBI has filed a report for arraigning five more persons as accused Nos. 20 to 24 in the case. The appellant herein has been included as accused No.21 in the said report. He was arrested on 9.7.2015 and since then, he is in judicial custody.

6.For properly appreciating the rival contentions, it may be necessary to briefly advert to the charge laid by the Investigating Agency before the

Sessions Court. The essence of the charge is that on 01.09.2014, while one Manoj, a leader of RSS, was driving his Omni van bearing Registration No. KL-58 – G – 4530 along with his friend Pramod along the Kizhakke Kadirur – Ukkas Motta Road in Kadirur Amsom, he was attacked by a group of CPI (M) workers with dangerous weapons, like Bombs, pruning Knife etc., with intention to murder Manoj and his friend Pramod and that bombs were hurled towards the van and the assailants thereupon, hacked Manoj to death and caused grievous injuries on Pramod. It is further alleged that the assailants hurled bombs with intention to strike terror in the people at the place of occurrence and created a terrorizing situation in the area.

7.We have heard Sri.P.Vijayabhanu, the learned

Senior counsel appearing for the appellant and Sri.K.Chandrasekhara Pillai, the learned Standing Counsel appearing for the CBI.

8.The learned Senior counsel appearing for the appellant has raised the following contentions :-

(a). The appellant was originally arrayed as CW48 in the charge. He was brought in the array of the accused as he refused to toe the line of the prosecution and to implicate certain persons as dictated by the Investigating Agency.

(b). The statements of the prosecution witnesses submitted along with the charge would falsify the present allegations and bring out that the appellant had no role to play .

(c). The appellant had no knowledge that the

assailants had assembled on the date of crime and on previous occasions in the house which was under construction. The property where the house was built actually belonged to the friend of the appellant and the construction was being carried out using the joint funds of the appellant and his friend. The 161 statements produced would reveal that both the owners were unaware of the assembly of the accused in the premises on the day of occurrence.

(d). The Innova Car belonging to the appellant was used by Rajit (CW79), as directed by the authorized driver Mahesh, and it is evident from the 161 statements that the appellant was also kept in the dark about this aspect. Mahesh, the authorized driver, was a near relative of the 1<sup>st</sup> accused, and he had given specific instructions to

Rajit to conceal this aspect.

(e). Finally it was contented that this Court in **Ramachandran v. CBI ( 2015 (3) KHC 678 )** had granted bail to Accused Nos. 3, 11 and 12 finding that they had not actually participated in the commission of the crime and were roped in on the ground that they were party to the conspiracy with the principal accused. According to the learned Senior counsel, the appellant herein is also entitled to be included in the same category as the materials against the accused are flimsy and was not of such a nature to form an opinion that the accusation against the appellant was *prima facie* true.

9.Per contra, the learned Standing counsel appearing for the CBI has adverted to the report dated

9.7.2015 , and contended as follows:-

Investigation revealed that he is the branch Committee member of CPI(M), 5<sup>th</sup> mile branch, Kadirur. In pursuance of the criminal conspiracy about 1½ months before the murder of Manoj, he took Vikraman (A1) to Nimhans for de-addiction treatment and thus prepared Vikraman (A1) to indulge in the criminal act. Two of his houses under construction at east Kadirur were provided to Vikraman (A1) and others for carrying out the criminal conspiracy and for hiding the weapons and explosives prior to the incident. He is also a close associate of Vikraman (A1) and Vijesh @ George (A14). He also provided his Innova car bearing registration No.KL-58-L-4747 for transporting Vikraman (A1) from east Kadirur to Payyannur for treatment purposes after the

incident. The learned Standing counsel also submitted that S. 43D(5) of the UA (P) Act would put a complete embargo on the powers of the Sessions Court to release an accused on bail. According to the learned counsel if the Court, on perusal of the case diary or the report made u/s 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 cannot 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. It was finally contented that the learned Sessions Judge has properly evaluated the materials and have dismissed the application on its merits and there is no scope for interference in appeal .

10.The only question is whether the order under challenge warrants interference and whether the appellant is entitled to bail at this stage.

11.It has to be noted at this stage that the learned Sessions Judge has held in para 17 of the impugned order that there is no material at this stage to prove that the petitioner has committed an offence punishable u/s 19 of the Act. It was also found that the act of the petitioner in providing

conveyance to the prime accused, even if proved, will only attract the offence punishable u/s 201 and 202 of the IPC and that those offence are bailable. The learned Sessions Judge has also noted that the CBI has not yet invoked the charge of conspiracy u/s 18 of the Act against the petitioner but has proceeded on the basis that there is material to implicate him for an offence u/s 120 B of the IPC .

12.To hold that the charge of conspiracy is made out, the learned Sessions Judge has relied on two circumstances. Those are :-

(a). CW69 to CW71 have stated in their 161 statements that in the morning of 1.9.2014, they had seen the accused George ( A14 ) at the house of Riju, which was under construction, and they

saw Vinod ( A 7 ) and George ( A 14 ) there and that there are materials to conclude that the assailants had assembled in the unoccupied house of the appellant just before the incident waiting for Manoj to pass through the road in front so as to perpetrate the offence

(b). That the prime accused was taken to Kannur in the Innova Car belonging to the appellant and driven by CW79 - Rajit late in the evening on the day of occurrence. Based on these materials, the learned Sessions Judge came to the conclusion that there are reasons to believe that the petitioner was a party to the conspiracy to murder Manoj .

13.We have anxiously evaluated the materials on record and the contentions of the opposing counsels .

14.It is clear from the materials produced by the prosecution that the assailants had assembled in the house under construction which is 100 meters away from the scene of occurrence waiting for Manoj. Sri Shaji A.V @ Venadan Shaji, was questioned by the CBI and his statement has been handed over for perusal. The said witness has stated that the property having an extent of 10.5 cents situated at Ukkas Motta was purchased jointly by the aforesaid Shaji and the appellant about 5 years back for a consideration of Rs. 40,000/ per cent. It appears that the property was registered in the name of Shaji. The appellant as well as the aforesaid Shaji started construction of a two-storied residential house in the said property. The observation mahazar prepared by the CBI

would reveal that the house was still under construction and the doors and windows had not been fitted. One of the accused by name Andan Vinu @ Vinod (A7) resides adjacent to the house. It is also borne out from the statements of witnesses produced by the Investigating Agency that neither the appellant nor Shaji A.V were aware that the said premises were being used by the accused for perpetration of crime. Their presence in or near the house at any point of time is not spoken to by any person. The 161 statements of CW100 - Jaleel who resides near to the house under construction reveals that there has been no construction activities for the last few months. The Dy. Supdt. of CBI had also recorded statement of the appellant, on 23.11.2014 prior to his inclusion in the array of accused, and the said

statement also reveals about the apparent lack of knowledge of the appellant about the assembly of the accused in the house under construction. It appears from the objection filed by the CBI before the trial Court that the mental element of the appellant is attempted to be brought in on the premise that he had not made any complaint about the encroachment of the premises by the assailants on 1.9.2014. This, according to us, is a feeble circumstance to connect the appellant. For the limited purpose of consideration of this bail application, we are of the considered view that the aforesaid circumstance cannot be said to be so vital to import the element of criminal conspiracy on the appellant.

15.The next circumstance is the use of Innova car

bearing registration No.KL-58-L-4747 owned by the appellant for taking the principal accused from east Kadirur to Payyannur for the purpose of imparting medical treatment. The prosecution extensively relies on the 161 statement of CW79 - P.Rajit for this purpose. The 161 statement of the said witness reveals that he is a driver by profession. He works for the appellant. It has also come out from the prosecution records that the appellant owns several vehicles. One Mahesh is the main driver of the Innova Car. When Mahesh goes on leave, CW79 takes on the duty as the driver. On 1.9.2014 at 7 - 7.30 p.m, Mahesh came to his house and informed him that there was an emergency and a lady had to be taken to the hospital. CW79 was informed that Mahesh had consumed alcohol and he was not in a position to

drive the vehicle. CW79 was told that the vehicle was parked at Brahmavumukku. CW79 went to the Brahmavumukku junction in his bike and took the key of the vehicle from Mahesh. Mahesh led him to another house about 1½ kms away to a house under construction. The principal accused Vikraman and another person by name Achar boarded the vehicle. Mahesh asked him to take those persons to Kannur. He also states in his statement that when a friend of the appellant called him over phone and enquired, he lied that he was taking a lady to the hospital. The statement of CW79 was also recorded u/s 164 of the Cr.P.C and the said statement reveals in addition to the above that the aforesaid Mahesh was a near relative of A1-Vikraman. From the aforesaid materials, it does not appear that the appellant

was in any way aware of the fact that his taxi vehicle was used for the purpose of shifting Vikraman to the hospital. After going through the 161 statements, it does not appear to us that a strong *prima facie* case has been made out against the appellant.

16.It is by now settled, that 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.( See **Ramachandran V CBI ( 2015 (3) KHC 578 )** )

17.Having arrived at an opinion as regards the accusation by the prosecution insofar as the

appellant is concerned, we also take note of the observations made by the Apex Court in **Shaheen Welfare Association V Union of India (1996 (2) SCC 616)**, in relation to grant of bail to under trials in TADA Cases. The Apex Court has held as follows:--

*[13]. For the purpose of grant of bail to TADA detenus, we divide that 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 Sections 3 and/or 4 of the TADA Act;*

*(c) under trials who are roped in, not because of any activity directly attracting Section 3 and*

*4, but by virtue of Section 120B or 147, I.P.C., and;*

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

18.The appellant obviously can only fall under category (c) above and therefore, a stringent stand need not be taken as in the case of the accused falling into category (a) or (b).

19.Further, in **State of Kerala V Raneef (2011 (1) SCC 784)** the Apex Court while considering an appeal filed by the State against the grant of bail to an accused who was alleged to have committed offence under the UA ( P ) Act had occasion to hold as follows :--

*"[12]. At this stage we are not expressing any opinion as to whether the allegations in the versions of the prosecution or defense are correct or not, as evidence has yet to be led. However, we would like to make certain observations:*

*i) We are presently only considering the bail matter and are not deciding whether the Respondent is guilty or not. Evidence has yet to be led and the trial yet to commence. Hence the prosecution is yet to establish by proof beyond reasonable doubt that the Respondent was part of a conspiracy which led to the attack on Prof. Jacob.*

*ii) The case against the respondent is very different from that against the alleged assailants. There is no allegation that the Respondent was one of the assailants.*

*We are of the opinion that at this stage there is no prima-facie proof that the Respondent was involved in the crime. Hence the proviso to Section 43D(5) has not been violated.*

*.....*

*Prima facie we are of the opinion that the only*

*offence that can be leveled against the respondent is that under Section 202 I.P.C., that is, of omitting to give information of the crime to the police, and this offense has also to be proved beyond reasonable doubt. Section 202 is a bailable offense."*

20. Taking note of the above settled pronouncements of the Apex Court and the various guidelines issued, we hold, for the limited purpose of consideration of the instant bail application, that there are no reasonable grounds to form an opinion, at this stage, that the accusations against the appellant under S. 19 of the UA(P) Act are prima-facie true. As far as the charge of criminal conspiracy is concerned, we are of the opinion that before the examination of the prosecution witnesses, which are yet to begin, and before the conspiracy part is proved conclusively, it will be difficult for us to form an opinion that the

accusations are *prima facie* true. The findings recorded by us undoubtedly would be tentative in nature and will not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

21.We also take note of the fact that the appellant was arrested on 9.7.2015 and has been undergoing detention for more than 88 days. We are satisfied that, in the fact situation of the case, the continued detention is not warranted and the appellant can be released, subject to stringent safeguards.

22.In the result, we set aside the order dated

19.8.2015 in Crl.M.C. No. 1100 of 2015 of the learned Sessions Judge Thalasssery, and allow the Appeal. We hold that the continued detention of the appellant is unwarranted and he can be enlarged on bail on adequate conditions safeguarding the interests of the prosecution as well.

23.It is made clear that the observations and findings made in this Judgment are limited to the consideration of the bail application and the trial Court shall proceed with the matter untrammelled by the observations contained in this Judgment.

24.Accordingly, the appellant is directed to be released on bail on his executing a bond for Rs. 3,00,000/- (Rupees Three Lakhs only) with two

solvent sureties each for the like amount to the satisfaction of the Sessions Court, Thalasserry, and subject to the following conditions:--

(i). The appellant shall report before the Dy. Supdt. of Police, ACB, CBI, SPE, Cochin, who is the Investigating officer in charge of the case as and when required without fail.

(ii). The appellant shall not influence or intimidate the prosecution witnesses nor shall he attempt to tamper with the evidence of the prosecution.

(iii). The appellant shall surrender his passport, if any, before the Sessions Court, Thalasserry, at the time of executing bail bond. In case he is not holding any passport, he shall file an affidavit to that effect before the

Sessions Judge, Thalassery, while executing the bail bond.

(iv). The appellant shall not commit any offence nor shall he involve in any prejudicial activity while on bail.

(v). In case the appellant commits breach of any of the above conditions, the bail granted to him shall be liable to be canceled.

The Appeal is accordingly, allowed as above.

**Sd/-**

**K.T. SANKARAN**  
**Judge**

**Sd/-**

**RAJA VIJAYARAGHAVAN.V.**  
**Judge**

MrCs