

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 27TH DAY OF NOVEMBER 2019 / 6TH AGRAHAYANA, 1941

CRL.A.No.1300 OF 2019

AGAINST THE ORDER DATED 6.11.2019 IN CRL.MP NO.1789/2019 OF
SESSIONS COURT,KOZHIKODE

CRIME NO.507/2019 OF PANTHEERANKAVU POLICE STATION

APPELLANT/2ND PETITIONER/2ND ACCUSED (UNDER CUSTODY) :

THWAHA FASAL,AGED 24,
S/O. ABOOBACKER, KOTTUMMAL, MOORKHANAD,
PANTHEERNAKVU P.O., KOZHIKODE

BY ADVS.
SRI.K.S.MADHUSOODANAN
SRI.THUSHAR NIRMAL SARATHY
SRI.M.M.VINOD KUMAR
SRI.P.K.RAKESH KUMAR
SRI.K.S.MIZVER
SRI.M.J.KIRANKUMAR

RESPONDENTS/COMPLAINANT & FORMAL PARTY:

- 1 STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031
- 2 ASSISTANT COMMISSIONER OF POLICE (SOUTH) ,
KOZHIKODE CITY - PIN-673 001
- 3 STATION HOUSE OFFICER,PANTHEERANKAVU POLICE STATION,
KOZHIKODE PIN-673019

R1 TO R3 BY SRI.K.V.SOHAN, STATE ATTORNEY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2019,
ALONG WITH CRL.A.1301/2019, THE COURT ON 27.11.2019 DELIVERED THE
FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

WEDNESDAY, THE 27TH DAY OF NOVEMBER 2019/6TH AGRAHAYANA, 1941

CRL.A.No.1301 OF 2019

AGAINST THE ORDER DATED 6.11.2019 IN CRL.MP NO.1789/2019 OF
SESSIONS COURT,KOZHIKODE

CRIME NO.507/2019 OF PANTHEERANKAVU POLICE STATION

APPELLANT/ACCUSED NO.1:

ALLAN SHUAIB,AGED 20 YEARS
S/O.SABITHA SEKHAR, MANIPURI HOUSE,
PALAT NAGAR, THIRUVANNUR POST, KOZHIKODE.

BY ADVS.
SRI.S.RAJEEV
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.D.FEROZE
SRI.K.ANAND (A-1921)

RESPONDENT/STATE:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM - 682 031 (CRIME NO.507/19 OF
PANTHEERANKAVU POLICE STATION, KOZHIKODE
DISTRICT) .

BY SRI.K.V.SOHAN, STATE ATTORNEY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-11-2019,
ALONG WITH CRL.A.1300/2019, THE COURT ON 27.11.2019 DELIVERED THE
FOLLOWING:

“C.R.”

A.HARIPRASAD & N.ANIL KUMAR, JJ.

Crl.Appeal Nos.1300 & 1301 of 2019

Dated this the 27th day of November, 2019

COMMON JUDGMENT

Hariprasad, J.

Appellants are the accused in Patheerankavu Police Station Crime No.507 of 2019 registered under Sections 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 (in short, "UA(P) Act").

2. Gist of the prosecution allegations is thus: On 01.11.2019 Sub Inspector of Police, Pantheerankavu Police Station along with his party started patrolling duty at 17.00 hours. At about 18.45 hours, while passing through Perumanna - Parammal road, they reached near Medi Care Laboratory, adjacent to Parammal football turf. They found three persons suspiciously standing on a dark shop varandha. Defacto complainant found them clearly on flashing a torch light. On seeing the police party, one person took to his heels and could not be apprehended. Police officers restrained the other two persons, who identified themselves by revealing their names and addresses. Defacto complainant noticed that the accused persons were in a perplexed state

and they did not properly account for their presence at the place. 1st accused was possessing a shoulder bag. When the bag was searched, the defacto complainant found certain booklets and pamphlets/leaflets indicating their association with Communist Party of India (Maoist), undisputedly a banned terrorist organisation figuring in the first schedule to the UA(P) Act. At 19.00 hours, the accused were arrested and the objectionable materials along with a motor bike were seized. At 19.30 hours, the crime was registered as above.

3. Seizure mahazar prepared on 01.11.2019 shows the details of the reading materials recovered from the possession of the 1st accused. The appellants moved for bail before the Sessions Judge, Kozhikode. Their bail application was dismissed by the learned Sessions Judge finding prima facie that there are materials against the appellants to proceed with an investigation under Section 38 of the UA(P) Act. Learned Sessions Judge found that it is not fit to release the appellants on bail at that stage of the investigation. Feeling aggrieved, the appellants preferred these appeals.

4. Heard Sri.K.S.Madhusoodanan and Sri.S.Rajeev, learned counsel for the appellants and Sri.K.V.Sohan, learned State Attorney. We have carefully perused the case diary produced by the State Attorney and also a memo filed by him dated 14.11.2019, along with a report by the Assistant Commissioner of Police, South, Kozhikode City, dated 13.11.2019.

5. Impugned order shows that the learned Sessions Judge has treated the bail application as one under Section 439 of the Code of Criminal Procedure, 1973 (in short, "Cr.P.C."). However, these appeals are filed by invoking Section 21(4) of the National Investigation Agency Act, 2008 (in short, "NIA Act"). In the light of the pronouncement by a co-ordinate Bench of this Court in **Sahadath Hossain v. State of Kerala (2017(1) KHC 156)** we find no defect in preferring an appeal against the dismissal of the bail plea. Reasons set out in paragraph 7 of the said judgment, quoted below, will justify filing the appeals before this Court.

"7. Therefore it is clear that, with respect to an offence under the UA(P) Act, which is specified in the schedule of NIA Act, the Sessions Court is only exercising the jurisdiction which is conferred on the Special Court and that such Court is vested with all the powers conferred by the NIA Act and it is bound to follow the procedure provided under the relevant chapter of the NIA Act. Hence, even though the offence is not tried by the Special Court, the Sessions Court is exercising only the jurisdiction of the Special Court, as conferred by the NIA Act. Therefore, for all practical purposes, the Sessions Court which is trying an offence under the UA(P) Act, which is a scheduled offence, need to be deemed as a Special Court, irrespective of whether the investigation is conducted by the NIA or not. Therefore, this Court is of the considered opinion that, any order passed by the Sessions Court granting or refusing bail with respect to any offence coming under the UA(P) Act, which is included in the Schedule of

the NIA Act, is appealable to the High Court under S.21(4) of the NIA Act and in such cases, the application for a regular bail under S.439 Cr.P.C is not maintainable before the High Court.”

6. Sri. K.S.Madhusoodanan contended that in the First Information Statement (FIS) there is absolutely no reason stated for arresting the appellants. According to him, possession of certain readable materials ostensibly published by someone owing allegiance to Communist Party of India (Maoist) organisation, cannot by itself create any offence under the UA(P) Act. It is also urged that the 1st appellant is a law student and the 2nd appellant is a journalism student. Forcefully it is argued by Sri.K.S.Madhusoodanan that at their young age students are expected to read a lot and those who read some literature leaning towards left wing shall not be labelled as terrorists indulging in anti-national activities. Sri.S.Rajeev would contend that during the search conducted in the house of the 1st accused, except a mobile phone, nothing incriminatory in nature could be found out. According to them, the arrest itself is illegal.

7. In order to bring home that point, various aspects under Section 43A of the UA(P) Act have been put forward. For clarity, we shall extract the Section:

“Power to arrest, search, etc.- Any officer of the Designated Authority empowered in this behalf, by general or special order of the Central Government or the State Government, as the case may be, knowing of a design to

commit any offence under this Act or has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or from any document, article or any other thing which may furnish evidence of the commission of such offence or from any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under this Chapter is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him to arrest such a person or search such building, conveyance or place whether by day or by night or himself arrest such a person or search such a building, conveyance or place.”

It is contended by the learned counsel for the appellants that there is no material on record to show that the defacto complainant (Sub Inspector of Police) is an officer empowered by the Designated Authority under the UA(P) Act to effect an arrest. Section 2(e) of the UA(P) Act defines “Designated Authority” as follows:

“Designated Authority” means such officer of the Central Government not below the rank of Joint Secretary to that Government, or such officer of the State Government not below the rank of Secretary to that Government, as the case may be, as may be specified by the Central Government or the State Government, by notification published in the Official Gazette.”

8. Learned State Attorney would reply that the Home Secretary

of the State Government is the Designated Authority and the detecting officer is empowered in this behalf. Nevertheless, no document is produced before us to pronounce on this aspect. Indisputable is the legal position that a mere illegality or irregularity in the arrest ipso facto will not vitiate the investigation, especially when Section 14 of the UA(P) Act says that an offence punishable under the Act shall be cognizable and further Section 43C interlinks the UA(P) Act with Cr.P.C. by stating that the provisions in Cr.P.C. shall apply, insofar as they are not inconsistent with the provisions of the Act, to all arrests, searches and seizures made under the UA(P) Act. At any rate, at this stage of the matter, we cannot simply infer any prejudice caused to the accused in this regard. Section 43(c) of the UA(P) Act mandates that the investigation into the offences falling under Chapters IV and VI shall be done by a police officer of the rank of a Deputy Superintendent of Police or of an equivalent rank, which is satisfied in this case.

9. Let us look into the provisions of law with which the appellants are charged. As mentioned earlier, the offences alleged against them fall under Sections 20, 38 and 39 of the UA(P) Act. Those Sections are quoted hereunder:

“20. Punishment for being member of terrorist gang or organisation.- Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall

also be liable to fine.

38. Offence relating to membership of a terrorist organisation.-(1) *A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:*

PROVIDED that this sub-section shall not apply where the person charged is able to prove-

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the First Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

39. Offence relating to support given to a terrorist organisation.- (1) *A person commits the offence relating to support given to a terrorist organisation, -*

(a) who, with intention to further the activity of a terrorist organisation, -

(i) invites support for the terrorist organisation; and

(ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a

terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is-

(i) to support the terrorist organisation; or
(ii) to further the activity of the terrorist organisation; or

(iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both."

10. Section 20 of the UA(P) Act is included in Chapter IV and Sections 38 and 39 fall within Chapter VI. Chapter IV deals with punishment for terrorist activities. "Terrorist act" is defined in Section 2(k) as follows:

"terrorist act" has the meaning assigned to it in section 15, and the expressions "terrorism" and "terrorist" shall be construed accordingly"

11. Chapter VI deals with terrorist organisations and individuals. The expression "terrorist organisation" is defined in Section 2(m) of the UA(P) Act in the following lines:

"terrorist organisation" means an organisation listed in the First Schedule or an organisation operating under the

same name as an organisation so listed”

12. On a plain reading of Section 20 of the UA(P) Act, it can be seen that punishment under the Section can be awarded only when it is proved that the accused is a member of a terrorist gang or terrorist organisation. At this stage of the investigation, it may be too much to insist on proof to show that the accused persons are members of a banned organisation, keeping in mind the fact that normally the activities of a banned organisation will be subterranean. Therefore, the investigation has to progress to reveal their complicity, if any.

13. Section 38, on the other hand, deals with punishment of a person, who associates himself or professes to be associated with a terrorist organisation with an intention to further its activities, thereby commits an offence relating to membership of a terrorist organisation. Proviso to that Section may not be relevant at this stage of the case. It is evident that a person knowingly or consciously associating with a terrorist organisation and a person who professes to be associated with a terrorist organisation will be punishable, if he does so with an intention to further its activities, as he commits an offence relating to membership of a terrorist organisation. We are inclined to think that the words “associated” and “professes to be associated” occurring in Section 38 of the UA(P) Act are employed in a broad sense and with a specific purpose. Anybody indulging in such activities will normally do so clandestinely or surreptitiously. Contextually therefore, not only overt

actions, but covert actions may also at times satisfy the ingredients of the Section, provided they were done knowingly or consciously for the objectives mentioned in the Section. At this inceptive stage of the investigation, the State Attorney contends, it may be difficult for the investigating agency to place all the materials before the court to satisfy the ingredients of the offence, particularly when the materials recovered from the accused contain electronic gadgets and writings in a code language. We find merit in this submission. For establishing these aspects, we are of the definite view, the investigation has to progress.

14. Section 39 of the UA(P) Act deals with punishment for support given to a terrorist organisation. On a reading of the Section, it will be clear that the support must be intentional and it should be for furtherance of the activity of a terrorist organisation.

15. Learned counsel for the appellants contended that with the materials on record, the Sessions Court wrongly took a view that an offence punishable under Section 38 of the UA(P) Act was made out. Learned State Attorney took exception to this observation in the impugned order and argued that since the investigation is at a nascent stage, no such observation should have been made. We neither affirm nor differ from the view taken by the learned Sessions Judge regarding the nature of offence prima facie revealed at this stage against the appellants. It may be too early to pronounce on the culpability of the accused and if so, under which provision of law.

16. What is to be considered at this stage is clear from Section 43D of the UA(P) Act. It reads as follows:

“Modified application of certain provisions of the Code.- (1) *Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly.*

(2) *Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2), -*

(a) *the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and*

(b) *after the proviso, the following provisos shall be inserted, namely:-*

PROVIDED FURTHER that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

PROVIDED ALSO that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the

delay, if any, for requesting such police custody.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that-

(a) the reference in sub-section (1) thereof-

(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government",

(ii) to "order of the State Government" shall be construed as a reference to order of the Central Government or the State Government, as the case may be", and

(b) the reference in sub-section (2) thereof, to "the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be."

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

PROVIDED that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable

grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

For our present purpose, Sub-section (5) of Section 43D will be relevant.

It says that notwithstanding anything contained in the Cr.P.C., no person accused of an offence punishable under Chapters IV and VI of the UA(P) Act shall, if in custody, be released on bail unless the public prosecutor has been given an opportunity of being heard on the bail application. Proviso thereto further shows that such an accused person shall not be released on bail, if the court, on a perusal of the case diary or the report made under Section 173 Cr.P.C. (which we are not concerned at this stage), is of the opinion that there are reasonable grounds for believing that the accusation against such a person is prima facie true. It is therefore amply clear that what is to be looked for, from the documents in the case diary produced, is whether there is any material to prima facie satisfy the court that the accusation against the accused is true. It is also clearly stated in Sub-section (6) that the restrictions on granting

bail under Sub-section (5) are in addition to the restrictions under the Cr.P.C. or any other law for the time being in force for granting bail.

17. In the light of the above provisions, we shall consider the material averments in the appeal memoranda, the case diary and also the material documents produced before this Court as per memo dated 14.11.2019.

18. According to the appellants, there is no material collected by the investigating agency from their possession to implicate them in serious offences under the UA(P) Act. 1st appellant contended that barring seizure of a mobile phone, no objectionable material was seized from his possession. Both the appellants are persons without any bad antecedents. 2nd appellant contended that the Sessions Court went wrong in denying bail on the assumption that the materials would prima facie indicate an offence punishable under Section 38 of the UA(P) Act when the court itself found no material to prosecute the appellants under Sections 20 and 39 of the said Act.

19. We are of the definite view that at this stage of the case, neither the Sessions Judge/Special Judge nor this Court is expected to find from the materials placed before the court as to what is/are the precise offence(s) made out from the records. Such an adjudication can be done only at the trial and, in any case, it cannot be done at this stage. We shall only embark on a consideration as to whether prima facie any offence requiring an investigation, by keeping the accused in custody, is

made out or not and also if the materials produced prima facie reveal their complicity in the offences alleged, could their release on bail hamper in any way the progression of investigation. Therefore, we shall closely examine the records to find out whether a prima facie case is made out against the appellants.

20. On a close scrutiny of the materials in the case diary, it can be seen that a body search of the 1st accused revealed his conscious possession of certain literature/booklets purported to be professing Communist Party of India (Maoist) ideology. In this context, we have to consider the arguments raised by the learned counsel for the appellants that mere possession of such leaflets/pamphlets ipso facto will not be sufficient for branding the accused as members of a banned organisation. True, something more has to be established to name them as members of such an organisation. A person, out of curiosity or lust for knowledge, may possess such reading materials. But, nature of the materials revealed from the seizure mahazar dated 01.11.2019 and search list would prima facie show that they cannot be lightly brushed aside as innocent possessions. According to the learned State Attorney, the materials recovered from the 1st accused would reveal details about the organisational set up of Communist Party of India (Maoist) and also their *modes operandi* in conducting meetings and disseminating Maoist ideology. It is also mentioned in the case diary that certain printed matters challenging the unity and integrity of the Union of India are also

recovered from their possession. According to the report, recovery of materials revealing very recent activities of Maoist organisation indicate the accused's close link to the outfit. The investigating officer in his report dated 13.11.2019 has extracted in detail the contents of certain objectionable materials recovered from the possession of the 1st accused. The materials collectively indicate that a person possessing them prima facie could be a close associate of the organisation because secret functional details and operational tactics adopted by them could be seen from some literature, which normally may not be accessible to an outsider. According to the report, printed materials exhorting people to wage war against the State Government for killing 4 Communist Party of India (Maoist) ideologists were recovered. Besides, materials supporting dissensions and disruptive forces in Jammu and Kashmir were also allegedly recovered. It is also reported by the investigating officer that the mobile phone recovered from the 1st accused's house was sent for forensic analysis. At this initial stage, it revealed materials which are per se against national interest. It is also alleged that various photographs pertaining to insurgency activities in Jammu and Kashmir are also seen in the 1st accused's mobile phone.

21. It is pointed out by the investigating officer that in the memory card seized from the house of the 2nd accused also they found certain objectionable materials. According to the report, the investigating officer could not get certain files stored in the memory card in PDF

format opened and some of them were found to be deleted. According to him, these matters are to be probed further.

22. Submission by the learned counsel for the appellants, that the accused persons, if at all found to be in possession of certain materials, cannot be regarded as associates, workers or sympathizers of Communist Party of India (Maoist) and they can only be regarded as inquisitive students, cannot prima facie be accepted in the light of the materials produced before us.

23. Learned State Attorney submitted that the third person found in the company of the appellants at the time of detection of the offence and who fled before apprehension has been identified as Usman, S/o.Abubacker, aged 40, Melethil House, Odompatta, Pandikkad, Malappuram District. He is an accused involved in ten cases, out of which five crimes, registered in various police stations, are offences under UA(P) Act along with offences under the Indian Penal Code, 1860 (in short, "IPC") and Prevention of Damage to Public Property Act, 1984 (in short, "PDPP Act"). He is involved in five other cases too wherein offences under IPC and PDPP Act are charged. Presence of the accused persons in the company of such a person, according to the learned State Attorney, is a clear indication of their linkage to the banned organisation.

24. Sri.K.S.Madhusoodanan relied on **Arup Bhuyan v. State of Assam ((2011)3 SCC 377)** and **Indra Das v. State of Assam ((2011) 3**

SCC 380) to urge a proposition that being a member of a banned organisation will not make a person a criminal unless he resorts to or incites people to violence or create public disorder by violence or incitement to violence. Both the decisions were rendered by the Supreme Court in the context of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short, "TADA"). On a perusal of the decisions, we find absolutely no similarity in the facts and circumstances therein to this case. In **Indra Das's** case (supra), the Supreme Court considered the application of the provisions of TADA and UA(P) Act in a case where the accused was convicted only relying on his alleged confession made to a police officer. In the case on hand, we are at an early stage of investigation. This aspect makes a considerable difference in the appreciation of materials on record because we are only expected to see whether there is any prima facie material in the case diary insinuating the appellants.

25. Sri.S.Rajeev relied on a single Judge's decision in **Shyam Balakrishnan v. State of Kerala and others (2015(3) KHC 84)**, which, after taking up in an intra court appeal, was decided by a Division Bench in **State of Kerala and others v. Shyam Balakrishnan and others (2019(3) KHC 963)**. That was a case where an individual was arrested on a mere suspicion that he had links with Maoist organisation. It is seen that he was taken to custody and search was conducted on his body and in his house. Later, police found that there was no evidence to

connect him with the Maoist outfit and let him free. Thereafter, he approached this Court under Article 226 of the Constitution. Learned single Judge allowed the petition granting a compensation of ₹1,00,000/- to the petitioner which was affirmed by the Division Bench, dismissing the appeal preferred by the State. On going through the facts, we find the issues involved in this case are totally dissimilar to those dealt with in **Shyam Balakrishnan's** case and therefore the legal proposition laid down therein may not be applicable to this case, especially when the investigation is in progress.

26. Sri.S.Rajeev placed reliance on the decision in **Union of India and others v. Shameer and others (MANU/KE/1429/2019)**. A Division Bench of this Court considered an appeal preferred by convicts, who were allegedly involved in offences under IPC and UA(P) Act. On an appreciation of evidence, this Court found that the charge levelled against them were not maintainable and they were acquitted. This case also can be distinguished on facts.

27. Learned counsel for the appellants and the State Attorney relied on a decision rendered by the Supreme Court in **National Investigation Agency v. Zahoor Ahmad Shah Watali ((2019) 5 SCC 1)**. That is a case wherein Section 43D(5) of UA(P) Act, along with other provisions, has been considered by the Court. In paragraph 21, the following proposition is laid down:

“Before we proceed to analyse the rival submissions,

it is apposite to restate the settled legal position about matters to be considered for deciding an application for bail, to wit:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- (ii) nature and gravity of the charge;*
- (iii) severity of the punishment in the event of conviction;*
- (iv) danger of the accused absconding or fleeing, if released on bail;*
- (v) character, behaviour, means, position and standing of the accused;*
- (vi) likelihood of the offence being repeated;*
- (vii) reasonable apprehension of the witnesses being tampered with; and*
- (viii) danger, of course, of justice being thwarted by grant of bail. (State of U.P. v. Amarmani Tripathi - (2005) 8 SCC 21)”*

After extracting Section 43D of UA(P) Act, in paragraph 23, it is observed thus:

“By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967

Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is “prima facie” true. By its very nature, the expression “prima facie true” would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is prima facie true”, as compared to the opinion of the accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is

lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. Nevertheless, we may take guidance from the exposition in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra ((2005) 5 SCC 294), wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paras 36 to 38, the Court observed thus: (SCC pp.316-17)

“36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.

38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. What would further be

necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea.”

In paragraph 24 the following observations could be seen:

“A priori, the exercise to be undertaken by the Court at this stage-of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.”

Finally, it is observed in paragraph 28 that the question is whether there are reasonable grounds for believing that the accusations made against the accused are prima facie true. It depends on facts and circumstances in each case.

28. We, after bestowing a careful attention to the facts and circumstances revealed from the materials placed before us and also on hearing the learned counsel on both sides, are prima facie of the view that there are sufficient materials against the appellants to continue an investigation for the aforementioned offences under UA(P) Act and release of the appellants at this stage of investigation may hamper or adversely affect the furtherance of the same. It is the prosecution case

that the 3rd accused is still at large and he evades the process of law. The investigating agency apprehends that the accused persons, if released on bail, may not only meddle with the investigation, but also flee from justice. We are not persuaded to ignore these apprehensions. We are, therefore, not inclined to grant bail to the appellants at this stage of the investigation.

In the result, both the appeals are dismissed.

All pending interlocutory applications will stand dismissed.

**A.HARIPRASAD,
JUDGE.**

**N.ANIL KUMAR,
JUDGE.**

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APPENDIX OF CRL.A 1300/2019

PETITIONER'S/S EXHIBITS:

ANNEXURE-I **PHOTOCOPY OF THE FIR WITH FIRS IN CRIME
NO.507/2019 OF PATHEERANKAVU POLICE
STATION**

ANNEXURE-II **TRUE COPY OF THE ORDER IN CRL
M.P.1789/2019 DATED 6.11.19 OF COURT OF
SESSIONS,KOZHIKODE**

RESPONDENT'S EXHIBITS:NIL