

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

WEDNESDAY, THE 31ST DAY OF MARCH 2021 / 10TH CHAITHRA, 1943

CRL.A.No.163 OF 2021

SC 1/2015 DATED 19-02-2021 OF SPECIAL COURT FOR TRIAL OF NIA
CASES, ERNAKULAM

CRIME NO.2004/2010 OF Muvattupuzha Police Station , Ernakulam

APPELLANT/ACCUSED NO.3

M.K.NASER

AGED 49 YEARS

S/O. KUNHAN PILLAI, HOUSE NO.VII/276, MARAGATTU HOUSE,
KUNHUNNIKKARA, ALUVA, ERNAKULAM-683 108.

BY ADVS.

SRI.RENJITH B.MARAR

SRI.P.C.NOUSHAD

SRI.E.A.HARIS

SMT.LAKSHMI.N.KAIMAL

SHRI.ARUN POOMULLI

SHRI.BIJU VIGNESWAR

SMT.SURABHI SANTHOSH

SMT.MEERA M.

RESPONDENT/COMPLAINANT

UNION OF INDIA

REPRESENTED BY NATIONAL INVESTIGATION AGENCY, THROUGH
THE SPECIAL PUBLIC PROSECUTOR OF NIA, HIGH COURT OF
KERALA, ERNAKULAM-682 301.

BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA

OTHER PRESENT:

SRI.ARJUN AMBALAPPATTA, SPL. PP FOR NIA CASES

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31.03.2021,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated : 31st March, 2020

M.R.Anitha, J.

1. This appeal has been filed against the order in CrI.M.P.No.19/2021 in S.C.No.01/2015/NIA on the file of the Court for the Trial of NIA Cases, Ernakulam.
2. CrI.M.P.No.19/2021 is the third application for bail filed by the third accused in the above sessions case. The petitioner is accused No.28 in crime No.2004/2010 registered at Muvattupuzha Police Station. The case was taken over by the National Investigation Agency (NIA) and registered as RC 01/2011/NIA/DLI on 09.04.2011. Originally the FIR was registered u/s.143, 147,148, 120B, 323, 324, 341, 427, 506(ii), 201, 202, 153A, 212 and 307 r/w.149 IPC. S.3 of the Explosives Substances Act and Section 15 r/w.16, 18, 18B, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967 (UA(P) Act, 1967). NIA filed supplementary

final report on 18.01.2013 adding Sections 143, 147, 148, 120B, 323, 324, 326, 341, 427, 506(ii), 153A and 307 r/w.149 IPC. Sections 16 and 20 of the Unlawful Activities (Prevention) Act, 1967 against nine accused including the petitioner. The trial was conducted and 13 accused were convicted and sentenced under various Sections as per the judgment dated 30.04.2015. According to the petitioner, he was not aware of the investigation process against him when the final report was preferred, hence he did not participate in the trial. Based upon the final report filed in the year 2013, 18 accused were acquitted out of 31 accused. The maximum sentence awarded to the convicted accused was only 8 years. The petitioner surrendered before the Court on 06.11.2015 and ever since he is in judicial custody. The prosecution allegation is that the petitioner involved in the conspiracy to attack Professor T.J. Joseph on a belief that he perpetrated

blasphemy. It is also alleged that the appellant made arrangements for financing of purchase of van which was used during the attack and made arrangements for harbouring the assailants.

3. 5th accused was granted bail by this Court on 23.07.2019. Thereafter appellant filed CrI.M.P.No.99/2019 before the Special Court alleging change of circumstances, that was also dismissed, which was challenged before this Court by filing CrI.A.No.991/2019. The same was dismissed on 30.09.2019. When the said appeal was dismissed, the bail granted to the 5th accused by this Court was stayed by the Hon'ble Supreme Court. Subsequently the Hon'ble Supreme Court upheld the grant of bail to the 5th accused. So alleging change of circumstances, the petitioner again moved the Special Court seeking bail and that was dismissed by the impugned order.

4. The main contention of the learned counsel is with regard to the grant of bail to the 5th accused by this Court which has been confirmed by the Hon'ble Supreme Court in CrI.A.98/2021. He would also specifically contend about the time which would be consumed for starting the trial and completing the same and further that in the previous trial inspite of examining innumerable witnesses and conducting a day-today trial only 13 accused were convicted and maximum sentence imposed was only 8 years. It is also his contention that the role of the appellant as well as the 5th accused was almost similar. No materials could be produced by the prosecution for believing the accusation as against the petitioner as *prima facie* true. It is also his contention that he has been implicated on a mistaken identity.
5. Respondent filed a detailed objection contending that the petitioner is a prominent leader of fundamentalist

organization Popular Front of India (PFI) and formerly the District Convener of the predecessor NDF in Ernakulam District. He is the principal conspirator of this terrorist activity and played an active role in the conspiracy in the execution of the act of attack on Professor T.J. Joseph. He has been absconding for long and surrendered only on 06.11.2015 despite the fact that his property was attached u/s.83 Cr.P.C. on 01.03.2012 itself. The submission that he was not aware of the charge against him is without any substance. He absconded from the day of the commission of the act. His role as the main conspirator was revealed immediately after the initial arrest of convicted accused No.9 and 10. He was in close contact with several leaders of State and District leaders of PFI. He acted as a member of unlawful assembly and hatched criminal conspiracy along with other accused at Seemas Auditorium. The presence of the petitioner

near the house of the victim and also the hotel near Muvattupuzha was spoken to by the witnesses. His direct involvement in facilitating the terrorist attack has been disclosed on his own disclosure. According to the learned Public Prosecutor there is direct evidence to link the petitioner with the vehicle which was used for transporting the assailants. The learned Prosecutor seeks protection under the proviso to Section 43D(5) of UAP Act and contend about the possibility of the petitioner intimidating and influencing the witnesses if he is released on bail. The dismissal of two earlier bail applications was also vehemently pressed into service. It is also contended that the grant of bail to the 5th accused is not a ground to release the petitioner. The learned Prosecutor would further contend that the case has been scheduled to 19.04.2021 for trial.

6. This is the third appeal of the appellant/third

accused against the dismissal of application for bail. The trial against 31 available accused was conducted earlier in S.C.No.1/2013/NIA and 13 accused were convicted and sentenced under various heads as per the judgment dated 30.4.2015. After the disposal of that case the appellant surrendered before the trial court. The present change of circumstance alleged is the dismissal of CrI.A.No.98/2021 by the Hon'ble Supreme Court which upheld the grant of bail to the 5th accused by this court. But the very same ground of grant of bail to 5th accused has been considered by this Court while disposing CrI.A.No.991/2019 which was filed against the dismissal of the second application for bail filed by the appellant. The Special Court and this Court have on the earlier instances of dismissal of bail application found a *prima facie* case against the appellant.

7. Annexure A3 is the copy of the judgment in CrI Appeal

991/2019 which was filed by the appellant against the dismissal of the second bail application. It was dismissed by this Court assigning special reasons and the grant of bail to the 5th accused has also been specifically considered. In paragraph No.8, the dictum laid down in *Younus Aliyar v. The Sub Inspector of Police* [2016 (3) KLT 877] has also been quoted as part of the contentions of the respondent which is relevant in this context to be extracted and it reads as follows:

“8. In view of what we have stated above, we answer the reference as hereunder:

(i) When the NIA Court or the appellate court dealing with an appeal under Section 21 of the NIA Act comes to an opinion that there are reasonable grounds for believing that the accusation against the accused person is prima facie true on the basis of the perusal of the case diary or the report made under Section 173 of the Code, the same is not

liable to be overlooked while dealing with a subsequent bail application or an appeal, unless there are further materials or circumstances during the course of investigation as is discernible from the case diary of a case where investigation is going on and where the entire materials, which may include availability of materials in that portion of the case diary that was looked into in the bail application already decided. Therefore, when a subsequent bail application is filed, during the course of investigation, the entire case diary can be looked into afresh to consider the materials and circumstances in the case diary as presented for consideration at the hearing of the subsequent bail application, including any material therein which was left unconsidered in the earlier round. We answer the reference as aforesaid. In view of what we have stated above, we answer the reference as aforesaid:

(ii) In cases where a final report has been placed in terms of S.173 of the Code and when a bail

application or an appeal has been considered on the basis of such report to hold that there is a prima facie case to exclude grant of bail in terms of the proviso to sub-s.(5) of S.43D of the U.A.P. Act, a subsequent consideration would stand excluded. However, in cases where further investigation is permitted in terms of sub-s.(8) of S.173 of the Code and a further report comes and is treated as the final report, for the purpose of sub-s.(2) of S.173, that could also be the subject of a fresh scrutiny for grant of bail. In cases of further investigation in terms of sub-s.(8) of S.173, the course of such investigation may also generate bail applications on materials that come, including materials in case diary during such investigation.

(iii) The aforesaid principles are in furtherance of the rights of accused as protected in terms of the judgments of the Honourable Supreme Court interpreting Arts.21 and 22 of the Constitution of India.

The reference having been answered as above, list this matter before the Division Bench as per roster.”

8. Ultimately in paragraph No.19 it has been held as follows:

“After hearing the learned counsel on both sides, we are of the view that the appellant could not establish any change in circumstances enabling him to claim bail. If we consider the case against the 5th accused, who has been released recently by this Court on bail, and that against the appellant, we do not find any reason to mechanically adopt the same yardstick to grant bail to the appellant, ignoring the clear differences in the nature of allegations.”

9. In **Kalyan Chandra Sarkar V Rajesh Ranjan @ Pappu Yadav & Another (2004 7 SCC 528)** it has been observed by the Apex Court as follows:

“ In cases where earlier bail applications have been rejected there is further onus on the court to

consider the subsequent application for grant of bail by noticing the grounds on which earlier bail application have been rejected and after such consideration if the court is of the opinion that bail has to be granted then the said court would have to give specific reasons why in spite of such earlier rejections the subsequent application for bail should be granted”

10. The impugned order passed by the learned Special Judge would go to show that the appellant has surrendered only after the disposal of the original case SC No.1/2013/NIA. Moreover, the earlier orders passed against the appellant found that *prima facie*, the allegations against the appellant of being the key instigator and conspirator in attacking Professor T.J. Joseph holding him responsible for blasphemy in setting a question paper for college examination is true. So when the third application for bail comes up for consideration the earlier finding against the

petitioner/accused that there are reasonable grounds for believing that the accusation against the petitioner is *prima facie* true cannot be overlooked. It is to be noted that it is after taking into account the fact of grant of bail to the 5th accused and specifically finding that the case of the petitioner cannot be treated on the same yardstick as that of the 5th accused; ignoring the clear differences in the nature of allegations, that the appeal filed against the rejection of bail to the appellant has been dismissed by this Court. So we do not find any specific reason or change of circumstance for entertaining the third application for bail.

11. In *Mahipal V Rajesh Kumar @ Polia & another* (2020(2)SCC 118 : 2019 KHC 7205) the Hon'ble Supreme Court while dealing with S.439 CrPC and scope of interference of appellate court in an order rejecting bail by a Sessions Court quoted **Prasanth Kumar**

Chatterjee Vs Ashis Chatterjee (2010 (14) SCC 496). In that case accused was facing trial under S.302IPC. Several bail applications filed by the accused were dismissed by the Addl. Chief Judicial Magistrate. High Court in turn allowed the bail application filed by the accused. Setting aside the order of High Court it has been held by the Apex Court as follows:

“.....It is trite that this court does not normally interfere with an order passed by the High Court granting or rejecting bail to the accused .However it is equally incumbent upon the High Court to exercise its discretion judicially cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this court on this point.....”

12. So when an application for bail has been filed by the accused for the third time and the designated court has dismissed it, this court should be very cautious

and act with circumspection in making interference to that order.

13. Yet another ground alleged by the petitioner is the delay in starting and completing the trial. Accused has been in custody from 06.11.2015. There are 276 witnesses to be examined, out of whom summons has been issued to only 55 witnesses. So the trial will not get concluded in the near future. True, the 5th accused was granted bail by this court mainly on the ground of incarceration for long period with out trial and impossibility of starting trial in the immediate future causing prejudice and sufferings to the accused. According to the appellant, in CrI.A.No.98/2021 the Apex Court while upholding the grant of bail to the 5th accused had observed that the grant of bail owing to the long period of incarceration and the unlikelihood of trial being completed can be traced back to Article 21 of the

Constitution. It is also contended that though the Union of India represented that the case has been scheduled to be tried, in the reply affidavit, the Hon'ble Apex Court was pleased to hold that the statutory restriction u/s.43(D) (5) of UAPA does not oust the power of the Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. But the observations so made with respect to the 5th accused cannot at all be sought in aid by the appellant whose appeal against dismissal of bail application was dismissed by this Court for specific reasons stated in the order and the appellant has not opted to challenge the dismissal of his appeal. So the observation made by the Hon'ble Supreme Court while upholding the grant of bail to the 5th accused on the basis of safeguards under Part III of the Constitution is also of no avail to the appellant/3rd accused. The Supreme Court judgment by

itself will not amount to a change of circumstance, to entertain his third application for bail especially because the Hon'ble Supreme Court rejected the appeal against grant of bail by this Court. The grant of bail by this court to the 5th accused was considered by this Court while dismissing his earlier appeal against the rejection of bail for the 2nd time. There was also found no identity of facts or allegations against the 5th accused who was granted bail and the present appellant.

14. The appellant is said to be the king-pin who masterminded the conspiracy, planned the attack, coordinated the crime itself and arranged the get-away vehicle. He even ensured treatment to an accused who suffered an injury and then absconded. It is also contended by the prosecution that in the earlier trial 90 witnesses turned hostile due to the coercion, threats and inducement by the absconding accused, of

whom the appellant is the leader and the master mind. There are also cases registered against threats levelled against the witnesses at Thirur Police Station in Malappuram and Muvattupuzha Police Station in Ernakulam. The appellant was the Convenor of the District Committee of PFI who by the crime and his later actions while remaining underground had spread and instilled a fear psychosis generally in the society and particularly in the witnesses. In the instant case there are 10 witnesses who have come forward to testify, risking their lives who have been granted special protection by the Special Court carrying on the trial. The case has been scheduled for trial to 19.04.2021 and summons has been issued to witnesses. It is also scheduled to be completed within 180 days. The appellant being the mastermind and the key conspirator cannot be let out on bail at this stage which would seriously jeopardize the trial. Even

the witnesses who have been granted protection would be compromised since their close relatives could be threatened or induced. We do not find any reason to interfere with the impugned order or to entertain the appeal.

15. In the result Criminal Appeal stands dismissed.

Sd/-

K.VINOD CHANDRAN, Judge

Sd/-

M.R.ANITHA, Judge

Mrcs/Shgxxx

APPENDIX

- ANNEXURE A1 TRUE COPY OF ORDER DATED 13.3.2019 IN CRL.A.NO.162/2019 PASSED BY THIS HON'BLE COURT.
- ANNEXURE A2 TRUE COPY OF THE ORDER DATED 23.7.2019 IN CRL.M.A.NO.1/2019 IN CRL.A.NO.659/2019 PASSED BY THIS HON'BLE COURT.
- ANNEXURE A3 TRUE COPY OF THE ORDER DATED 30.9.2019 IN CRL.A.NO.991/2019 PASSED BY THIS HON'BLE COURT.
- ANNEXURE A4 TRUE COPY OF THE ORDER DATED 1.2.2021 IN CRL.A.NO.98/2021 PASSED BY THE HON'BLE SUPREME COURT OF INDIA.