

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

CRL.A.No. 858 of 2015 (A)

CRIME NO. 780/2014 OF KADIRUR POLICE STATION

APPELLANT(S)/APPELLANTS/ACCUSED NOS. 17 & 19:

1. NITH @ NIJITH, AGED 28 YEARS,
S/O. RAJAN, VAKKUMMAL, AMBILAD.P.O
NIRMALAGIRI, THALASSERY TALUK, KANNUR DISTRICT.
2. P.P. RAHIM @ JAGA RAHIM, AGED 36 YEARS
S/O. MUHAMMED, POOLAKKANDI PARAMBA, AMBILAD
NOW RESIDING AT C.K. QUARTERS
24/393 OF KUTHUPARAMBA MUNICIPALITY
THALASSERY TALUK, KANNUR DISTRICT.

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

RESPONDENT(S)/COMPLAINANT

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

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20.10.2015, THE
COURT ON 29-10-2015, DELIVERED THE FOLLOWING:

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

Crl.Appeal No.858 of 2015

Dated 29th October, 2015

JUDGMENT

Raja Vijayaraghavan.V. (J)

1.The instant appeal 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.17 and 19 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.2510 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.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 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 r/w S.13(a) of the Unlawful Activities (Prevention) Act, 1967. (hereinafter referred to as the UA(P) Act) based on the statement given by one Sasidharan. V.

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 RC 10(S)/2014/CBI/SCB/TVPM 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.

4.The appellants, accused Nos.17 & 19 were arrested on 21.11.2014 and they were remanded to judicial custody and are still undergoing pre-trial detention.

5.The CBI, on completion of investigation laid the final report before the Court on 7.3.2015 against 19 accused for offences punishable u/s 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 the UA(P) Act and S.3 and 5 of the Explosives Substance Act and S. 27 of Arms Act, 1959.

6.The appellants preferred bail application before the 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 detailed evaluation 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 the appellants are *prima facie* true and held that they are not entitled to be released on bail. The above orders are under challenge.

7.We have heard Sri. K. Gopalakrishna Kurup, the learned Senior counsel appearing for the appellants as instructed by Sri P.N. Sukumaran and Sri. P. Chandrasekara Pillai, the learned Standing counsel for the CBI.

8.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 that the prosecution version was unbelievable insofar as the acts committed by the appellants are concerned. It was further argued that the appellants have been undergoing incarceration since 21.11.2014 which is a sufficient enough reason to consider the application positively. 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.

9.The contentions of the learned Senior counsel was vehemently opposed by Sri.Chandrasekhara Pillai,

the learned Standing Counsel for the CBI. It is contended by the learned counsel that there are serious allegations against the appellants and they had participated in the gruesome act of murder. 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.

10.The only question is whether in the light of the facts as borne out from the final report u/s 173 of the Code and witness statements and after considering the submissions of the learned counsel appearing for the opposing parties, the order refusing grant of bail to the appellants is liable to be interfered with.

11.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 offences punishable under the Indian Penal code, the Explosive Substances Act and also the Arms Act. A bare reading of sub-section (5) of Section 43D of the UA (P) Act 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 S.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 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 shall not be released on bail or on his own bond. This position is further made clear by sub-section (6) of S.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]).

12. 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 S. 43D(5). 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 u/s 43 D (5) of the UA (P) Act.

13. We shall now deal with the specific allegations against the 1st appellant, Nith @ Nijith, who is arrayed as the 17th accused in the final report. According to the prosecution, he had participated in the commission of the crime on 1.9.2015, along

with the other accused. The specific allegation against the appellant is that he was one of the persons who had hacked Manoj indiscriminately with choppers and murdered him. It is the further allegation that he had slit the throat of the deceased with a steel dagger. CW49 - Pramod had identified the appellant during the test identification parade held on 23.12.2014, as one of the accused who had hacked Manoj to death. The prosecution also relies on the 161 statements of CW97 - Santha, CW100 - Jaleel, CW96 - Prameela, CW70 - Shaji Vachali and CW71 - Rajesh P.V to bring out the fact that the assailants had assembled in the house under construction near to the scene of occurrence prior to and on the day of occurrence in order to perpetrate the murder. 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 appellant No.1 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).

14.The appellant No.2, P.P.Rahim @ Jaga Rahim, has been arrayed as the 19th accused in the final report. According to the prosecution, he had participated in the commission of the crime on 1.9.2015, along with the other accused. Allegation is that he is one of the accused who hacked Manoj to death. CW49 - Pramod, a witness to the occurrence, has identified the 2nd appellant during the test identification parade held on 23.12.2014, as one of the accused who was present during the commission of the murder of Manoj. The prosecution also relies on the 161 statements of CW97 - Santha, CW100 - Jaleel, CW96 - Prameela, CW70 - Shaji Vachali and CW71

- Rajesh P.V to bring out the fact that the assailants had assembled in the house under construction near to the scene of occurrence prior to and on the day of occurrence in order to perpetrate the murder. 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 appellant No.1 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).

15.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 appellants on bail at this stage. The fact that the final report has been laid is not a ground for releasing the appellants on bail in view of the statutory embargo.

16.We make it clear that the observations made by us touching the various aspects of the case, during the consideration of the appeal, 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. 43D (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.

17.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.

Accordingly, the appeal shall stand dismissed.

Sd/-

K.T. SANKARAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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P.S. To Judge