

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.08.2019

Pronounced on : 06.09.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.421 of 2019

1.Mohammed Riyaz
2.Mohammed Asarudeen
3.S.Nizam Ali
4.Mohammed Rizwan
5.Sarbudeen

.... Appellants

-Vs-

Union of India,
represented by,
The Additional Superintendent of Police,
National Investigation Agency,
Kochi.

.... Respondent

PRAYER: Criminal Appeal filed under Section 21 of the NIA Act, 2008, to set aside the impugned order passed in CrI.M.P.No.215 of 2019 in R.C.No.06/2019/NIA/DLI before the learned Special Court under the National Investigation Agency Act, 2008 Sessions Court for Exclusive Trial of Bomb Blast Cases Chennai at Poonammallee and consequently enlarge the appellants/petitioners on bail in R.C.No.06/2019/NIA/DLI pending before the learned Special Court under the National Investigation Agency Act, 2008 Sessions Court for Exclusive Trial of Bomb Cases Chennai at Poonammallee.

For Appellants : Mr.S.Shanmuga Velayutham,
Senior Counsel for
M/s.A.Raja Mohamed

For Respondent : Mr.R.Karthikeyan
Special Public Prosecutor

JUDGMENT

[Judgment of the Court was made by M.M.SUNDRESH, J.]

This Criminal Appeal has been filed by the accused Nos.1 to 5 in CrI.M.P.No.215 of 2019 in R.C.No.06/2019/NIA/DLI, which came to be dismissed by the learned Sessions Judge for Exclusive Trial of Bomb Blast Cases, Poonammallee by its order dated 24.06.2019.

2.The case of the prosecution is that on 05.02.2019 the deceased Ramalingam raised objections against the Dawah work as poor and back-trodden people were forced to convert Islam. The deceased took offense of the conversion programme of the accused. During the protest and altercation, the deceased removed the skullcap of one of the muslim in Dawah programme and worn by him and applied sacred ashes on the forehead of the muslim and recorded the same in his mobile and uploaded in the social media. Thereby the deceased exhibited his protest by defending the rights of the Hindus. Irked by the protest against their Dawah work and subsequent altercation with the deceased, A1 to A5, A17 & A18 along with other accused belonging to Popular Front of India (PFI) and its political organisation Social Democratic Party of India (SDPI) had conspired to wage Jihad against the deceased, who is a non-Muslim.

3.At about 08.30 p.m, A1 to A5, A17 & A18 conspired with each other near Periyapalli/Mosque at Thirubuvanam in person and over phone to commit the crime so as to create terror in the minds of the particular section of people as well as general public. In pursuant to the conspiracy, A1 to A8, A11 & A13 had joined together at Periyapalli/Mosque at about 11.00 a.m. A12, A15 to A18 had conspired at PFI Office, Kumbakonam at about 11.30 a.m. In furtherance to the conspiracy at about 12.30 p.m., A1, A5 to A8, A11 to A16 again assembled near Periyapalli Mosque. Later, A6 to A8, A11 to A16 planned to murder the deceased at about 01.30 p.m at the residence of A11. In pursuant to which, A11, A12 and A16 deputed A6 and A7 to carry out reconnaissance in their motorcycles bearing numbers TN 68 H 9786-Yamaha FZS and TN 68 E 9354-Hero Splendor Pro respectively. Maruti Swift Dzire Car bearing registration number TN 48 L 1280 was provided by A9 to the assailants/A8, A13, A14 and A15, who had collected weapons viz., Matchet (big knife), big hook (Aruval), Chilly powder and waited to attack the deceased. Thereby the accused persons A1 to A18 had constituted themselves formed a terrorist gang with an intention of attacking the deceased and creating terror in the minds of a section of people.

4.As early planned, A6 and A7 informed about the locations and movements of the deceased to the assailants A8 and A13 to A15, who travelled in Maruti Swift Dzire Car and intercepted the deceased, who was coming in his vehicle (Mini-lorry) at New Muslim Street at about 11.15 p.m. All the four accused got down from the Swife Dzire Car with big knife/Machet and bill hook (Aruval), questioned the deceased about the altercation with PFI Dawah team in the morning and abused the deceased with obscene language. When A8 tried to remove the key of the deceased vehicle, the deceased was caught hold by A8. The deceased is said to have stated that he already spoken about the problem to one Rasudeen, and he would speak next day morning. At that time, A8 stated that "if we leave you, you will indulge in similar activities". Then, A8 took Chilly Powder, threw on the face of the deceased, who screamed and tried to open the door of the Mini-lorry using his left hand. At that time with the intention to kill the deceased, A13 and A15 caught hold of the right hand of the deceased and A8 inflicted heavy cut injury on the right elbow by using big knife and again he inflicted another cut injury on his left palm. Thereby, the deceased sustained deep injuries in tissues, muscles, vessels, nerves and bone.

5.The accused pulled out the deceased from the vehicle, surrounded and attacked him with deadly weapons in order to kill him. At that time, A13 shouted and said that "don't leave him, kill him". Immediately, A14 inflicted a blow on the deceased by using a bill hook. The deceased blocked the attack with his left hand and he sustained cut injury on his left palm. On seeing a vehicle entering into the Muslim street, the assailants escaped from the scene in their car. The deep injuries caused the death of the deceased at about 12.48 p.m on 06.02.2019. Thereby the accused committed the terrorist act of lethally attacking and killing the deceased, with the intention of striking terror amongst a section of people. A10 in this case had harboured the assailants and reconnaissance accused at Karaikal in furtherance to the conspiracy.

6.The son of the deceased Shiyam Sundar lodged a complaint before Thiruvidadaimarudur Police Station, Thanjavur, which was registered in Crime No.17 of 2019 for the offences under Sections 341, 294(b) and 307 of IPC on 06.02.2019 by the Sub Inspector of Police against four identifiable known persons, F.I.R in Crime No.17 of 2019 was sent to the learned Judicial Magistrate No.I, Kumbakonam. The medical officer of Thanjavur Medical College Hospital declared the deceased was brought dead. Thereafter the Sub Inspector of Police altered the Section 302 of IPC. The Inspector of Police, Thiruvidadaimarudur Police Station took up the investigation, conducted inquest, prepared observation mahazar, rough sketch in the scene of crime.

7. During the course of investigation based on the statements of the witnesses and considering the after effects of the crime as well as the terror intention created by the accused and the consequent impact of the incident on the minds of the particular section of the people, on 06.02.2019 the Inspector of Police filed an alteration report before the concerned Court to incorporate Section 15 r/w 16, 18, 18(b), 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 and handed over the investigation to the Deputy Superintendent of Police (Law and Order), Thanjavur.

8. During the course of investigation the Deputy Superintendent of Police, Thanjavur arrested A1 to A5 on 06.02.2019, A6 to A8 on 09.02.2019, A9 and A10 on 10.02.2019 and 12.02.2019 respectively. All of them were produced before the concerned Court and remanded to Judicial custody.

9. Considering the gravity of the offence and other factors involved in this case, the Government of India, Ministry of Home Affairs, CTCR Division, North Block, New Delhi vide order No.11011/08/2019/NIA dated 05.03.2019 as per provisions of Sub-Section (4) of Section 6 r/w Section 8 of the NIA Act, 2008 entrusted the investigation to the National Investigation Agency. Accordingly, the National Investigation Agency registered the case as RC-06/2019/NIA/DLI under Sections 341, 294(b), 307, 120(b), 143, 147, 148 & 302 r/w 149 of IPC besides Sections 15 r/w 16, 18, 18(b), 19 & 20 of Unlawful Activities (Prevention) Act, 1967 on 07.03.2019. The entire case was submitted before the NIA Special Court, Poonamallee, Chennai. Thereafter, the investigation of this case was completely taken over from the Tamil Nadu Police on 25.04.2019. Thereafter A17 and A18 were arrested by the National Investigation Agency on 10.05.2019 and 26.06.2019 respectively. A11 to A16 along with other unidentified accused have been absconding ever since the incident.

10. The assailants in this case are A8 and A13 to A15. On the strength of warrant issued by the learned Sessions Judge for Exclusive Trial of Bomb Blast Cases, Chennai at Poonammallee, the National Investigation Agency searched the accused at various places, including their house on 02.05.2019 and seized the incriminating materials/documents related to this case. All the seized documents and the material objects were produced before the Special Court along with search lists. The seized digital devices had been forwarded to CDAC, Thiruvananthapuram for analysis. The mirror images of the seized digital devices were obtained from CDAC, Thiruvananthapuram and on scrutiny it is found that the accused were in close association among themselves for the crime, as well as with PFI and SDPI is established.

11.The National Investigation Agency conducted the investigation and took up 11 accused persons viz., A1 to A10 and A17 into police custody for further investigation. On investigation it reveals that A1 to A5 were present at Pakku Vinayakam Thoppu, Village along with A17 and A18 and had hatched criminal conspiracy at Pakku Vinayakan Thoppu just after the verbal altercation took place between the deceased and the Dawah workers. They had also participated along with other accused in conspiracy meeting that took place near Periyapalli/Mosque Thirubhuvanam and other places after the altercation. In furtherance to the criminal conspiracy, the assailants and the conspirators had collected vehicles, weapons, chilly powder, arranged hideouts etc and they planned and decided to commit the terrorist act as part of doing jihad by chopping the hand of the deceased and thereby murdering him, acting themselves as a terrorist gang.

12.The learned counsel for the appellants would submit that the order of the trial Court is nothing but mere reproductive version of the prosecution as well as the appellants. It is clear that the trial Court has failed to state the reason as to how the Court is satisfied with the prosecution case and failed to provide justification of the impugned order independently, wherein the trial Court stated that "the alleged murder is the part of one group belonging to one religion in order to wreck vengeance and in order to create fear in the minds of the people of some other religion, thus inviting serious concern over the safety and security of the country" without any material and it had travel beyond the scope of the Unlawful Activities (Prevention) Act, 1967, since the object and reason of the Act is not fulfilled in both facts and law, there is no prima facie case made out against the appellants.

13.The order of the trial Court is only on assumption that "the release of the appellants on bail at this stage is not conducive". The trial Court failed to exercise its discretion in a judicious manner and not as a matter of course and the order of the trial Court is not a speaking one. It is well settled law mere presence of the accused allegedly in the area where the incident took place will not reveal the direct complicity of the appellants in the murder and did not prima facie constitute an offence under the said Act. In the absence of any materials against the appellants the order of the trial Court is to be set-aside. The trial Court failed to take into the fact that the appellants were taken in police custody illegally without following the due process of law by the Deputy Superintendent of Police, Thiruvadaimudur. The appellants were detained in illegal custody in the police station more than 24 hours in contravention of Section 57 of Cr.P.C. The wife of A3 filed a petition under Section 97 of Cr.P.C before the learned

Judicial Magistrate No.I, Kumbakonam to issue search warrant to produce her husband from illegal custody of the police. On 07.02.2019 the same was taken on file in CrI.M.P.No.587 of 2019 and the learned Magistrate issued notice to the Inspector of Police, Thiruvadaimudur. Thereafter, the Inspector of Police produced the appellants before the learned Judicial Magistrate No.I, Kumbakonam on 07.02.2019 at about 05.00 p.m. The appellants made a complaint against the police officers ill-treatment and torturing them.

14.It is stated that the investigating agency by illegal manner, tortured the appellants and taken forcible confession statements and recorded the same. The trial Court failed to consider these factual aspects while passing the order.

15.The learned counsel for the appellants would further submit that the respondent has not recovered or seized any banned or objectional materials. Further mere possession of literature, pamphlets and other articles without actual execution of the ideas continued therein would not amount to any offence. The names of the appellants are not even mentioned in the FIR though they hail from the same place. The case in Crime No.17 of 2019 was registered at about 01.00 a.m on 06.02.2019 and the offence was altered by two subsequent alteration reports by adding the offence relating to the provision of Unlawful Activities (Prevention) Act, 1967, within the short span of 15 minutes between two alteration reports. Such act of the investigating agency is without any reason or rational. The trial Court failed to consider the fact that the investigating agency invoked the Unlawful Activities (Prevention) Act for a murder case by giving terrorist colour with prefix mind within a short span of time without any materials. The lower Court has not followed the settled position of law denying rights of appellants to be enlarged on bail, on the other hand on mere allegations and alleged confessions, dismiss their bail applications.

16.The learned counsel for the appellants would further submit that the appellants have been in incarceration for more than 211 days. Further freedom of an individual is of utmost importance and cannot be curtailed merely on the ground of suspicion. The object of the bail is preventive not punitive. In this case Article 21 of the Constitution of India is completely violated. He would further submit that the appellants are ready to cooperate with the investigation and they are neither in a position to tamper or hamper any witness nor flee from justice and they are ready to abide by any stringent condition. Now the investigation in this case has been completed and charge sheet has been filed on 02.08.2019.

17.The lower Court failed to consider the accusations against the appellants under chapter IV and VI of the Unlawful Activities (Prevention) Act, 1967 based on case diary or materials gathered by the Investigating Officer. Hence, the lower Court without application of mind had mechanically dismissed the bail petition of the appellants. It is noticed in the police report that the appellants had gathered at the place of occurrence at about 08.30 a.m made Dawah. The deceased came there and removed the skullcap of A17 and applied the sacred ashes on the forehead of A17. Hence, the deceased is the aggressor, who had created such a situation. By any stretch of imagination it cannot be said that within 15 minutes all the appellants joined to do Jihad against the deceased.

18.The learned counsel for the appellants relied upon the Judgment in the case of National Investigation Agency Versus Zahoor Ahmed Shah Watali reported in (2019) 5 SCC 1. The relevant portion of the Judgment is extracted here under:-

"24.A priori, the exercise to be undertaken by the Court at this stage-of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the Accused in the commission of the stated offence or otherwise."

19.Per Contra, the learned Special Public Prosecutor appearing on behalf of the respondent would submit that it is a well planned crime committed by all the accused in unison by contribution to each other in accomplishing the murder of the deceased, thereby creating terror in the minds of others belonging to particular religion and group. The assailants and some of the accused are still absconding. The eye witnesses to the occurrence have categorically stated about the role played by the accused. Further the other witnesses have also identified the accused being present in the scene of occurrence. The presence of the appellants during the Dawah is not disputed. During the custodial interrogation, the appellants confessed about the place of conspiracy, other important places and the complicity of each other in the case. The appellants are active cadre and leaders of PFI/SDPI which has been banned in some of the states in India. The appellants conjointly acted as members of terrorist gang for attacking and killing the deceased with the intention of striking terror amongst a section of people. After completion of the investigation, the National Investigation Agency collected sufficient evidence against the

accused persons, filed a charge sheet before the NIA Special Court, Poonamallee on 02.08.2019. If the appellants were released on bail there is likelihood that they would flee from the clutches of law and further they would threaten the witnesses, tamper the evidences and also would further commit similar activities.

20.The learned Special Public Prosecutor would further submit that the witnesses examined and materials so far collected against the appellants are not mere allegations and they have clearly identified the accused in the TI Parade and the role played by them in the occurrence. The trial Court in terms of provisions of Section 43-D (5) of the Unlawful Activities (Prevention) Act after finding and being satisfied that prima facie case is made out against the accused, had rightly dismissed the bail petition of the appellants. After filing of the charge sheet the scope of bail to the appellants have to be viewed on the report made under section 173 of the Code. Hence prayed for dismissal of the Bail application of the appellants.

21.Further the Special Public Prosecutor relied upon the Judgment in the case of National Investigation Agency Versus Zahoor Ahmed Shah Watali reported in (2019) 5 SCC 1. The relevant portion of the Judgment is extracted here under:-

"46.In Niranjana Singh Karam Singh Punjabi, the Court essentially considered the scope and ambit of the enquiry by the Trial Court at the stage of discharge. In that context, the Court made observations in paragraphs 6 and 8 of the said judgment which must be understood accordingly. In the present case, however, we are called upon to consider the prayer for bail in the context of the purport of the proviso to Section 43D(5) of the 1967 Act which mandates that the accused person involved in the commission of offence referable to Chapters IV and VI of the 1967 Act shall not be released on bail or on bond. However, the Court may release such accused on bail only if it is of the opinion, on perusal of the case diary and/or the report made under Section 173 of Cr.P.C. that there are no reasonable grounds for believing that the accusation against such person is prima facie true. Conversely, if in the opinion of the Court, there are reasonable grounds for believing that the accusation against such person is prima facie true, the question of granting bail would not arise as the bar under the first part of the proviso of no bail in such cases would operate.

47.The fact that there is a high burden on the accused in terms of the special provisions contained in Section 43D(5) to demonstrate that the prosecution has not been able to show that there exists reasonable grounds to show that the accusation against him is prima facie true, does not alter the legal position expounded in K. Veeraswami (supra), to the effect that the charge sheet need not contain detailed analysis of the evidence. It is for the Court considering the application for bail to assess the material/evidence presented by the Investigating Agency along with the report under Section 173 of Cr.P.C. in its entirety, to form its opinion as to whether there are reasonable grounds for believing that the accusation against the named accused is prima facie true or otherwise."

22.Considering the rival submissions and on perusal of the materials this Court finds that the charge sheet is now filed in this case, after filing of the charge sheet the lower Court has to necessarily look into the materials under Section 173 of Cr.P.C and thereafter only decide the bail application on merits by considering the contentions of the appellants with case diary, report u/s.173 of Cr.P.C/Charge sheet and materials available.

23.In view of the above, this Criminal Appeal stands dismissed, with liberty to the appellants to approach the trial Court by filing a fresh petition. The trial Court on considering the materials including the charge sheet, independently decide the bail application of the petitioner, uninfluenced by the dismissal order in the above appeal.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

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To

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- 1.The Sessions Court for Exclusive Trial of Bomb Blast Cases, Poonammallee.
- 2.The Additional Superintendent of Police, National Investigation Agency, Kochi.

3. The Special Public Prosecutor,
High Court, Madras.
4. The Judicial Magistrate,
Kumbakonam.
5. - do - The Chief Judicial Magistrate,
Thanjavur at Kumbakonam.

6. The Sub Jail, Poonamallee, Chennai - 56

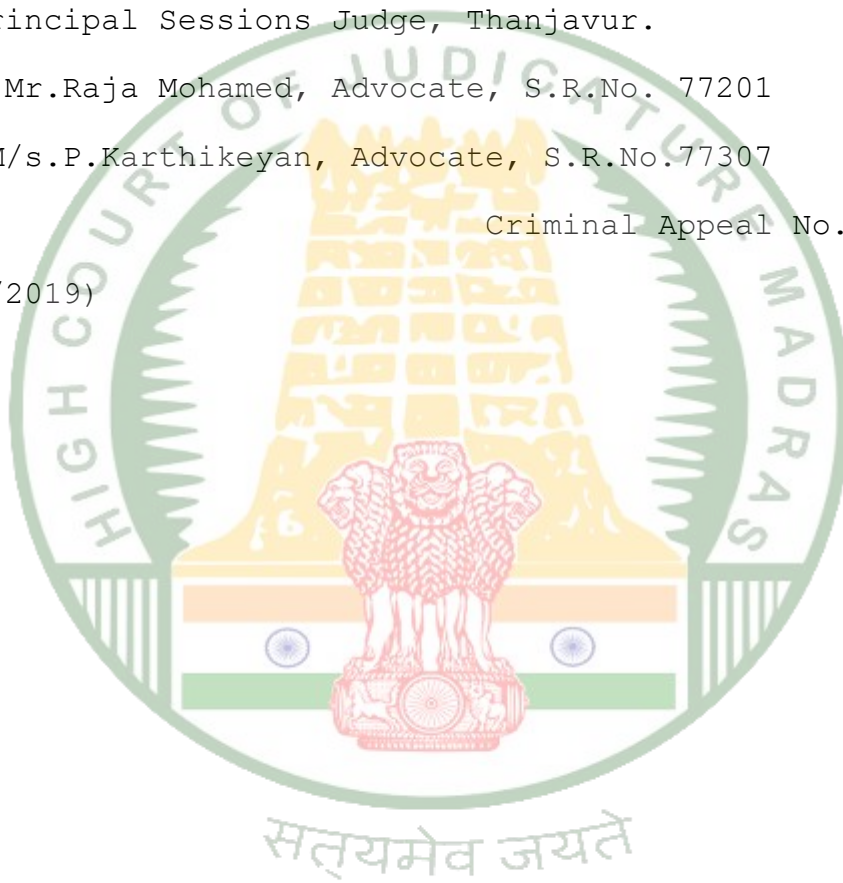
7. The Principal Sessions Judge, Thanjavur.

+3 ccs to Mr.Raja Mohamed, Advocate, S.R.No. 77201

+1 cc to M/s.P.Karthikeyan, Advocate, S.R.No.77307

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RR(CO)
SSM(10/09/2019)



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