IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR.JUSTICE P. V. BALAKRISHNAN

Thursday, the 12th day of December 2024 / 21st Agrahayana, 1946

CRL.M.APPL.NO.1/2024 IN CRL.A NO.1204 OF 2023

SC 1/2015 OF THE SPECIAL COURT FOR THE TRIAL OF NIA CASES,ERNAKULAM

APPLICANT/APPELLANT:

M.K. NASAR, AGED 56 YEARS,
S/O. KUNHANPILLAI, HOUSE NO.7/276, MARANGATTU HOUSE, KUNHUNNIKKARA, ALUVA, ERNAKULAM DISTRICT, PIN - 683108.

RESPONDENT/RESPONDENT:

UNION OF INDIA
REPRESENTED BY SUPERINTENDENT OF POLICE, NATIONAL INVESTIGATION AGENCY, KOCHI, PIN - 682020.

Application praying that in the circumstances stated therein the High Court be pleased to suspend the sentence imposed by the Special Court of Trial of NIA Cases, Kerala, Ernakulam in SC No.01/2015 against the applicant and release him on bail, pending disposal of the above appeal in the interest of justice.

This Application coming on for orders upon perusing the application and upon hearing the arguments of M/S.E.A.HARIS, M.A.AHAMMAD SAHEER, MUHAMMED YASIL, P.C.NOUSHAD, WAKARUL ISLAM K.S., E.A.HARIS, RENJITH B.MARAR, P.C.NOUSHAD, Advocates for the petitioner and of DSGI respondent, the court passed the following:

P.T.O.

RAJA VIJAYARAGHAVAN V. & P.V. BALAKRISHNAN,JJ.

Crl. M.A.No. 1 OF 2024

in

Crl.A.No.1204 OF 2023

Dated this the 12th day of December, 2024

O R D E R

Raja Vijayaraghavan, J.

The applicant herein is the 3rd accused in S.C.No. 1 of 2015 on the file of the Special Court for the Trial of NIA Cases, Ernakulam. In the said case, he was charged for having committed offences punishable under Sections 143, 147, 120B, 148, 201, 202, 212, 341, 427, 323, 324, 326, 506(ii), 307 r/w. Section 149 and 120B of the IPC, Sections 3 and 6 of the Explosive Substances Act, 1908, and Sections 16, 18, and 20 of the Unlawful Activities (Prevention) Act, 1967.

2. The case revolves around a violent attack on Prof. T.J. Joseph, a Malayalam Professor at Newman College, Thodupuzha. There was a controversy, wherein, the Professor had set a controversial question paper for his students on 23.03.2010. The question contained a passage that was perceived by a section of the community as insulting to Prophet Muhammed. The question paper became public on 25.03.2010, leading to widespread protest and condemnation.

The most vociferous protests were from the Popular Front of India (PFI) and the Social Democratic Party of India (SDPI). Various pamphlets were issued and rallies were held with a view to threatening the college authorities and the Professor. On 04.07.2010, Prof. Joseph and his family members went to Nirmala Matha Church in his Maruti Car to attend Sunday mass. While returning in the same car, at about 8.05 a.m., a group of men armed with deadly weapons and explosive substances came in a Maruti Omni Van and intercepted the Wagon-R Car and thereafter pulled out Prof. Joseph, and inflicted multiple cut injuries. They chopped off the right hand which was used by the Professor to pen the controversial question and threw it away to the nearby compound. When the family members tried to intervene, they were also attacked.

3. Initially, Crime No.714/2010 of Muvattupuzha Police Station was registered against the unnamed assailants. Later, the NIA took over the investigation. The investigation revealed that the accused were leaders/active members of the PFI and SDPI and motivated with a specific intention of taking revenge on Prof. Joseph, hatched a criminal conspiracy by gathering at various places on various dates and through multiple means of communication and thereupon agreed to form a terrorist gang to physically attack and commit the murder of Prof.Joseph, so as to strike terror in the minds of the people and to promote enmity and hatred between different groups on ground of religion. They

had chalked out a detailed plan upto the post-incident stage for the escape of the assailants, the disappearance of evidence, to provide safe hideouts to the assailants, and surrendering another set of persons before the police and thereby screening the actual assailants. In furtherance of the conspiracy entered into, each one of the accused persons performed the specific roles assigned to them and accordingly, the incident on 04.07.2010 and the subsequent events happened.

4. As many as 54 persons were arrayed as accused, including the assailants, conspirators, persons who aided and assisted the commission of the crime, and persons who harboured the assailants and destroyed the evidence at the post-incident stage. In the first phase, the Police filed the first final report on 14.01.2011 against 27 accused persons. The names of the remaining 27 accused were included in the final report as persons not charge sheeted for the time being.

5. As per the order dated 09.03.2011 of the Ministry of Home Affairs, the National Investigating Agency took over the investigation, and the case was re-registered as RC.01/2011/NIA/DLI on 09.04.2011. NIA filed the first supplementary final report before the court on 18.01.2013 against 9 more accused persons. A second supplementary report was filed by NIA on 12.04.2013

against another accused.

6. Before the NIA court, all 37 accused persons covered by the above three charge sheets were called upon to face trial in S.C.No.1/2011. Out of the 37 accused, six absconded and failed to face trial, and 31 faced trial. By judgment dated 30.04.2015, the Trial Court convicted 13 accused persons and acquitted the remaining 18 accused persons.

7. Challenging the judgment, separate appeals have been filed before this Court by the accused challenging the finding of guilt and sentence. Appeals have also been filed by the NIA against the acquittal and also for enhancement of sentence.

8. The case against the six absconding accused was split up and refiled as S.C.No.1/2015(NIA), against which judgment, a number of appeals were filed by the accused as well as the NIA. Sri. Savad (A1), the person who had allegedly chopped the right palm of Prof.Joseph, is stated to have surrendered and the trial against him is scheduled to commence.

9. According to the prosecution, the applicant, Sri.M.K. Nasar, is the master conspirator. He allegedly participated in nearly all conspiracy meetings, including those on 28.03.2010, 03.04.2010, 06.04.2010, 10.04.2010, 19.04.2010, 04.05.2010, 17.05.2010, 01.07.2010, 03.07.2010, and 04.07.2010.

He is accused of recruiting members for the terrorist gang, assigning specific duties, collecting and disbursing ₹1 lakh for purchasing the Omni van, procuring mobile phones and SIM cards through co-accused, and distributing them to key players, particularly the piloting team. He allegedly monitored and supervised the entire operation, maintaining constant contact with the piloting team using a mobile phone, and successfully executed post-incident plans to harbour the assailants. Nasar absconded after the incident and surfaced only in 2013.

10. To prove its case, the prosecution examined 228 witnesses as PW1 to PW228 and Ext.P1 to P767 were exhibited and marked. MOs 1 to 180 were produced and identified. Among the witnesses, PW198 to PW206 were categorized as protected witnesses. The original documents relied upon by the prosecution were produced in the parent case, S.C.No.01/2013, while most of the documents marked in these proceedings are certified copies of those originals. During the cross-examination of the prosecution witnesses, the defence marked Ext.D1 to D37, which included relevant portions of the 161 of the Cr.P.C statements and depositions from S.C.No.01/2013.

11. The learned Sessions Judge, after evaluating the entire evidence, labelled the appellant as the master conspirator and the leader of the terrorist gang. It was found that he was instrumental in maintaining a communication

link with all the key members including members of the execution team throughout the conspiracy. The Call Data Records which showed the volume and the timing of the calls made from the mobile phone used by the appellant was found to indicate his leadership role in coordinating the attack. It was found that it was the applicant herein who had played a key role in identifying and procuring the Maruti Omni Van which was used by the assailants to transport themselves to and from the scene of attack. He was also found to have procured multiple mobile SIM cards and phones, some on the very day of the attack, to facilitate communication and coordination among the conspirators. It was found that he was instrumental in holding a series of post-incident conspiracy meetings aimed at providing safe havens for the attackers and obstructing the investigation. He was also found to have taken deliberate steps to eliminate evidence including disposing of mobile phones and SIM cards used during the conspiracy. It was further held that the applicant herein was not directly involved in the commission of the terrorist act and there is no evidence proving his membership in an unlawful assembly, therefore, he was acquitted of offences under Section 143 of the IPC and Section 16 of the UA(P) Act.

12. Sri. Ragenth Basant, the learned Senior counsel appearing for the applicant, submitted that the applicant had surrendered on 06.11.2015 and since then, he has been in custody. He has spent more than 9 years and 1 month,

most of which, as an undertrial prisoner and a portion after the finding of guilt by the learned Sessions Judge. The other accused who had faced trial was Sajil (A2), Shafeeq (A4) and Najeeb K.A. (A5), Azeez Odakkali (A6), Mohammed Rafi @ Rafi (A7), Subair T.P.@ Subu (A8), M.K.Noushad (A9), Mansoor (A10), P.P.Moideenkunju (A11) and P.M.Ayoob @ Ayoob (A12). Pending trial , A2 was released on bail on 15.09.2017, A4 on 24.09.2022, A5 on 23.07.2019 and thereafter on 01.02.2021, A6 on 06.06.2018, A7 on 31.01.2019, A8 on 27.03.2015, A9 on 07.12.2011, A10 on 11.04.2018, A11 on 06.03.2012 and A12 on 29.11.2015. According to the learned counsel, the applicant having been undergoing incarceration for almost a decade and the trial in respect of the 1st accused having commenced, there is no likelihood of the appeal filed by him being taken up in the near future. Relying on the observations in **Union of India v. K.A. Najeeb**[1], it was urged by the learned Senior counsel that 'gross delay' in the conclusion of proceedings would violate the right to life and personal liberty under Article 21 of the Constitution of India.

13. The learned Senior counsel would then submit that as many as 37 accused had faced trial for the very same allegations in S.C.No. 1 of 2013 (NIA) before the Special Court For NIA Cases, Ernakulam. Among the accused, A2, A3, A5, and A6 were the assailants, who along with the 1st accused, were present at

[1] [2021) 3 SCC 713]

the spot and had taken part in the incident. A7 was the Driver of the Omni Car, A8, A12, A27, A9, and A29 were the conspirators and A25, A34, and 36 were the accused who had harboured the offenders. The learned Sessions Judge, though a different Presiding Officer, had found the assailants guilty and for the offence under Section 307 r/w. Section 149 of the IPC, the accused were sentenced to undergo RI for 8 years, for the offence under Section 20 of the UA(P) Act, to undergo RI for 5 years, for the offence under Section 3 of the Explosive Substances Act, r/w. Section 120B of the IPC to undergo RI for 3 years, for the offence under Section 15 r/w. Section 16 of the UA(P) Act and for the offence under Section 16 r/w. Section 18 of the UA(P) Act to undergo RI for 8 years each. In the subsequent trial for the very same offence, the appellant was found guilty to undergo imprisonment for life under Section 20 of the UA(P) Act and for the offence under Section 302 r/w. Section 120B of the IPC and Section 3 of the Explosive Substances Act, he was sentenced to undergo RI for 10 years each in addition to the lesser sentence for the other offences. The learned counsel would point out that most of the accused in S.C.No. 01/2013(NIA) has undergone the sentence imposed and has since been released. The appeal preferred by the NIA for enhancement of the sentence has not been heard and disposed of to date and those appeals are pending. He would also point out that the applicant herein has in fact been found not guilty for the offence under Section 15 r/w.

Section 16 of the UA(P) Act and this, according to the learned counsel, would show the lesser role played by the appellant when compared to the other accused.

14. The learned Senior Counsel further contended that, even on merits, the appellant has a strong case. The appellant was labeled as the master conspirator primarily on the premise that he procured multiple mobile SIM cards and phones. However, the learned counsel argued that the appellant successfully highlighted significant discrepancies in the IMEI numbers of the devices allegedly procured by him. PW198, a prosecution witness, was cited to establish that the appellant had purchased a mobile phone from his shop in 2010. This witness produced a register containing records of purchases made by thousands of individuals. Despite this, he identified the appellant in court as the purchaser of a phone over 12 years ago. The learned counsel submitted that this evidence, which lacked reliability due to the passage of time and the volume of records, should have been rejected. Instead, the learned Sessions Judge relied on it to link the appellant to the mobile phone in question. Regarding the mobile phone with an IMEI number ending in '4210,' the learned counsel pointed out that the device was allegedly used by A8, who was acquitted by the trial court. Furthermore, the prosecution's stance on the usage of this phone was inconsistent, as it was previously alleged to have been used by A37 in the earlier

trial. Similarly, for the mobile phone with an IMEI number ending in '1688,' the counsel highlighted that A7, who was accused of using the device, was also acquitted by the trial court. These discrepancies, the learned counsel argued, undermine the prosecution's case and cast serious doubt on the allegations against the appellant.

15. The learned counsel would also refer to the judgment rendered by the Apex Court in **Kashmira Singh v. State of Punjab**[2] and it is urged that it would be a travesty of justice to keep a person in jail for a considerably long time if the likelihood of the appeal being taken up and heard within a reasonable time.

16. The submission of the learned counsel appearing for the applicant is stoutly opposed by the learned Assistant Solicitor General of India. It is submitted that the trial of the case was delayed as the applicant had absconded for years together. After having absconded, the applicant cannot be heard to contend that the trial was delayed on account of any lapses on the part of the prosecuting agency. It is urged that the learned Sessions Judge has correctly labelled the applicant herein as the master conspirator as it was he who was instrumental in obtaining crucial resources like mobile phones, SIM cards, and a Maruti Car and coordinated the attack by communicating with all involved to

[2] [(1977) 4 SCC 291]

facilitate the commission of the crime. It is further submitted that the sentence imposed by the Sessions Judge in the earlier case cannot have any bearing on the findings of the learned Judge who presided over this case. It is further submitted that while awarding life imprisonment for the offence under Section 20 of the UA(P) Act, the learned Sessions Judge has given cogent and convincing reasons. It is further submitted that seeking enhancement of sentence and against the order of acquittal, separate appeals are pending before this Court and the same is pending. The learned ASG has painstakingly taken us through the observations and findings of the learned Sessions Judge and it was urged that all relevant aspects of the matter were meticulously considered by the learned Sessions Judge while convicting the appellant. According to the learned ASG, the applicant is a religious fanatic, who along with his team of fanatics took the law into his own hands and ventured to deliver the sentence as per their interpretation of the religious text and executed the sentence by chopping off the right hand of the Professor, with the objective of striking terror in the minds of the people. Reliance is placed on the observations in **Preetpal Singh v. State of U.P**[3] and it is urged that while considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction

[3] (2020) 8 SCC 645

prima facie erroneous and it is not open to this Court to reassess and/or re-analyze the same evidence and take a different view. Much reliance is placed on **Omprakash Sahni v. Jai Shankar Chaudhary and Another**[4] and it is argued that in cases wherein the maximum punishment has been imposed considering the gravity of the crime, suspension of sentence can be imposed only in extremely rare cases.

17. We have carefully considered the submissions advanced and have carefully perused the judgment and the records made available.

18. It needs to be noted at the outset that the applicant herein surrendered on 6.11.2015. The trial commenced only on 23.06.2021 and the judgment was delivered on 12.7.2023. As of date, the applicant has been under incarceration for over 9 years. Another aspect that needs consideration is that some of the accused in the very same case, who faced trial during the first phase were convicted by the learned Sessions Judge for the offence under Section 20 of the UA(P) Act and they were sentenced to undergo RI for 5 years whereas the appellant, who face the very same allegation find himself sentenced to undergo life imprisonment. Similarly placed accused against whom identical allegations are there in the charge underwent their sentence and were released from prison. They are awaiting the judgment in the appeal filed by the NIA

[4] [(2023) 6 SCC 123]

seeking enhancement of sentence. We also find that the 1st accused, who was absconding all through, has now surrendered and his trial is slated to commence.

19. As the appeal is of the year 2013, and as appeals preferred by accused undergoing sentence are pending, it may not be possible to take up the appeal and hear the matter in the near future. Furthermore, the appeals seeking enhancement of sentence in the earlier case are also pending.

20. **Shivani Tyagi v. State of U.P. & Anr.**[5], the Apex Court, while considering the question of suspension of sentence had observed as under:

> 9. We have already referred to the mandate under Section 389 of the Cr.P.C that the order passed invoking the said provision should reflect the reason for coming to the conclusion that the convicts are entitled to suspend their sentence and consequential release on bail. In the decision in **State of Haryana v. Hasmat**[6], this Court held that in an appeal against conviction involving serious offence like murder punishable under Section 302 of the IPC, the prayer for suspension of sentence and grant of bail should be considered with reference to the relevant factors mentioned thereunder, though not exhaustively. On its perusal, we are of the opinion that factors like the nature of the offence held to have been committed, the manner of their commission, the gravity of the offence, and also the desirability of releasing the convict on bail are to be considered objectively and such consideration should reflect in the consequential order passed under Section 389 of the Cr.P.C. It is also relevant to state that the mere factum of sufferance of incarceration for a

[5] [2024] 5 S.C.R. 36
[6] (2004) 6 SCC 175

> particular period, in a case where life imprisonment is imposed, cannot be a reason for invocation of power under Section 389 of the Cr.PC without referring to the relevant factors. We say so because there cannot be any doubt with respect to the position that disposal of appeals against conviction, (especially in cases where life imprisonment is imposed for serious offences), within a short span of time may not be possible in view of the number of pending cases. In such circumstances if it is said that disregarding the other relevant factors and parameters for the exercise of power under Section 389 of the Cr. PC, likelihood of delay and incarceration for a particular period can be taken as a ground for suspension of sentence and to enlarge a convict on bail, then, in almost every such case, favourable invocation of said power would become inevitable. That certainly cannot be the legislative intention as can be seen from the phraseology in Section 389 of the Cr.PC. Such an interpretation would also go against public interest and social security. In such cases giving preference over appeals where sentence is suspended, in the matter of hearing or adopting such other methods making an early hearing possible could be resorted. We shall not be understood to have held that irrespective of inordinate delay in consideration of appeal and long incarceration undergone the power under the said provision cannot be invoked. In short, we are of the view that each case has to be examined on its own merits and based on the parameters, to find out whether the sentence imposed on the appellant(s) concerned should be suspended during the pendency of the appeal and the appellant(s) should be released on bail.

21. The Apex Court emphasized that the mere fact of incarceration for a particular period, especially in cases where life imprisonment is imposed, cannot, by itself, justify invoking the power under Section 389 of the Cr.PC without taking relevant factors into consideration. This is particularly true given

the reality that appeals against convictions, especially for serious offences resulting in life imprisonment, may not be disposed of swiftly due to the heavy backlog of cases. The Apex Court also reminded that the likelihood of delay and the period of incarceration undergone cannot alone be treated as standalone grounds for suspending sentences and granting bail. The Hon'ble Court clarified that the observations contained in the judgment should not be understood as a blanket prohibition against invoking the provision in instances of excessive delay or prolonged incarceration. It was also noted that each case must be assessed on its individual merits and within the framework of established parameters to determine whether the sentence should be suspended during the pendency of the appeal and whether the appellant should be granted bail.

22. In **Satender Kumar Antil v. CBI**,[7] the Apex Court had occasion to observe the principles that are to be borne in mind when an application for suspension is filed due to delay in disposal of the appeal considering the long period of incarceration undergone. It was observed as under:

> 55. Section 389 of the Code concerns itself with circumstances pending appeal leading to the release of the appellant on bail. The power exercisable under Section 389 is different from that of the one either under Section 437 or under Section 439 of the Code, pending trial. This is for the reason that "presumption of innocence" and "bail is the rule and jail is the exception" may not be available to the appellant who has suffered a conviction. A mere pendency of an appeal per se

[7] [(2022) 10 SCC 51]

would not be a factor.

56. A suspension of sentence is an act of keeping the sentence in abeyance, pending the final adjudication. Though delay in taking up the main appeal would certainly be a factor and the benefit available under Section 436-A would also be considered, the courts will have to see the relevant factors including the conviction rendered by the trial court. When it is so apparent that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the appellant.

57. Thus, we hold that the delay in taking up the main appeal or revision coupled with the benefit conferred under Section 436-A of the Code among other factors ought to be considered for a favourable release on bail.

The Apex Court observed that when the circumstances are such that the appeals are not likely to be taken up and disposed of, then the delay would certainly be a factor in favour of the appellant. It was also observed that the delay in taking up the main appeal or revision coupled with the benefit conferred under Section 436-A of the Code among other factors ought to be considered for a favourable release on bail.

23. Having considered the facts of the instant case in light of the principles laid down by the Apex Court, we are of the considered opinion that this is a fit case in which the powers under Section 389 of the Cr.P.C. can be invoked to suspend the sentence and grant bail to the applicant. The applicant has been undergoing incarceration, at the pre-conviction and post-conviction phases, for over 9 years. Furthermore, the fact that the accused facing the same

allegations were earlier imposed a lesser term of imprisonment and have been released after having undergone the sentence is a factor that cannot be ignored. Additionally, the appeals filed by the NIA against the findings of the learned Sessions Judge are being considered in separate appeals, which have not yet been taken up. There is also the likelihood of delay, as the prime accused has surrendered, and the learned Sessions Judge may have to take up the trial and dispose of it in accordance with the law and some of the original records may be required for that purpose. In view of these facts and circumstances, we are of the considered opinion that the sentence imposed on the applicant can be suspended pending the consideration of the appeal.

24. Resultantly, this application is allowed.

The sentence imposed on the applicant in S.C. No. 1 of 2015 on the files of the Special Court of Trial of NIA Cases, Kerala, Ernakulam, will stand suspended and the applicant shall be enlarged on bail, subject to the following terms and conditions:

a) The applicant herein, who is the 3rd accused in S.C.No. 1 of 2015 on the file of the Special Court for the Trial of NIA Cases, Ernakulam, shall execute a bond for a sum of Rs.100,000/-

(Rupees One Lakh only) with two solvent sureties each for the like amount to the satisfaction of the learned Sessions Judge.

b) He shall not leave the country without seeking permission from this Court.

c) He shall not interfere with the trial or influence the witnesses in the trial in respect of Sri. Savad (A1), in R.C.No. 1/2011/NIA/DLI in the original case.

d) He shall not commit any similar crime while on bail.

Sd/-
RAJA VIJAYARAGHAVAN V,
JUDGE

Sd/-
P.V. BALAKRISHNAN,
JUDGE

PS/12/12/24