

(2013) 04 KL CK 0059

High Court Of Kerala

Case No: Bail Application No's. 1795, 1797 and 1830 of 2013

Rajesh and Gopal

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: April 9, 2013**Acts Referred:**

- Constitution of India, 1950 - Article 19(1)(c), 21
- Criminal Procedure Code, 1973 (CrPC) - Section 439
- Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 23
- National Investigation Agency Act, 2008 - Section 2(1)(g)
- Penal Code, 1860 (IPC) - Section 120B, 143, 147, 149, 361
- Unlawful Activities (Prevention) Act, 1967 - Section 10, 13, 15, 18, 18B

Hon'ble Judges: S.S. Satheesachandran, J**Bench:** Single Bench**Advocate:** C.K. Sajeev, for the Appellant; C. Rasheed, Public Prosecutor, for the Respondent**Final Decision:** Allowed

Judgement

@JUDGMENTTAG-ORDER

S.S. Satheesachandran, J.

Petitioners are some of the accused in Crime No. 1622/12 of Mavelikkara Police Station registered for offences punishable under Sections 143, 147, 120B, 361 r/w 149 of the Indian Penal Code and Section 23 of Juvenile Justice (Protection of Children) Act, 2000 and Section 10 and 13 of Unlawful Activities (Prevention) Act, 1967 hereinafter referred to as UA(P) Act. Petitioners were initially arrayed as accused numbers 1 to 5 when crime was registered, but, later their rank has been changed as A2 to A6 arraying another person as first accused in the crime (A1). Investigation of the crime is now continuing incorporating offences u/s 18, 18B, 20 and 35 of UA(P) Act also.

2. Prosecution allegation in short is that on 29.10.2012 at about 11:45 hours Sub Inspector of Police Mavelikkara Police Station got information of a secret meeting conducted by some persons in a room in a lodge situate in Mavelikkara town. With a police party he reached the spot and there found petitioners (A2 to A6) with two minor girls. Questioning of the petitioners revealed that they are active members and followers of Communist Party of India (Maoist), an organisation banned for unlawful activities by the Government of India. The two minor children found with them are stated to be daughters of two activists of the above organisation, but, absconding from police. The two minor children, it is alleged, had been unauthorisedly removed from the lawful guardian, the grand mother, and were brought to the place for the purpose of scheming and organizing a student wing for the aforesaid maoist organisation in the State. Some literature of the above organisation disclosing their avowed object to destabilize and overthrow the parliamentary form of democratic Government in the country, were seized with a laptop, mobile phone, pamphlets, note book, money etc. Petitioners were arrested, and, the two minor girls removed to a shelter home. Crime registered initially arraying petitioners as A1 to A5 is now being continued re-ranking them as A2 to A6 with some other accused, adding some more penal provisions under the UA(P) Act and also some more accused, by the Deputy Superintendent of Police, Chengannur.

3. Petitioners (A2 to A6) produced before the magistrate were remanded to judicial custody, which still continues, with their bail applications having been turned down by magistrate and also Sessions Judge. Petitioners have filed the above applications u/s 439 of Code of Criminal Procedure seeking their enlargement on bail. B.A. No. 1795/13 is by A2 and A3, B.A. No. 1797/13, by A4 and A6, and, B.A. 1830/13, by A5 in the crime.

4. The respective learned counsel appearing for the applicant/s in the above applications raised common grounds to contend that extending of remand of petitioners by the magistrate, and their continued detention ever since their arrest, is repugnant to and violative of the provisions covered by National Investigation Agency Act 2008, for short NIA Act. Reliance is placed on a judicial pronouncement made by this court, rendered in "Ashraf v. State of Kerala" (2010 (4) KLT 558), to contend that where an offence is punishable under the UA(P) Act an order of extending remand of suspected person can be passed only by a Sessions court which is competent to try such offence. It is further contended by the respective counsel for petitioners that on the allegations raised there is nothing to hold that they are active members of an organisation banned by the government, and, even assuming that they are passive members of such organisation, having regard to the inviolable fundamental rights of freedom of expression, freedom of association etc. the petitioners have formed a meeting and some literature of a banned organisation were seized from the spot or their possession cannot be a ground to prosecute them for the grave offences imputed of nor even for their continued detention till investigation/trial is completed. One among the petitioners is a

scientist and the petitioners are activists engaged in protection of human rights and they have been arrested and detained on false allegations, is the further submission made to urge for their release subject to such conditions as deemed fit and proper. Petitioners are prepared to abide by any condition imposed by this court for their release, is the submission of counsel appearing for them.

5. Opposing the applications vehemently, learned Public Prosecutor contended that the laptop, mobile phones etc. seized from the place where these petitioners conducted a secret meeting as members of a banned organisation are now being subjected to scientific examinations and the reports thereof are awaited. Manifesto of a frontal organisation of the banned maoist organisation seized from possession of petitioners clearly spell out that their aim is to overthrow the democratically elected government through violent means and to change the parliamentary form of government in the country adopting terrorist activities. Petitioners are active members of the banned organisation, Communist Party of India (Maoist), and investigation has revealed that members of the organisation are bent upon unleashing terror and violence in the State to spread their ideology and to destabilize the elected government. Presently reranked first accused, namely, one Ajayan, it is stated, continued as State Secretary of the banned organisation, and, he was involved in several violent incidents connected with activities of the banned organisation. Though he has been arrested and now detained, release of petitioners at this stage when report over the scientific examination of the laptop, mobile phones etc. is awaited with further probe over various aspects of the crime is going on, will be counterproductive and, in fact, the investigating agency apprehends that if enlarged on bail petitioners are likely to abscond and also indulge in violent activities to implement the programmes and policies of the banned organisation. Investigating agency has already moved under 43(d)(i) of the UA (P) Act for extending the period of detention of petitioners beyond 90 days since completion of investigation within such period having regard to the probe to be conducted is not possible, is the further submission of learned Public Prosecutor.

6. So far as the submissions made by learned counsel appearing for petitioners that orders passed by magistrate extending remand of petitioners was illegal, relying on Ashraf's case referred to above, I do not find any merit at all. True, in the above decision adverting to the meaning of the expression "court" in NIA Act some observations in the lines canvassed by petitioners have been made. In the aforesaid decision, it is seen, the authority conferred to the National Investigation Agency, for short, "the NIA", to investigate offences covered by the UA(P) Act, including them as scheduled offence u/s 2(1)(g) of the NIA Act, has been given too much significance to hold that the expression "court" used in UA(P) Act has to be read and understood with reference to and giving effect to what has been stated of "court" in the NIA Act. Exposition so made in the decision, with respect, is seen not in tune with the provisions covered by the UA(P) Act and NIA Act, both self contained Acts operating distinctly and differently. NIA is empowered to investigate offence under the UA(P)

Act, since such offences are included thereunder as scheduled offence under the NI Act, does not postulate that other agencies including state police are denuded of power to investigate the offences under the UA(P) Act, and also the trial of such offences before the competent court under the Code where investigation is conducted and report filed by agencies other than NIA. A reference on this question, though I take a different view from what has been sated in Ashraf's case, to a larger bench, I find, is not warranted in the present case, where entitlement of petitioners for release on bail can be safely decided on the basis of the decisions rendered by apex court, which have a binding force on the question involved.

7. Petitioners are proceeded for various penal offences apart from offences under the Juvenile Justice Act and UA(P) Act. So far as the penal offence u/s 361 of Indian Penal Code and that under the Juvenile Justice Act the allegations canvassed to sustain them relate to unauthorised removal of two minor girls from the lawful guardian, their grand mother. Parents of those two children are stated to be hard core members of the banned organisation and, at present, remaining at large, absconding police. Practically, no serious submission was made before me on behalf of prosecution to sustain the allegations over the kidnapping of the minor children by petitioners from their lawful guardian though it was argued that the presence of the two children in the meeting was to scheme and organise a student wing for the banned organisation to spread its ideology and activities among the student community in the State. Presence of two minor children in the meeting, allegedly, held by petitioners as such, prima facie, is not sufficient when nothing more is there to hold that they have been kidnapped from their lawful guardian.

8. In fact, the offences imputed against petitioners under the UA(P) Act have been banked upon to contend that these petitioners are not entitled to be released on bail at this stage when investigation is going on over such serious offences stating that if unlawful activities of the banned organisation are not curbed it would undermine the security of the country and also infringe its peace and tranquility. The banned organisation in which petitioners are alleged to be members is engaged in terrorist activities has also been highlighted to contend that these petitioners are not entitled to be released on bail. Question on the allegations made with reference to the facts and circumstances presented is whether a prima facie case has been made out against petitioners or any of them with respect to the offences imputed under UA(P) Act to deny them bail while investigation is going on. Petitioners conducted a meeting in a room in a lodge and from the meeting site some pamphlets, Manifesto and other materials of the banned organisation apart from a laptop, mobile phone etc. were seized. Petitioners are alleged to be members of an organisation, Communist Party of India (Maoist), banned by the central Government. They are proceeded for offences punishable under Sections 10, 13, 18, 18B, 20 and 35 of UA(P) Act. Section 10 of the Act deals with penalty for being a member of an unlawful association. Declaration of an association as unlawful is covered by Section 3 of the above Act. The association, Communist Party of India

(Maoist), has been declared as an unlawful association by the central Government is not a matter in dispute. Section 13 of the Act provides punishment for unlawful activities. What is an unlawful activity is defined u/s 2(o) of the Act. The unlawful activity, if we go by the definition takes within its purview any act either spoken or written, signs or by visible representation or otherwise by an individual or association for cessation of a part of a country or disruption of its sovereignty and territorial integrity of the country or to cause disaffection against the country. Section 18 of the Act deals with punishment for conspiracy to commit any terrorist act or any act preparatory to the commission of the terrorist act. Terrorist act is defined in Section 2(k) stating that it shall have the meaning as assigned in Section 15 of the Act. If we go by terrorist act defined u/s 15 as of now on the allegations raised, no case, prima facie, has been made against petitioners for the offence u/s 18 of the Act for the reason that they have conducted a meeting as members of an unlawful association. When that be so, Section 20 which deals with punishment for being a member of a terrorist gang or organisation, which is also imputed against petitioners, does not require serious consideration at this stage. The allegations imputed against them do not call for any serious dilation with respect to Section 35 of the Act since that Section does not deal with any offence, and its incorporation among other offences under the Act against petitioners has not much merit. So, the pivotal issue to be looked into is whether on the allegations set out any offence u/s 10 or 13 of UA(P) Act has been made out against petitioners or any of them for having participated in a meeting as alleged, from which place some pamphlets, Manifesto etc. of a banned organisation were seized. In the context, what has been stated by the apex court in [Arup Bhuyan Vs. State of Assam](#), and [Sri Indra Das Vs. State of Assam](#), that mere membership in a banned terrorist organisation is not sufficient as that will not make a person criminal, is significant and decisive in examining the question of bail when a person is suspected of having committed the offences punishable under Sections 10 or 13 of the UA(P) Act. The fundamental rights guaranteed under Article 19(1)(c) and 21 of the Constitution giving right to form association and freedom of expression cannot also be lost sight of in considering whether mere membership of a banned organisation will make a person liable to be prosecuted for the offences under the UA(P) Act. Viewed in the above perspective the allegations imputed against petitioners are examined with reference to the offences under the UA(P) Act, at this stage, when there is nothing to indicate that any of them has resorted or incited people to violence for the reason they are proceeded for offences under the UA(P) Act alone, I find denying them bail since investigation of the crime is continuing will not be proper and justifiable. In the given facts of the case, I find, petitioners can be released on bail, at this stage, where they have already undergone pre-trial detention of more than three months, subject to conditions safeguarding smooth and fair completion of investigation of the crime.

Petitioners are directed to be enlarged on bail subject to the following conditions:

- 1) Petitioners shall execute a bond for Rs. 25,000/- each, with two solvent sureties for the like sum, by each of them, to the satisfaction of the Judicial First Class Magistrate, Mavelikkara. Sureties of petitioners, both of them should have permanent abode within Alleppey district and their solvency has to be satisfied by the magistrate insisting for production of title deeds over immovable properties for the value fixed, or, certificate issued by competent revenue authority, or of their status as servants under the Government or public sector undertakings.
- 2) Petitioners shall report before the investigating officer at the station twice in a week on every Monday and Friday at a time between 10:00 a.m. and 12:00 noon for a period of three months or till completion of investigation of the crime, whichever is earlier.
- 3) Petitioners shall not leave Alleppey district for a period of three months or till completion of investigation of the crime.
- 4) Petitioners shall not involve or indulge in any criminal act or violence or incite any person to commit any criminal act while they continue on bail in the present case and, if any of them does any such act, it is open to the magistrate/Sessions Judge to cancel his bail without any further orders from this court, but, in accordance with law.
- 5) Petitioners shall not leave the State till investigation of the crime is over without getting prior permission from the investigating officer in writing.
- 6) Petitioners, all of them, shall furnish particulars of their address and also mobile phone number, if any of them possess a phone, to enable the investigating officer to contact them and secure their presence as and when needed for completion of investigation of the crime. Such particulars shall be furnished by them to the investigating officer within one week from the date of their release.

Petitions are allowed.