
(2019) 08 SC CK 0006

Supreme Court Of India

Case No: Criminal Appeal No. 1199, 1200 Of 2019

Union Of India

APPELLANT

Vs

Yasmeen Mohammad
Zahid @ Yasmeen

RESPONDENT

Date of Decision: Aug. 2, 2019

Acts Referred:

- Indian Penal Code, 1860 - Section 120B, 125, 202
- Unlawful Activities (Prevention) Act, 1967 - Section 38, 38(2), 39, 39(a), 39(b), 39(c), 40, 43D(5),

Citation: AIR 2019 SC 3699 : (2019) 7 SCC 790 : (2019) 10 Scale 351 : (2019) 3 ACR 2798 : (2019) ALLMR(Cri) 3937 : (2019) 108 ALLCC 901 : (2019) 3 Crimes 201 : (2019) CriLJ 4222

Hon'ble Judges: Uday Umesh Lalit, J; Indu Malhotra, J

Bench: Division Bench

Advocate: K.M. Nataraj, Meenakshi Grover, B. V. Balaram Das, Santosh Krishnan, Zulfiker Ali P. S, Faisal M. Aboobaker, Lakshmi Sree Puthenpurackal

Final Decision: Disposed Off

Judgement

Uday Umesh Lalit, J

1. Special leave to appeal granted.

2. The judgment and order dated 04.10.2018 passed by the High Court of Kerala in Criminal Appeal No.506 of 2018 has given rise to these two

appeals, one by Union of India against acquittal of A2-Yasmeen Mohammad Zahid @ Yasmeen in respect of offences punishable under Section 125

of the Indian Penal Code (IPC for short), Sections 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 (UAPA for short) and also

against reduction in sentence ordered by the High Court for offences under Section 120B of IPC and Section 38 of the UAPA, while said A2,–

Yasmeen is in appeal against her conviction and sentence under Section 120B IPC and Section 38 of the UAPA.

3. The case of the prosecution, in brief, was as under:

(a) Pursuant to complaint received on 10.07.2016 in Chandera Police Station, Kasaragod preliminary investigation was undertaken which revealed that

14 persons had left India to join Islamic State of Iraq and Syria (ISIS) which is declared to be a terrorist organisation (Serial No.38 in the First

Schedule to the UAPA).

(b) During the course of investigation, A2,–"Yasmeen was arrested on 01.08.2016 at Indira Gandhi International Airport, New Delhi while she was

attempting to travel to Afghanistan along with her child.

(c) According to the prosecution, there was a criminal conspiracy between original Accused No.1 (husband of A2-Yasmeen) and A2-Yasmeen from

2015 pursuant to which conspiracy A1 and A3 to A15 left India and joined ISIS in Afghanistan; and A2-Yasmeen was an active participant supporting

terrorist activities of ISIS; and she had raised funds to further the activities of ISIS and had received funds which were utilised for supporting the

activities of ISIS.

4. Out of 15 accused named in the charge-sheet all the other accused were declared to be absconding and A2-Yasmeen alone was sent up for trial

for the offences punishable under Section 120B IPC, Section 125 IPC and under Sections 38, 39 and 40 of the UAPA. The charges were framed

against her in respect of said offences. The prosecution examined 52 witnesses and relied upon various documents and material objects. Insofar as the

role attributed to A2-Yasmeen was concerned, the relevant witnesses were PWs 4, 6, 7, 8, 11, 12 and 13.

5. After going through the material on record, the Special Court for the trial of NIA Cases, Ernakulam, found that the prosecution had established the

case against A2-Yasmeen and convicted her for the offences punishable under Sections 120B and 125 IPC and under Sections 38, 39 and 40 of the

UAPA and sentenced her to suffer rigorous imprisonment for three years, seven years, seven years, seven years and seven years respectively under

the aforesaid five counts. A2-Yasmeen was also directed to pay fine in the sum of Rs.25,000/- under Section 120B IPC, in default whereof she was

directed to suffer three months rigorous imprisonment. The judgment and order dated 24.03.2018 passed by the trial court was the subject matter of

challenge at the instance of A2-Yasmeen in Criminal Appeal No.506 of 2018.

6. The High Court by its judgment under appeal, set aside the conviction and sentence of A2-Yasmeen for the offences punishable under Section 125

IPC, Sections 39 and 40 of the UAPA while upholding her conviction for the offence punishable under Section 120B IPC and Section 38 of the

UAPA. The High Court however reduced the substantive sentence from three years and seven years to one year and three years respectively on said

two counts. The other elements, namely, sentence of fine and the default sentence were not varied or modified by the High Court.

7. During the course of its judgment, the High Court observed as under:-

“The aforesaid evidence of PW4, PW6, PW18 and PW21 who had attended the class of 1st accused clearly proves the propagation of ideology of

IS. Therefore there is absolutely no difficulty in assuming that the class attended by A2 in the house of PW7 and PW8 and taken by A1 was with

reference to IS and the Jihad, which according to them was a war against non Muslims”

The prosecution has thus proved that the account ending with 251 is of Sonia Sebastian who is the wife of the 1st accused and the amount was

withdrawn from the said account on various dates from 3.6.2016 to 22.07.2016 by the 2nd accused. Contention is that the money was deposited by A1

in the account of Sonia Sebastian and the ATM card given to Sonia Sebastian was used by A2 for collecting the amounts. It is stated that the CCTV

footage would show that the 2nd accused has withdrawn money from the bank accounts. The 2nd accused was arrested on 1.8.2016 and she was

under judicial custody in Kannur women prison. At the time of admission, her personal belongings were entered in a register. Among the articles, there

were two Idea SIM cards. The SIM cards were seized by PW41 as per P29 mahazar and produced as MO13 and MO14. The articles also contained

a memory card marked as MO15. The memory card contained revelation videos and videos relating to ISIS, audio speech of Anwar Alwaki, a brief

guide to Islamic State and women of Islamic State. This according to the prosecution further proved that she was preparing to go to Afghanistan at

the instance of the 1st accused. When these facts are proved, the question is whether the accused had committed any such offence.

In the backdrop of these proved facts, the High Court then considered whether the offences alleged against A2-Yasmeen under the aforesaid five

counts were made out. It was observed that there was evidence to prove that A2 had attended classes of Jihad propagating ISIS ideology by original

Accused No.1 but there was nothing to indicate that she had taken any steps to wage a war or had attempted or abetted waging of such war against

any Asiatic Power in alliance with or at peace with Government of India and as such there was no material to sustain the charge under Section 125

IPC. As regards charge under Section 38 of the UAPA it was observed as under:

“There is evidence to prove that the 2nd accused was associated with A1 who propagated ISIS ideology and had gone even to the extent of joining

him. Her attempt to proceed to Afghanistan was with a clear intention to meet 1st accused and to involve in IS related activities. Therefore she is

punishable under Section 38(2).

8. In respect of charge under Section 39 of the UAPA the High Court found that though A2 was certainly influenced by the ideology professed by

A1, she herself had not arranged any of the acts falling under Clauses (a) to (c) of Section 39. The High Court went on to observe as under:

“She had already become a member of the organization as contemplated under Section 38 of the Act. If a person is punishable under Section 38,

Section 39 becomes superfluous.”

9. As regards charge under Section 40 of the UAPA, the High Court found that she was not raising any funds for terrorist organisation; the amounts

she received were for personal use and for purchasing tickets for travel and other arrangements for herself and for her son and as such charge under

Section 40 of the UAPA was not made out.

10. Concluding that A2-Yasmeen was guilty of the offences punishable under Section 120B IPC and Section 38 of the UAPA, the High Court

considered the case with a lenient view and reduced the substantive sentences in respect of these two offences as stated hereinabove.

11. In these appeals we heard Mr. K.M. Natraj, learned Additional Solicitor General for Union of India and Mr. Santosh Krishnan learned Advocate

for A2-Yasmeen. According to the learned Additional Solicitor General, the material on record established the role played by A2-Yasmeen beyond

any doubt and her acquittal in respect of offences punishable under Section 125 IPC and Sections 39 and 40 of the UAPA was incorrect and in any

case there was no reason to reduce the substantive sentence in respect of offences under Section 120B IPC and Section 38 of the UAPA. Mr.

Santosh Krishnan, learned Advocate for A2-Yasmeen not only supported the judgment of the High Court in respect of acquittal under Section 125

IPC and Sections 39 and 40 of the UAPA but submitted that A2 deserved acquittal even in respect of Section 120B IPC and Section 38 of the

UAPA. Relying upon the decisions of this Court in *Arup Bhuyan v. State of Assam* (2011) 3 SCC 377 and *State of Kerala v. Raneef* (2011) 1 SCC

784 it was submitted that for an offence under Section 38 of the UAPA to get attracted the prosecution must establish requisite mens rea. He further

submitted that in order to attract Sections 39 and 40 of the UAPA there must be material indicating that the acts in question were done by the accused

in order to further the activity of a terrorist organisation.

12. In *State of Kerala v. Raneef*², a practising Dentist was alleged to have given medical aid to a wounded accused and the matter arose from the order of the High Court granting bail to said Dentist. While affirming the order of the High Court, it was observed,

“7. At this stage we are not expressing any opinion as to whether the allegations in the versions of the prosecution or defence are correct or not, as evidence has yet to be led. However, we would like to make certain observations.

8. 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. 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 43-D(5) has not been violated.

9. The respondent, being a doctor, was under the Hippocratic oath to attempt to heal a patient. Just as it is the duty of a lawyer to defend an accused,

so also it is the duty of a doctor to heal. Even a dentist can apply stitches in an emergency. Prima facie we are of the opinion that the only offence

that can be levelled against the respondent is that under Section 202 IPC, that is, of omitting to give information of the crime to the police, and this

offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence.”

13. Mr. Krishnan, however, relied upon certain observations in said decision to submit that mere membership of an unlawful organization was not

enough and there must be clear proof that the accused intended to accomplish the aims of the organization by resort to violence. Those observations

were made while considering the matter in the context of order of release on bail during trial which is clear from paragraphs 10 and 15 of the decision.

14. In the case of Arup Bhuyan v. State of Assam¹, the only material against the concerned accused was his confession to the police in which he had

identified the house of the deceased and it was observed:-

“7. In the instant case, the prosecution case mainly relies on the alleged confessional statement of the appellant made before the Superintendent of

Police, which is an extra-judicial confession and there is absence of corroborative material. Therefore, we are of the opinion that it will not be safe to

convict the accused on the basis of alleged confessional statement.”

The subsequent portion of the decision, where the earlier decision in State of Kerala v. Raneef² was considered, was relied upon by Mr. Krishnan.

15. The evidence on record, as culled out by the High Court in the observations quoted hereinabove establishes that A1 was propagating the ideology

of IS and advocating, among other things, war against non-Muslims; that the classes were attended by A2-Yasmeen; that the videos relating to such

speeches were found on her person when she was arrested; and that she was attempting to go to Afghanistan at the instance of A1. These features

definitely point the existence of mens rea. The Courts below were therefore absolutely right in recording conviction against A2 in respect of offences

under Section 120B IPC and Section 38 of the UAPA. The submissions advanced by Mr. Krishnan, therefore, cannot be accepted and the appeal

preferred by A2-Yasmeen must fail.

16. We now turn to the appeal preferred by the Union to see whether the acquittal of A2 for offences under Section 125 of IPC and Sections 39 and

40 of the UAPA was justified. As regards the offence under Section 125 of the IPC, the matter was rightly appreciated by the High Court and we are

in complete agreement with the view taken by the High Court.

Coming to Sections 39 and 40 of the UAPA, these provisions require certain elements in respect of which there is no material evidence on record. For

Section 39 of the UAPA to get attracted, support to a terrorist organisation must be within the meaning of either of three clauses viz clauses (a), (b)

and (c) of sub Section (1). Similarly, Section 40 requires certain elements on satisfaction of which a person can be said to be guilty of raising funds for a terrorist organisation. None of those features are established as against A2-Yasmeen. The acquittal in respect of charges under Sections 39 and 40 was therefore rightly recorded by the High Court.

17. We must however state that the High Court was not right in observing “if a person is punishable under Section 38, Section 39 becomes

superfluous”. In our view, the scope of these two Sections and their fields of operation are different. One deals with association with a terrorist

organisation with intention to further its activities while the other deals with garnering support for the terrorist organisation, not restricted to provide

money; or assisting in arranging or managing meetings; or addressing a meeting for encouraging support for the terrorist organisation.

18. Lastly, we come to the quantum of sentence in respect of offences where A2-Yasmeen has been found guilty by both the Courts.

19. The only ground that weighed with the High Court while reducing the sentence was sympathy. The material on record indicates the role played by

A2-Yasmeen. Even at the time of her arrest, while leaving for Afghanistan, certain objectionable material was found on her person. The intensity of

her participation and involvement were clearly made out. In the circumstances, there was no room for invoking sympathetic considerations. The

quantum of sentence imposed by the trial court was absolutely correct and adequate.

20. In the premises,

A] Appeal preferred by A2-Yasmeen challenging her conviction and sentence under Section 120B IPC and Section 38 of the UAPA is dismissed.

B] Appeal preferred by the Union challenging the acquittal of A2-Yasmeen in respect of offences under Section 125 of the IPC and Sections 39 and

40 of the UAPA is dismissed.

C] Appeal preferred by the Union as regards reduction of sentence awarded to A2-Yasmeen for offences under Section 120B IPC and Section 38 of

the UAPA is allowed. The order passed by the High Court in that behalf is set aside and the sentence imposed by the trial court in respect of offences

under Section 120B IPC and Section 38 of the UAPA against A2 is restored.

21. Appeals stand disposed of, in aforementioned terms.