IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

Friday, the 10th day of February 2023 / 21st Magha, 1944

CRL.M.APPL.NO.1/2022 IN CRL.A NO. 904 OF 2022

SC 2/2018 OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

PETITIONER/APPELLANT/1ST ACCUSED:

MIDLAJ @ ABU MIS'AB, AGED 32 YEARS , S/O MOIDEEN V.V, , 'BAITHUL FARZANA', KAIPPAKKAYIL, MUNDERI P.O, CHAKKARAKKAL POLICE STATION, KANNUR DISTRICT, KERALA, PIN - 670591

RESPONDENT/RESPONDENT/COMPLAINANT:

UNION OF INDIA , REPRESENTED BY NATIONAL INVESTIGATION AGENCY, KOCHI, PIN - 682031

Application praying that in the circumstances stated therein the High Court be pleased to suspend the execution of the sentence passed in SC 2/2018 (NIA) as per the judgment dt.15.07.2022 of the NIA Special court 1 ,Ernakulam pending disposal of the appeal and to release the petitioner on bail.

This Application coming on for orders upon perusing the application and upon hearing the arguments of M/S.V.T.RAGHUNATH, A.K.PREETHA, C.V.RAJALAKSHMI, Advocates for the petitioner and of SRI S.MANU,DEPUTY SOLICITOR GENERAL OF INDIA for the respondent, the court passed the following:

P.T.O

ALEXANDER THOMAS & SOPHY THOMAS, JJ.

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Crl.M.A.No. 1 of 2022 in Crl.Appeal No.904 of 2022
[Arising out of the impugned judgment in S.C.No. 2/2018/NIA on the file of the Special Court for Trial of NIA Cases, Ernakulam]

Crl.M.A.No. 2 of 2022 in Crl.Appeal No.994 of 2022
[Arising out of the impugned judgment in S.C.No. 2/2018/NIA on the file of the Special Court for Trial of NIA Cases, Ernakulam] &

Crl.M.A.No. 1 of 2022 in Crl.Appeal No.847 of 2022
[Arising out of the impugned judgment in S.C.No. 2/2018/NIA on the file of the Special Court for Trial of NIA Cases, Ernakulam]

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Dated this the 10th day of February, 2023

O R D E R

Sophy Thomas, J.

These applications are filed by A1, A2 and A5 respectively in SC No.2 of 2018/NIA on the file of Special Court for the Trial of NIA Cases, Ernakulam, who are the appellants in the above appeals, under Section 389(1) of Cr.P.C, seeking suspension of sentence and release on bail.

2. The applicants/appellants in Crl.Appeal Nos.904 of 2022 and 847 of 2022 (A1 and A5 in SC No.2 of 2018) were convicted under Sections 38 and 39 of the Unlawful Activities (Prevention)

Act (UAP Act) and Section 120B r/w Section 125 of IPC and Sections 38 and 39 of UAP Act, and sentenced to undergo rigorous imprisonment for seven years and fine under each count, which shall run concurrently.

3. The applicant/appellant in Crl.Appeal No.994 of 2022 (A2 in SC No.2 of 2018), was convicted under Section 38 of UAP Act and Section 120B r/w Section 125 of IPC and Sections 38 and 39 of UAP Act and sentenced to undergo rigorous imprisonment for six years and fine under each count, which shall run concurrently.

4. The applicants/appellants were arrested on 25.10.2017 and since then, they are in judicial custody. They were never released on bail during trial and they have completed more than five years in custody. The judgment of conviction was delivered on 15.07.2022. Since set off was allowed for the period of remand during trial, major portion of their sentence is already over, and the period remaining is less than two years.

5. According to the applicants/appellants, the prosecution failed to prove its case beyond reasonable doubt, and there is

every chance for them to succeed in the appeal. So, their prayer is to suspend the sentence and to release them on bail or else, the appeals may become infructuous.

6. The respondent-Union of India represented by National Investigation Agency, Kochi, filed separate objections in the Crl.M.As contending inter alia that the learned Special Court for the Trial of NIA cases convicted and sentenced the applicants/ appellants on analysing the entire facts, evidence and circumstances in detail, the approvers clearly spoke about the involvement of the applicants/appellants and their testimony was corroborated by other witnesses coupled with documentary and scientific evidence, the trial court, based on legal evidence, found that, the applicants/appellants, as part of a criminal conspiracy, and with the intention of joining ISIS, a proscribed terrorist organisation, tried to cross over to Syria to further its activities, there was sufficient evidence to conclude that the applicants/appellants associated themselves with the terrorist organisation ISIS etc. etc., and their petition to suspend the

sentence and to release them on bail is filed with dubious intention, as they want to further the activities of ISIS, by finishing their task before leaving the country to join the holy war of ISIS. According to the respondent, if the applicants/appellants are released on bail, there is every chance for them to abscond and to indulge in terrorist activities, as they are highly motivated and charged with ISIS ideology, and that they may go to ISIS prominent areas for conducting Hijra and to spread the violent ISIS ideology, and hence their applications are liable to be dismissed.

7. The brief facts of the case for the purpose of these applications can be stated as follows:

The DySP, Kannur, Sri.P.P Sadanandan, got reliable information that, several youngsters from northern Kerala had joined the proscribed terrorist organisation Islamic State of Iraq and Syria (ISIS)/Daish) and that they have migrated to Syria and Afghanistan to perform Hijra (migration) for indulging in violent jihad. On a secret enquiry conducted by him, it was revealed that accused Nos.1 to 6, named in the charge sheet, who belonged to

Kannur District, attempted to join ISIS/Daish for indulging in violent jihad, as part of waging war against Asiatic powers at peace with the Government of India. A1, A2 and A3 were intercepted by Turkish authorities while they were trying to cross over to Syria, and they were deported back to India. A4 was intercepted at the Mangalore Airport by the immigration authorities while he was going to Syria through UAE to perform Hijra. A5, one of the masterminds in teaching ISIS/Daish ideology in Kerala, indoctrinated and recruited youngsters into the proscribed terrorist organisation, besides motivating and sending them to the Islamic State announced by ISIS/Daish for waging war against the Asiatic powers at peace with the Government of India. A5 had booked tickets to exit India, but he cancelled the same on knowing that A4, his associate, was arrested by the immigration authorities at Mangalore Airport. There is unconfirmed report that A6 crossed over to Syria and was killed while indulging in violent jihad.

8. The DySP, Kannur suo motu registered Crime No.1010 of 2017 of Valapattanam Police Station in Kannur District, against

accused Nos.1 to 5 under Sections 38 and 39 of the UAP Act and arrested all of them on 25.10.2017. On 16.12.2017, NIA took over the investigation and re-registered the crime as RC-02/2017/NIA/KOC at the NIA Police Station, Kochi, as per orders of the Ministry of Home Affairs, Government of India. On completion of investigation, NIA filed charge sheet against AI Midlaj, A2 Abdul Razak, A5 Hamsa and A6 Abdul Khayyum for offences punishable under Sections 120B and 125 of IPC and Sections 38, 39 and 40 of the UAP Act. Accused Nos.3 and 4 were turned as approvers. Learned Special Court for the Trial of NIA cases took cognizance of the offences and the case was taken on file of that court as SC No.2 of 2018/NIA.

9. Trial was conducted by examining PWs 1 to 143, marking Exts.P1 to P236, Exts.D1 to D4 and identifying M.Os 1 to 23. After elaborate hearing advanced from either side, the learned Trial Judge convicted and sentenced the applicants/appellants vide impugned judgment dated 15.07.2022, and since death of A6 was not confirmed officially, his case was split up and re-filed.

10. Learned counsel Sri.Pranoy K.Kottaram, appearing for the applicant/appellant in Crl.Appeal No.994 of 2022(A2 in SC No.2 of 2018) would contend that, the applicant is in judicial custody for more than five years, and he was convicted only under Section 38 of the UAP Act and Section 120B r/w Section 125 of IPC and Sections 38 and 39 of UAP Act, and his substantive sentence is only six years of rigorous imprisonment, as the imprisonment under different counts will have to run concurrently. According to him, his period of sentence will be over within one year, and if the appeal is not heard and disposed of within that period, it will become infructuous.

11. Learned counsel for the applicant/appellant in Crl.Appeal No.904 of 2022, Sri.V.T Raghunath, and learned counsel for the applicant/appellant in Crl.Appeal No.847 of 2022, Sri. K.N Abhilash, also would contend that the applicants are in judicial custody for more than five years, and they have also completed more than 80% of the period of their sentence. According to them, the appeal also to be construed as a facet of trial when it comes to the

consideration of bail on suspension of sentence, applying the benefit available under Section 436A of Cr.P.C. They further contended that the above appeals are of the year 2022 and the records are voluminous, and so the appeals are not likely to be taken up and disposed of immediately, which will render the appeals infructuous. Moreover, the evidence available against them is feeble and not sufficient to enter upon a conviction. According to them, there is fair chance for them to succeed in the appeal. Sections 38 and 39 of the UAP Act prescribes punishment of imprisonment for a term not exceeding ten years or with fine or with both. So, they would contend that, the offences alleged against them under the UAP Act were punishable even with fine only, without imposing any substantive sentence. For all these grounds, they would canvass for suspension of their sentence and to release them on bail.

12. In ***Preet Pal Singh*** *vs.* ***State of Uttar Pradesh and another*** [(2020) 8 SCC 645], the Apex Court held that, *'there is a difference between grant of bail under Section 439 Cr.PC in case of*

pre-trial arrest and suspension of sentence under Section 389 Cr.PC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. [(2018) 3 SCC 22]. However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC".

13. In ***Kalyan Chandra Sarkar*** *vs.* ***Rajesh @ Pappu Yadav & another*** [(2004) 7 SCC 528], the Hon'ble Supreme Court was pleased to observe that, the discretion under Section 389 of Cr.PC has to be exercised judicially and not in a casual manner. Even though detailed examination of the merits of the case may not be required while considering the application, exercise of jurisdiction has to be based on well settled principles and in a judicious manner and not as a matter of course. As the discretion under Section 389(1) is to be exercised judicially, the appellate court is obliged to consider whether any cogent ground has been disclosed giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal. Though detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders, reasons for prima facie concluding why bail was being granted, particularly where the accused is charged of having committed a serious offence.

14. In ***Preet Pal Singh's case*** cited supra, the Apex Court further observed that, in 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 prima facie erroneous. Where there is evidence, that has been considered by the trial court, it is not open for a court considering application under Section 389 of Cr.P.C, to re-assess and/or re-analyse the same evidence and take a different view, to suspend the execution of sentence and release the convict on bail.

15. The nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence and its social impact, are all to be looked into while considering an application for suspension of sentence and to release the accused on bail.

16. The prosecution case is that the accused persons, six in number, attempted to join the proscribed terrorist outfit ISIS/Daish for indulging in violent jihad as part of waging war against Asiatic powers at peace with the Government of India. A1 and A2 left

India and proceeded to cross over to Syria. A1 and A2 were arrested by Turkish authorities, and A5, though booked ticket to exit India, on knowing that A4 was arrested at Mangalore Airport, cancelled his ticket. So, according to the prosecution, there is clear and cogent evidence to prove the conspiracy and also to prove the fact that all of them wanted to cross over to Syria for indulging in violent jihad, following the call of ISIS. But, according to the applicants/appellants, there is nothing to prove their conspiracy, or membership or involvement in ISIS or any other terrorist outfit. Moreover, there is nothing to show that they did anything furthering the activities of the terrorist organisation.

17. Terrorism is an evil affecting the life and liberty of people. It affects the growth of the nation in all respects. In fact, no religion propagates terrorism or hatred. But, unfortunately, some fanatics or religious fundamentalists have distorted the views of religion, for spreading messages of terrorism and hatred, without realising the amount of damage it is doing to the society as well as to the country as a whole. Innocent youth attracted by the

call of terrorist organisations fall prey to violence and anti national activities, destroying the tranquility in society, unmindful of the freedom, liberty, and safety of their fellow beings, and the integrity of the nation. Here the allegation is that, the applicants/appellants wanted to indulge in violent jihad, following the call of ISIS, and they proceeded to perform Hijra for waging war against Asiatic powers like Syria, which are at peace with the Government of India. So, the nature of the offence alleged against the applicants/appellants are very serious in nature, and we have to consider the merits of their applications, prima facie to see whether there are strong compelling reasons for grant of bail, especially when the presumption of innocence has vanished, as they stand convicted by the impugned judgment.

18. Going by the guidelines given by the Apex Court in ***Preet Pal Singh's case*** and ***Kalyan Chandra Sarkar's case*** cited supra, while suspending the sentence pending appeal and releasing the convict on bail, discretion has to be exercised judicially and not in a casual manner. Though detailed examination of merits of the

case may not be required, exercise of jurisdiction has to be based on well-settled principles and in a judicious manner and not as a matter of course. Though detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding, why bail was being granted particularly where the accused is charged of having committed a serious offence. In considering an application for suspension of sentence, the appellate court has to examine if there is any patent illegality in the order of conviction, which renders the order prima facie erroneous. Where there is evidence that has been considered by the trial court, it is not open to a court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

19. In this backdrop let us have a glance of the important materials discussed by the trial court which entailed in conviction of the applicants/appellants.

20. Admittedly, the first accused was arrested by Turkish authorities from Istanbul. The evidence of PWs 1, 3, 14 and 26 supported the fact that, A1 while trying to cross over to Syria along with A3 (who subsequently turned approver, and examined as PW1), was arrested by the Turkish authorities. In 313 examination, the first accused himself admitted that he went to Istanbul, but it was under the instigation of PW1 that he could arrange him a job in European countries, and he had entrusted his passport also with him. It has come out in evidence that, PWs 1 and 14 were ardent believers, workers and supporters of ISIS, a proscribed terrorist organisation, and they were motivating innocent persons to join ISIS and that fact is admitted by A1. The trial court, after detailed discussion of the evidence, came to the conclusion, as seen in para 348 of the impugned judgment, that A1 had close acquaintance and contacts with A7 Mohammed Shajil, PW1 Rashid, PW14 Afsal, PW126 and Sri.Shajahan, and there was evidence to show that, they met together on many occasions and discussed about ISIS and also about performing Hijra to Syria for joining ISIS. On

14.10.2016, A1 exited India from Mangalore along with A7 Shajil. On the eve of his departure, a party was conducted in the house of Sri.Shajil, where A1 and A7 invited others to come and join ISIS. From Tehran, A1 and A7 joined Shajahan and PW1 Rashid. Thereafter, they moved together to Istanbul in Turkey where they met Mr.Abdul Manauf and Mr.Fajid and they stayed together for more than one month. In January 2017, the Turkish authorities deported A1 and PW1 to India and they reached Mumbai on 20.01.2017, and via Bangalore they reached Kannur on 21.01.2017. Thereafter, Sri.Shajahan, who was also deported from Turkey, met A1, PW1 and PW14 and informed that he was again preparing for Hijra to Syria. A1, PW14 and A6 met together and A6 decided to perform Hijra along with Sri.Shajahan. A2 also decided to perform Hijra along with A6. A1 and PW1 came to Kannur Railway Station on 18.04.2017 to see off A2 and A6.

21. Now coming to the second accused, the evidence of PW67, who is the wife of Sri.Shajahan, PW74, wife of A2 himself, and PW95 a relative and business partner of A2, were sufficient to

show that A2 had reached upto Turkey, and Sri.Shajahan, who was arrested at Delhi Airport, was also with him, and later Sri.Shajahan pleaded guilty to the charge. PW95 gave evidence to the effect that, A2 disclosed his intention to go to Syria for joining ISIS, and before he left, he had executed two agreements as Exts.P128 and P129 for PW95 to conduct business and to pay Rs.5,000/- per month to the wife of A2. He conducted business for some time, and thereafter he stopped the business. The trial court found that the evidence given by PW95 was trustworthy and there was nothing to discredit him. In para 362 of the impugned judgment, the trial court found that A2 maintained close contacts with A6 and PW4 from February to April, 2017. He had discussions with A1, A6 and PW14 regarding their plan to perform Hijra to Syria to join ISIS. A2 and A6 together decided to perform Hijra to Syria, to be part of the holy war against non believers and Governments who stood against Islamic Caliphate. On 18.04.2017, A2 and A6 left Kozhikode and A2 was arrested by the Turkish authorities along with Sri.Shajahan and they reached Delhi Airport by same flight on

01.07.2017 and Sri.Shajahan was arrested by Delhi police. A6 crossed over to Syria, joined ISIS and it is believed that he was killed while waging war against Syria.

22. Regarding the involvement of the fifth accused in the offences alleged, though there is nothing to show that he left Kerala, the learned trial court found that, knowing about the arrest of A4 in Mangalapuram on his way to Syria, A5 cancelled his ticket, though he also wanted to perform Hijra by crossing over to Syria. From para 406 of the impugned judgment, it could be gathered that the learned trial judge was satisfied with the evidence to find that A5 was one of the masterminds in indoctrinating youngsters with ISIS ideology and he was motivating and sending youngsters to Islamic State announced by ISIS for waging war against Asiatic powers like Syria, which were at peace with the Government of India. In paragraph 407 of the impugned judgment, the trial court found that there was overwhelming evidence to prove that A5 Hamsa preached and propagated Jihadist ideology from 2008 itself and he continued the same throughout. Further, when ISIS

declared caliphate in 2014, he associated himself with ISIS and canvassed support for this organisation to fight against the Syrian Government as well as non- believers. So, even if he had not left Kerala, his role was manifestly clear from the available evidence.

23. So, the impugned judgment gives clear finding as to the conspiracy of the applicants/appellants and their intention to perform Hijra to Syria for indulging in Jihad. No patent infirmity is there in the order of conviction which would render it prima facie erroneous. Moreover, considering the nature and gravity of the offences alleged, which are affecting the integrity of the nation and security and liberty of its citizens, the discretion has to be exercised with more care and caution, and not in a casual manner. Prima facie nothing is there, cogent enough to raise substantial doubts regarding the validity of the conviction.

24. Learned counsel for the applicants/appellants invited our attention to the fact that, A2 was not convicted under Section 39 of the UAP Act and he has to suffer substantive sentence of six years only out of which he had already undergone five years and two

months. A1 and A5 who were convicted both under Sections 38 and 39 of the UAP Act have to undergo substantive sentence of seven years, out of which they had already undergone imprisonment of five years and two months. So, according to them, if there is delay in hearing and disposing the appeals, the appeals itself may become infructuous.

25. In ***Satender Kumar Antil*** *vs.* ***Central Bureau of Investigation*** [(2022) 10 SCC 51], the Apex Court observed that, the delay in taking up the main appeal coupled with the benefit conferred under Section 436A of Cr.P.C among other factors ought to be considered, for releasing the applicants/appellants on bail. Moreover, where an appeal is pending for a longer time, to bring it under Section 436A, the period of incarceration in all forms may have to be reckoned. It is true that an appeal or revision could be construed as a facet of trial, when it comes to the consideration of bail on suspension of sentence.

26. The applicants/appellants were arrested on 25.10.2017 and they were under remand till the date of conviction, and they

were granted set off by the trial court. They are eligible to set off the period of remand, against the period of sentence, and so, less than one year is remaining for A2, and less than two years is remaining for A1 and A5, to complete the period of sentence. Applying the principle under Section 436A of Cr.P.C, normally, the applicants/appellants might have been eligible for suspension of sentence to get them released on bail under Section 389(1) of Cr.P.C. But, the available facts and circumstances proved before the trial court are sufficient to hold that, accepting the call of ISIS, a proscribed terrorist organisation, the appellants wanted to perform Hijra to Syria for indulging in violent jihad and some of them, on their way to Syria, were arrested by the Turkish authorities, and deported to India. A5 had booked tickets to go to Syria with the same ideology, but, on knowing that A4 was arrested at Mangalore, he cancelled his tickets. Moreover, A5 was indoctrinating and recruiting youngsters to the proscribed terrorist organisation, ISIS, for waging war against Syria, which was at peace with the Government of India. So, the applicants/appellants

were acting against the security and integrity of the nation, and also against the liberty and freedom of the citizens. So, their applications are to be considered, with all its seriousness and not in a casual manner.

27. In paragraph 5 of the judgment in ***Satender Kumar Antil's case*** cited supra, the Apex Court made it clear that all the discussions along with the directions in that case, were meant to act as guidelines, as each case pertaining to a bail application is obviously to be decided on its own merits. Here is a case where the applicants/appellants acted against the interest of the nation as they wanted to wage war against Syria, an Asiatic power at peace with the Government of India. So, even if the applicants/appellants have undergone major portion of the sentence imposed on them, it is not safe to release them on bail, as we do not know whether they still entertain the idea of performing Hijra to Syria for indulging in violent jihad.

28. Learned Dy.Solicitor General of India Sri.S.Manu contended that, the applicants/appellants have filed these

applications with dubious intention and the purpose of their bail application is to finish their tasks within the country, to further the activities of ISIS, before leaving the country, to perform Hijra to Syria. We do not know whether the applicants/appellants are having sleeping volcanoes of terrorism in their mind to indulge in violent jihad.

29. The purpose of punishment is to reform and to rehabilitate the criminal. It will have the effect of cleaning and purging the sin, for which they have to serve the sentence.

30. Considering the gravity of the offence prima facie proved against the applicants/appellants, though they have undergone major portion of their sentence, we are not inclined to suspend their sentence and to release them on bail at present. These appeals are of the year 2022, admitted on 14.09.2022 and 06.10.2022. The appellants will be at liberty to move applications for early hearing of the main appeals, which would then be considered.

31. It is clarified that the above findings and observations are

made purely for the purpose of the above applications, and it will not cause any prejudice to the contentions of the appellants in the main appeals, and it will not have any bearing on the merits of the appeals.

With these observations and directions, above Crl.M.As stand dismissed.

Sd/-

ALEXANDER THOMAS
JUDGE

Sd/-

SOPHY THOMAS
JUDGE

smp