IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR.JUSTICE JOBIN SEBASTIAN

TUESDAY, THE 10TH DAY OF DECEMBER 2024 / 19TH AGRAHAYANA, 1946

CRL.A NO. 783 OF 2024

CRIME NO.2/2016 OF NATIONAL INVESTIGATION AGENCY KOCHI, ERNAKULAM

AGAINST THE JUDGMENT DATED 09.02.2024 IN SC NO.3 OF 2019 OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANT/ACCUSED:

RIYAS A @ RIYAS ABOOBAKKAR @ ABU DUJANA
AGED 29 YEARS
S/O OF ABOOBAKKAR, HOUSE NO.XVI/717,
MUTHALAMAD PANCHAYAT, AKSHARA NAGAR,
CHULLIYARMEDU-POST, KOLLAMCODE,
PALAKKAD-DIST (PRESENTLY LODGED AT CENTRAL
PRISON VIYYUR), PIN - 678507

BY ADVS.
BIJU ANTONY ALOOR
K.P.PRASANTH
HASEEB HASSAN.M

ASOKAN K.V.
KRISHNASANKAR D.

RESPONDENT/COMPLAINANT:

UNION OF INDIA
REPRESENTED BY INVESTIGATING OFFICER,
IN RC- 02/2016/NIA/ROC OF NATIONAL
INVESTIGATING AGENCY, KOCHI, THROUGH
ASSISTANT SOLICITOR GENERAL OF INDIA,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.

BY ADV A.R.L. SUNDARESAN, ASGI.
ADV.SREENATH S, PUBLIC PROSECUTOR FOR NIA
ADV. ARJUN AMBALAPATTA, SR.PP FOR NIA

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 26.11.2024, THE COURT ON 10.12.2024 DELIVERED THE FOLLOWING:

'CR'

J U D G M E N T

Raja Vijayaraghavan. J.

In 2006, Yoko Ono—renowned songwriter and wife of the late John Lennon of the Beatles—offered a poignant tribute to the memory of lives lost in the aftermath of the so-called "War On Terror" following 9/11. Her words resonate as both a lament and a plea:

> "To those who have lost loved ones without reason: forgive us for failing to prevent such tragedies.
>
> To those who have suffered abuse or torture: forgive us for allowing these horrors through our silence."

Interpreted in the context of terrorism and related violence, these lines acknowledge the grief of those who have lost loved ones and the senseless violence driven by ideology and hatred. The lines also reflect how indifference, fear, or delayed action can create environments where extremist ideologies thrive, perpetuating cycles of violence and leaving lasting scars on victims and society.

2. The term “terror” originates from the Latin word “terrere”, meaning "to tremble" or "to frighten."

Background Facts:

3. In recent decades, terrorist activities have taken various forms, including the targeted killing of innocent civilians with advanced weaponry, planting explosives in public spaces, taking of hostages, aircraft hijackings, and even armed conflicts, leaving no corner of society untouched by its devastating reach.

4. Terrorism has evolved into a global menace, and India is not immune to its impact. It threatens not only the life, liberty, and property of individuals but also endangers the social order, disrupts the economic framework of the State, and undermines the ideals and values that define its liberal character.

5. Horrific acts of terrorism in India include the 1993 Mumbai blasts, the 2001 Parliament attack, the 2006 Mumbai train bombings, 26/11 attacks of the year 2008, the 2016 Pathankot attack, and the 2019 Pulwama

bombing. These tragedies highlight the persistent threat to national security and also the devastating but avoidable loss of hundreds of innocent lives.

6. The Unlawful Activities (Prevention) Act, 1967, (hereinafter referred to as "the UA(P) Act") was enacted to provide for more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therein. The said Act has been amended in the years 2004, 2008, and 2013 to add certain provisions relating to various facets of terrorism. Under Section 35 of the UA(P) Act, the Central Government is empowered to add an organization in the First Schedule or the name of an individual in the Fourth Schedule, if it believes that such organization or individual is involved in terrorism. It may also add an organization in the First Schedule if such organization is identified as a terrorist organization in the resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations to Combat International Terrorism.

7. The Ministry of Home Affairs, New Delhi, vide notification dated 16.02.2015, added Islamic State/Islamic State of Iraq and Levant/Islamic

State of Iraq and Syria/Daesh, and all its manifestations as a terrorist organization. In the said notification, it was mentioned as follows:

> "And whereas the Islamic State/Islamic State of Iraq and Levant/Islamic State of Iraq and Syria/Daesh, a terrorist outfit operating in Iraq and neighbouring countries, has been resorting to terrorist actions to consolidate its position in that area by recruiting youth for 'Global Jihad' to achieve the objective of establishing its own 'caliphate' by overthrowing democratically elected governments, besides resorting to terrorism in the form of killing of innocent civilians and security forces;
>
> And whereas, the Central Government believes that the Islamic State/Islamic State of Iraq and Levant/Islamic State of Iraq and Syria/Daesh is involved in radicalization and recruitment of vulnerable youth from various countries including India;
>
> And whereas, such recruitment of youth to the outfit from India and their radicalisation is a matter of serious concern for the country especially with regard to its likely impact on national security when such youth return to India;
>
> And whereas, the Central Government is satisfied that the Islamic State/Islamic State of Iraq and Levant/Islamic State of Iraq and Syria/Daesh is a terrorist organisation and has decided to add the said organisation and all its manifestations in the First Schedule to the said Act".

By the above notification, the Islamic State of Iraq and Syria (ISIS) was included in the First Schedule of the UA(P) Act, and any person who associates himself or professes to be associated with ISIS to further its activities are deemed to have committed an offence under Section 38 of the UA(P) Act. Similarly, any person who invites support to further the activities of a Terrorist organization is liable for punishment under Section 39 of the UA(P) Act.

A brief overview of the prosecution case:

8. In the year 2016, there was an exodus of Indian citizens leaving the country to join the Islamic State of Iraq and Syria (ISIS)/Daesh, a terrorist organization, proscribed in India by inclusion in the Schedule of the UA(P) Act. A certain Abdulla T.P. lodged a complaint before the Station House Officer, Chandera Police Station, wherein it was alleged that his son, one Abdul Rashid Abdulla and his wife Ayisha @ Sonia Sebastian, and their minor child had gone missing for over a month. On the basis of the said complaint, Crime No.534 of 2016 was registered under Section 57 of the Kerala Police Act, 2011. At or around the same time, it was also reported at the Chandera Police Station that 14 other persons from the locality had gone missing and several other crimes

were registered under Section 57 of the Kerala Police Act, 2011.

9. Preliminary investigation conducted by the police, revealed that the missing persons had left India to physically join ISIS, a Terrorist Organization included in the Schedule of the UA(P) Act. To conduct an exhaustive investigation, and to arrive at the root of the conspiracy leading to the missing of the individuals, a special team was constituted and all the crimes registered were clubbed together with Crime No. 534 of 2016 as the main case. In the course of the investigation, Sections 38 and 39 of the UA(P) Act were added. The 1st accused in the said case was Abdul Rashid Abdulla. In the course of the investigation, it was revealed that one lady by the name 'Yasmeen Muhammed Zahid' was also involved and she was arraigned as the 2nd accused. The 2nd accused was arrested on 01.08.2016, while she was attempting to exit India with a view to joining ISIS/Daesh in Afghanistan.

10. Taking note of the nature of the allegations and their gravity, the Ministry of Home Affairs, Government of India, by order dated 23.08.2016, entrusted the investigation of Crime No.534 of 2016 of the Chandera Police Station to the NIA. Immediately thereafter, the Crime was re-registered as

RC-02/2016/NIA/KOC of NIA Police Station, Kochi, under Sections 120B and 125 of the IPC and Sections 13, 38 and 39 of the UA(P) Act, 1967.

11. After the investigation was completed, the prosecution sanction was obtained on 27.01.2017, and a charge sheet was filed against the 1st accused, who was absconding, and the 2nd accused under Section 120B r/w. Section 125 of the IPC and Sections 38, 39, and 40 of the UA(P) Act.

12. The learned Special Court took cognizance of the offence and numbered the case S.C.No. 1 of 2017. As the 1st accused was absconding, the case proceeded against the 2nd accused. She was found guilty by the Sessions Court and sentenced to rigorous imprisonment for a period of 7 years with a fine for the offence under Section 120B r/w. Section 125 of the IPC and Sections 38, 39, and 40 of the UA(P) Act.

13. On appeal, this Court partly allowed the appeal and her conviction under Section 39 of the UA(P) Act was set aside. For the offence under Section 38 of the UA(P) Act, the imprisonment was reduced to three years. The matter was taken up before the Apex Court by the NIA and by judgment dated 2.8.2019 in **Union of India v. Yasmeen Mohammad**

Zahid Alias Yasmeen[1], the judgment passed by the Special Court was restored.

14. The investigation in the main case was proceeded with, in the course of which it was revealed that Nashidul Hamzafar, arrayed as accused No.16, and Habeeb Rahman, arrayed as accused No.17, had contacted the absconding accused, and they had hatched a conspiracy through various social media platforms to join ISIS/Daesh in Afghanistan and to further terrorist activities. Nashidul had in fact gone to Afghanistan through Iran to join ISIS. Habeeb had also gone with Nashidul upto Iran but had to return back to India, without entering Afghanistan. The charge sheet was laid before the jurisdictional court against Nashidul under Section 120B r/w. Section 125 of the IPC and under Sections 38 and 39 of the UA(P) Act. Habeeb was tendered pardon on condition that he make a full disclosure of the entire facts. Nashidul pleaded guilty before the Trial court and the same was accepted, and he was convicted and sentenced to undergo imprisonment for 5 years. This judgment has become final.

15. In the course of the investigation of the main crime, information

---

[1] [(2019) SCC OnLine SC 957]

was received that Riyas A.@ Riyas Aboobacker @ Abu Dujana, (the appellant herein), one Muhammed Faizal, Aboobakkar Sidik, and one Ahammed Arafath constantly maintained contact with the 1st accused and others, who joined ISIS/Daesh. The materials collected also revealed that the above accused were strongly influenced by the violent extremist ideology of ISIS and were potentially motivated to either join the Islamic State or carry out terrorist activities within Kerala. It was on the basis of the said information that the aforesaid persons were arrayed as accused Nos. 18 to 21.

16. On the strength of an advanced search memorandum, simultaneous raids were conducted in the residential homes of accused Nos. 18 to 20. In the course of the search, various electronic gadgets and equipment like mobile phones, SIM Cards, DVDs, and Memory Cards were seized. On further investigation, it was revealed that the appellant herein was a highly committed member of ISIS and that he was making serious efforts to commit terrorist acts, thereby, furthering the activities of ISIS /Daesh in India. In the said circumstances, the arrest of the appellant was recorded on 29.04.2019. The investigation also revealed that the appellant along with accused Nos. 19 and 20, in pursuance to a conspiracy to commit a terrorist

act, had organized meetings near Lulu Mall, Ernakulam, and Marine Drive, Ernakulam on 26.10.2018. The investigation also revealed that in the course of the said meeting, the appellant took strenuous efforts to convince accused Nos. 19 and 20 to carry out the Istishhad Operation (martyrdom operation) associated with armed warfare and 'military jihad' citing various Islamic texts.

17. The NIA concluded that though accused Nos. 19 and 20 were initially influenced by the ideology of ISIS/Daesh and were inclined to perform Hijra, they later realized their folly and joined the investigation. They expressed their willingness to state all facts to their knowledge with a view to seek pardon and in that view of the matter, their statements were recorded under Section 164 of the Cr.P.C. In their statement, they stated that they became radicalized by ISIS ideology through social media platforms and they were persuaded by the appellant of his desire to carry out suicide bombings in Kerala to further the agenda of ISIS in India. On expressing their willingness to turn approvers, the NIA filed an application under Section 307 of the Cr.P.C. before the Special Court seeking to grant pardon to accused Nos. 19 and 20 on condition that they make a full and true disclosure of the whole of the circumstances within their knowledge relating to the offence and to every

other person concerned. The accused Nos. 19 and 20 accepted the pardon tendered by the court as borne out from the order dated 20.11.2019.

18. The accused Nos. 3 to 15 and 17 could not be arrested as they remained absconding.

19. After the investigation was completed, the NIA filed supplementary charges against the appellant before the Special Court. In the meantime, the NIA sought sanction for the prosecution of the appellant under Section 45(1) of the Act for the offences punishable under Section 120B of the IPC and Sections 38 and 39 of the UA(P) Act, 1969. After receiving the recommendation from the authority set up under the Unlawful Activities (Prevention) (Recommendation and Sanction for Prosecution) Rules, 2008 (hereinafter referred to as 'Rules 2008'), the Central Government accorded sanction.

Proceedings before the Special Court:

20. After taking cognizance and hearing both sides, charges were framed against the accused for offenses under Sections 38 and 39 of the

UA(P) Act r/w. Section 120B of the IPC. The court charge framed against the appellant essentially reads as under:

a) The appellant, along with Muhammed Faizal and Aboobakker Siddiique were radicalized on the ideology of ISIS/Daesh, from 2017 onwards and had maintained contact with the absconding accused Abdul Rasheed Abdulla and others who had become members of the said proscribed terrorist organization. From July 2017 onwards, the appellant along with Muhammed Faizal and Aboobakker Siddique had contacted one another and shared the ideology of ISIS/Daesh with the intent to further the objectives of the proscribed organization, by performing Hijra to the Islamic State. The appellant had organized conspiracy meetings at Lulu Mall and Marine Drive in Kochi City on 26.10.2018, to further the activities of ISIS/Daesh in India. In the said conspiracy meeting, the accused decided to commit terrorist acts in Kerala through suicide attacks to further the activities of ISIS/Daesh in India. For achieving the said objective, the appellant motivated and sought support from Muhammed Faizal and Aboobacker Siddique, the co-conspirators during the meeting, and by doing so, the appellant has committed offences punishable under Section 120B of the IPC r/w. Section 38 and 39 of the UA(P) Act.

b) That the appellant along with Muhammed Faizal and Aboobacker Sidik maintained contact with persons who had joined ISIS, and pursuant to the conspiracy, from July 2018 onwards, he contacted

A19 and A20 in the crime and shared the ideology of ISIS/Daesh, to further the objectives of the proscribed organization, by performing Hijra to the Islamic State and thereby committed offences punishable under Section 38 of the UA(P) Act.

c) That the appellant along with Muhammed Faizal and Aboobacker Siddique had entered into a criminal conspiracy and invited support for ISIS/Daesh, a terrorist organization, with intent to further its activities, to wage war against Syria, an Asiatic power, at peace with India, arranged meetings to support the terrorist organization to commit terrorist acts in Kerala through suicide attacks in India, for furthering the activities of ISIS/Daesh and thereby committed offences punishable under Section 39 of the UA(P) Act.

21. When the charges were read and explained, the appellant pleaded not guilty. To establish the guilt, the prosecution examined PWs 1 to 22, during which Exts. P1 to P37 were exhibited and marked. MO1 was produced and identified. After the close of the prosecution evidence, the incriminating materials arising from the evidence were presented to the accused under Section 313(1)(b) of the Cr.P.C. The accused denied all circumstances and maintained his innocence. As the invocation of Section 232 Cr.P.C. was found to be not warranted, the accused was called upon to present his defence. Although no evidence was adduced, the accused filed a written

statement under Section 233(2) of the Cr.P.C., narrating his version of events. In his statement, the appellant contended that the witnesses examined in the case were strangers to him. According to him, after attaining adulthood, he had no occasion to stay at his family home and was unaware of the search conducted there. He denied attending any mosque as alleged by the prosecution and stated that he had no occasion to offer prayers in isolation. He refuted the allegations that he had spoken against India's democratic governance system or acted in any manner to support ISIS. He challenged the seizure of his phone and other electronic items, denying any authorship of the materials allegedly posted on instant messaging services or social networking platforms such as Facebook to support ISIS or any other terrorist organization. He denied the prosecution's claims that he forwarded inflammatory videos or audio clips and denied all allegations that he was involved with ISIS. According to the appellant, the prosecution's case lacked evidence and constituted a clear abuse of process. He asserted his innocence and denied any involvement in the alleged offences.

Findings of the learned Special Judge:

22. The learned Sessions Judge, after a detailed evaluation of the evidence adduced by the prosecution, came to the following conclusions:

a) Ext.P24 sanction order issued by the Central Government is in accordance with the provisions of Rules, 2008.

b) The evidence provided by PWs 1 and 2, along with data extracted from the mobile phone of the accused and other digital devices, coupled with the social media posts, clearly establishes that the accused was deeply radicalized by ISIS ideologies.

c) There is clear evidence to demonstrate a meeting of minds between PWs 1 and 2 on the one hand and the accused for performing hijra to Iraq and Afghanistan to further the activities of ISIS**.**

d) Audio files retrieved from the accused's devices reveal voice clips of Abdul Rasheed Abdulla, exhorting listeners to take up arms and engage in suicide attacks.

e) The search history of the appellant’s mobile phone includes searches

related to Zahran Hashim (a prominent Sri Lankan ISIS leader), Abu Esa (the Kuniya name of the original first accused), Sameer Ali (Shajeer Mangalassery, a Keralite who joined ISIS and was killed in Afghanistan), Abdul Ghayoob (absconding accused in a case under investigation by the NIA), Mithilaj (a convicted accused in an ISIS-related case), and Nimisha Fathima (an accused individual who joined ISIS and migrated to Afghanistan). The search history also includes queries on bomb-making and other similar subjects.

f) The prosecution successfully established that the accused entered into a criminal conspiracy to commit acts constituting offences under Sections 38 and 39 of the UA(P) Act. Consequently, the offence of criminal conspiracy stands proven.

g) The prosecution had successfully established that the appellant had radicalized PWs 1 and 2 with the ideologies of ISIS, a recognized terrorist organization, that they conspired to further ISIS activities and garner support for the organization by migrating to areas such as Syria, Iraq, and Afghanistan, that the appellant associated himself with ISIS

and professed such association with the intent to further its activities and that the appellant, with the intent to advance the organization's objectives, solicited support for ISIS by his acts and deeds.

h) It was accordingly held that the actions of the appellant constitute offences punishable under Section 120B of the IPC, read with Sections 38 and 39 of the UA(P) Act, as well as standalone offences under Sections 38 and 39 of the UA(P) Act.

i) The appellant was found guilty and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of one year for the offence under Section 38 of the UA(P) Act. He was also sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000/- with a default clause for the offence punishable under Section 39 of the UA(P) Act. He was sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.25,000/- with a default clause for the offence punishable under Section 120B of the IPC r/w. Section 38 of the UA(P) Act. The

substantive sentences of imprisonment were ordered to run concurrently.

Contentions advanced by the Appellant:

23. Sri. B.A.Aloor, the learned counsel appearing for the appellant raised the following contentions before us to assail the finding of guilt:

a) The appellant was arrayed as an accused merely because he refused to toe the line suggested by the NIA officers.

b) An evaluation of the evidence tendered by PWs 1 and 2 reveals that they were the persons who were influenced by the violent extremist ideology propagated by the absconding accused. One of the witnesses had even travelled abroad. However, with respect to the appellant, who was attempted to be radicalized by PW1 and 2, was arrayed as an accused instead of as a witness.

c) The investigating agency failed to present any material evidence suggesting that the appellant had met PWs 1 and 2 at Lulu Mall or Marine Drive, Ernakulam, with the intent to further ISIS activities. The best

evidence would have been statements from witnesses or CCTV footage corroborating such a meeting, neither of which was provided.

d) No reliance ought to have been placed on Exts. P30 and P31—the reports submitted by C-DAC—to further the claim of the prosecution that the appellant contacted PWs 1 and 2 through social networking sites to motivate them to join ISIS and spread its ideologies.

e) PWs 1 and 2 were accomplices, and their evidence was inherently unreliable. Nevertheless, the learned Sessions Judge placed undue reliance on their testimony to arrive at a finding of guilt.

f) The appellant had been in custody for over 90 days before an application was filed before the learned Magistrate to record the Section 164 statements of PWs 1 and 2. A reading of the evidence reveals that before recording their statements, both witnesses were permitted to review their earlier statements recorded on 07.06.2019 to refresh their memory.

g) In this case, the prosecution failed to prove the charge under Section 120B of the IPC, as the evidence did not establish a meeting of minds to

commit an illegal act through illegal means.

h) A proper evaluation of the evidence presented by the prosecution does not establish that the appellant was a member of a terrorist organization, professed such an association, or furthered its activities by soliciting support or any other means. Consequently, neither the offence under Section 38 nor under Section 39 of the UA(P) Act is attracted in the facts of this case.

i) The learned Sessions Judge has seriously erred in placing reliance on the evidence of PWs 4, 5, 9, 13, and 14 who were all cited to prove that the appellant had visited the Manjali mosque and that he had spoken against the democratic process and refused to pray along with other Muslims on the ground that they followed democratic principles. It is pointed out that numerous omissions and contradictions were brought out while cross-examining the above witnesses and thus, their credibility was itself under challenge.

j) Relying on the principles laid down in **Muhammed Riyas D.V.P v.**

Union of India[2], it is contended that merely watching ISIS-related videos or jihadist content or downloading speeches by individuals such as Zakir Naik is insufficient to categorize the appellant as a terrorist.

k) The procedure for obtaining sanction was not in accordance with the law. Furthermore, the sanction granted was issued without proper application of mind.

l) With respect to the trial procedure, it is submitted that the learned Special Judge recorded evidence without adhering to the mandate of Section 142 of the Indian Evidence Act, which explicitly prohibits leading questions during chief examination aimed at prompting witnesses to give answers favorable to the prosecution.

m) It is submitted that the 17th accused in the original crime had pleaded guilty to the charge and he was convicted and sentenced to undergo RI for 5 years. The 2nd accused was convicted by the Sessions Judge and was sentenced to undergo RI for 7 years, which judgment was upheld by the Apex Court. However, insofar as the appellant is concerned, the

---

[2] [(2018) 2 KLT S.N. 83 (Case No. 102)]

Special Judge has imposed the maximum sentence of 10 years, which according to the learned counsel cannot be sustained.

Contention of the respondents:

24. Sri.A.R.L.Sundareshan, the learned Assistant Solicitor General of India, as assisted by Sri.Arjun Ambalappatta, and Sri. Sreenath, the learned Public Prosecutor, raised the following contentions before us:

a) The Unlawful Activities (Prevention) Act prescribes a detailed procedure for granting sanction under Section 45(1) of the Act. The authority constituted under the Rules, 2008, conducted an independent review, and based on this recommendation, the Central Government granted sanction. The sanction order, it was argued, adhered to the prescribed procedure, upholding public interest while safeguarding the rights of the accused.

b) The learned counsel further contended that the rule requiring corroboration for relying on the evidence of an accomplice is one of prudence, not law. In this case, the evidence provided by the approvers

was corroborated in material particulars by the testimonies of PWs 4, 5, 9, and 13, as well as electronic evidence. Relying on **Suresh Chandra Bahri v. State of Bihar**[3], it was argued that a conviction can be recorded even on the uncorroborated testimony of an accomplice, provided the evidence is credible and cogent. Here, the approvers' evidence was not only credible but also supported by other prosecution evidence.

c) It was submitted that during cross-examination, PWs 1 and 2 were portrayed as individuals actively trying to further ISIS activities and persuading the appellant to join, rather than vice versa. However, the appellant did not challenge the conspiracy meetings held at Lulu Mall and Marine Drive on 26.10.2018. PWs 1 and 2 explicitly stated that the appellant had expressed an intention to carry out suicide bombings in Kerala to further ISIS's agenda, a claim corroborated by constant communications between the appellant and PW1 through social media.

d) The learned counsel would highlight the evidence of chats and interactions through platforms such as Facebook, Telegram, and other

[3] [(1995) Supp. 1 SCC 80]

internet-based messengers. These interactions included communications with Zahran Hashim, a Sri Lankan ISIS leader, and Shajeer Mangalassery, further demonstrating the appellant's association with ISIS. Additionally, data extracted from the appellant's mobile phone and memory card contained numerous videos, audio clips, documents, and images promoting ISIS ideology and violent jihad, evidencing his involvement in proscribed activities. It was argued that the evidence clearly establishes the appellant's propagation of ISIS ideology, demonstrating a clear mens rea.

e) The evidence let in by the prosecution clearly established that the appellant not only associated himself with the proscribed organization but also professed such an association. The appellant invited support, arranged meetings to further ISIS's activities, and assisted in their organization.

f) Addressing the delay in producing the Section 65B certificate, the learned counsel referred to the judgments in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**[4] and **State of Karnataka (s) v.**

[4] [(2020) 7 SCR 180)]

T.Naseer @ Nasir @ Thadiyantavida Naseer @ Umarhazi @ Hazi and Ors[5], arguing that such certificates can be submitted at a later stage.

g) It is urged that the evidence showed that the appellant sought to radicalize PWs 1 and 2, entered into a criminal conspiracy to further ISIS's activities, and actively garnered support. It was finally urged that the learned Special Judge had evaluated the evidence in its entirety, properly applied the legal principles, and rightly arrived at the finding of guilt.

25. We have carefully considered the submissions advanced and have carefully gone through the evidence and the entire records produced before the Court.

<u>The evidence tendered by the prosecution to prove the charge:</u>

26. The prosecution examined PWs 1 and 2 to establish that they were initially ISIS sympathizers. After seeing the messages and posts of the accused on social media and instant messengers, they got in touch with the

---

5 [2023 SCC OnLine SC 1447]

accused. He invited their support for ISIS and persuaded them to further the activities of the proscribed organization. The prosecution examined PW4, PW5, PW9, and PW13 to bring home the point that they had occasion to closely interact with the accused, and by his words and actions, he showed his affiliation to ISIS and looked down on Muslims who accepted the democratic principles. They also adduced digital evidence to prove the charge against the accused. We shall first deal with the oral evidence.

A. <u>The Oral Evidence:</u>

26.1. When examined before the Court, PW1 stated that he had furnished a statement before the Investigating Officer in June 2019 and before the learned Magistrate in September 2019. He narrated his family background and stated that he had completed his Engineering Degree. According to him, he studied up to the X standard in Saudi Arabia. From 2012 onwards, he has been using a smartphone for chatting and accessing social media. On Facebook, his profile name was initially "Muhammed Faizal," which he later changed to "Abu Marwan." In 2017, he came across a Facebook post by a person named “Sameer Ali,” which provided information about ISIS, its

concepts, and ideologies. In the comment box, he found references to Gold Dinar, Millath Ibrahim, and Al Muhajir, which were links to certain Telegram (instant messenger) IDs. He subscribed to these posts and chats, and his Telegram ID was "Kirman." In 2018, he began residing in Vytila. Under a Facebook post by the accused proclaiming allegiance to ISIS, he noticed comments made by Aboobaker Sidique under the pseudonym "Abu Esa." He stated that he had two telephone numbers, 9544365682 and 9744448485, both connected to IDEA. These numbers were linked to Telegram IDs, as evidenced by Ext. P2 series Customer Application Forms (CAF).

26.2. In 2015, while at the Kollam bus stand, PW1 witnessed a live accident, which led him to become devout and study Islam more deeply. By 2018, he was working as a Sales Supervisor at Citadel Tyres. During this time, he saw a post by Aboobakkar Sidik in the comment section of the accused's post and directly messaged him. He was asked whether he subscribed to the "Khawarij" ideologies. Later, their conversations on Facebook continued, and eventually, PW1 shared his Telegram ID, "Abu Fathima." Subsequently, PW1 and Abubakker Sidik (PW2) met in the parking area of Lulu Mall and discussed the prospects of doing Hijra (migration) to either Afghanistan or Syria. During

their conversation, PW1 realized that PW2 was more inclined to undertake Hijra with his family and identified him as an ISIS sympathizer.

26.3. On the same day, they met PW2, who introduced PW1 to the accused and shared his Telegram ID, "Mujahid Riyas." Thereafter, PW1 frequently chatted with the accused on Telegram. He further stated that PW2 is a native of Kasaragod, while the accused is a native of Palakkad, and both were engaged in the perfume (Athar) business. In October 2018, PW1 met the accused and PW2 at Lulu Mall, where they discussed the prospects of Hijra to Syria or Afghanistan and joining ISIS. Most of the conversation was led by the accused. PW1 stated that he travelled to Lulu Mall from Vytila, while the accused and PW2 arrived together. After this meeting, they proceeded to Marine Drive, Kochi, for a more detailed discussion on ISIS. They had food near Lulu Mall before heading to Marine Drive, where they sat under the Rainbow Bridge and conversed for over an hour. Their discussion revolved around plans for Hijra and joining ISIS.

26.4. The accused expressed intentions to establish a "Wilaya" or carry out a suicide bombing in India. To justify his actions, the accused narrated the

story of Salahuddin Ayyoobi, an Islamic commander, who purportedly sacrificed a soldier to breach enemy fortifications. Realizing the suicidal nature of such actions, PW1 and PW2 expressed their disinterest and clarified that their goal was solely Hijra to join ISIS in Afghanistan or Syria. The accused responded by stating that India is a land of "Kafirs," making it impossible for Muslims to live peacefully in the country. In response to a leading question by the learned Public Prosecutor about suicide attacks, PW1 stated that the accused had advocated for suicide bombings in India for ISIS.

26.5. After this meeting, they parted ways. In 2019, PW1 went to Qatar, where he continued chatting with the accused and PW2. During his time abroad, PW1 fell in love with a girl, which led him to lose interest in ISIS ideologies and cease communication with the accused and PW2. Towards the end of 2018, PW1 messaged an individual with the Telegram ID "Abdul Khadira" about Hijra, who provided him with the ID "Green Bird 1." Later, PW1 learned through newspapers that Riyas Aboobakkar had been arrested. After discussing with his family, he voluntarily surrendered to the NIA, and made a true and complete disclosure of all relevant facts. He also surrendered his OPPO mobile phone. PW1 clarified that he had previously used a Huawei

mobile phone, which he had sold; it was with that device that he communicated with the accused and PW2.

26.6. The chats retrieved from PW1's OPPO phone with the assistance of C-DAC were shown to him in court. PW1 identified the chats and confirmed that the messages emanating from the number 9544365682 were from his Telegram ID, "Abu Marwan New." He also identified the number 94446454340 as belonging to Riyas Aboobakkar. He recognized and authenticated the chat messages displayed on the screen, despite objections raised by the learned counsel for the accused regarding the non-service of hard copies of the documents. The objections were rejected as the learned Special Judge noted that soft copies had been served at the time of filing the charge sheet, and the objection was overruled.

26.7. PW1 admitted to addressing numerous messages to Riyas Aboobakkar as "Akhi," meaning brother. The contents of chat no. 187 were displayed in open court and reviewed by PW1 and counsel on both sides. Specific chats were marked as Exts. P3(a) to (g). PW1 clarified that the shared beliefs between himself, PW2, and the accused were rooted in the Salafist

ideology of ISIS. During cross-examination, it was suggested that PW1 had influenced Riyas Aboobakkar and not the other way around. It was further implied that PW1 and PW2 were instrumental in propagating ISIS ideologies. PW1 denied these suggestions and affirmed his interactions with Riyas Aboobakkar on social media.

26.8. It would be pertinent to note that during cross-examination, no questions were put to dispute the fact that PW1, PW2, and the accused met at Lulu Mall and Marine Drive. Instead, the suggestion was that it was PW1 and PW2 who initiated these meetings and the appellant was merely a passive partner. The witness denied the suggestion that Riyas Aboobakkar had declined to become an approver and that PW1 and PW2 had turned approvers at the instigation of the NIA.

27. PW2, Abubakkar Sidik, stated that during 2009-2010, he joined the Mujahid establishment after listening to the speeches of Mujahid Balussery and Hussain Salafi on YouTube. From 2011 to 2014, he was employed in the Gulf, and in 2017, he returned to India. Upon returning from the Gulf, he began attending the Salafi Mosque for prayers and religious study, later

frequenting the Kuniya Salafi Mosque at Kasaragod. There, he befriended Abdul Rahman and became acquainted with Bilal (PW4), who was engaged in the sale of Attar (perfumes). PW4 invited Abdul Rahman and PW2 to Ernakulam to assist in the business. Consequently, PW2 arrived in Ernakulam in 2018.

27.1 He stated that he subscribed to two numbers, 9633040454 and 9895557040, and in 2017, acquired new connections with numbers "7902371829" (CAF - Ext. P5) and "7994692007" (CAF - Ext. P6). Using these mobile phones, he interacted on social media and Telegram, where his Telegram ID was "Abu Esa." This pseudonym was also used by ISIS followers, including Rashid Abdulla (A1). Later, PW2 changed his Telegram ID to "Abu Fathima" and interacted with A1 through Facebook. PW2 stated that, after seeing A1's messages criticizing Salafis, Dammajis, Sunnis, and Saudis, he decided to connect with Riyas, who had posted content supporting ISIS. PW2 and Riyas exchanged phone numbers and interacted frequently through Telegram and WhatsApp.

27.2. During this period, a Facebook user with the profile name "Abu

Marwan" messaged PW2, asking whether he was a Khawarij. They began communicating through Facebook Messenger, and PW2 later identified "Abu Marwan" as Mohammed Faizal (PW1). In conversations with PW1, PW2 realized that Faizal was also an ISIS follower interested in Hijra (migration) to Afghanistan or Syria to become a martyr. The two decided to meet in person, and in 2018, after discussing Hijra, PW1 introduced PW2 to Riyas, providing him with Riyas' contact details. PW2 stated that Riyas had connections with individuals following ISIS ideology.

27.3 In August or September 2018, PW2 invited Riyas to Ernakulam to engage in the Attar business. Riyas was introduced to Muhammed Hafiz (PW9) and began residing at his house. PW2 and Riyas often met, shared meals, and discussed Hijra. Riyas frequently claimed that India was a land of "Kafirs" (infidels) and that such individuals should be eliminated, as per his interpretation of the Quran. Riyas also attended prayers at the Jama-at-Islami Mosque in Manjali but prayed separately, explaining that other attendees supported democracy, which he opposed.

27.4. Approximately a week later, Riyas moved to Kodungalloor. On a

subsequent Friday, PW4 (Muhammed Bilal), PW13 (Salahudeen V.S.), PW5 (Noushad), and CW9 (Ahammed Arfad) gathered at PW9's house, along with PW2 and Riyas. During this meeting, PW5 and PW13 confronted Riyas about his comments against Saudi Arabia and his practice of praying separately, identifying them as aligned with ISIS ideologies. Riyas remained steadfast in his views. Later, Riyas expressed a desire to meet PW1 in person, which PW2 communicated to PW1. In October 2018, PW2 and Riyas met PW1 at the parking area near Lulu Mall, Ernakulam. The three, all ISIS sympathizers, discussed Hijra, with Riyas leading the conversation. They moved to Marine Drive, Ernakulam, for a more private discussion, sitting near the bridge for over an hour.

27.5. During the discussion, PW2 expressed his inability to undertake Hijra due to financial issues. Riyas assured him that brothers in Afghanistan and Syria would assist him and stated that financial constraints were not valid reasons to avoid Hijra. PW1 similarly expressed his inability to do Hijra. Riyas then suggested they could carry out Istishhad Operations (martyrdom or suicide attacks) in India, claiming ISIS would support them. When Riyas was reminded that suicide operations were not an approved form of courting death

in Islam, he narrated the story of Salahudeen Ayoobi, a commander who persuaded his soldiers to throw him into an enemy fort to open its gates, leading to victory. This story was intended to persuade PW1 and PW2 to embrace martyrdom, but they were unimpressed and distanced themselves from Riyas.

27.6. Two days later, Riyas returned home. Subsequently, PW2 informed Riyas that his services were no longer needed, as their ideologies did not align. Thereafter, Riyas contacted PW2 only sporadically. PW2 read books, reconsidered his actions, and distanced himself from ISIS ideologies. NIA officers later raided his home, seizing books and his Redmi mobile phone (MO1). PW2 identified this phone and confirmed that his chats with Riyas occurred on Telegram.

27.7. Riyas had forwarded PW2 links to Telegram channels like "Al Mujahid" and "Gold Dinar," as well as Facebook links to speeches by Safran Hashmi and approximately 40 voice clips of Rashid Abdulla, an ISIS member advocating martyrdom. PW2 identified voice clips marked as Exts. P3(a) and P3(b) and a photograph of Riyas pointing to the sky, marked as Ext. P3(c), as

an ISIS gesture. He identified Ext. P3(d), an ISIS flag image featuring Abu Bakr al-Baghdadi, the leader of ISIS. PW2 explained that pledging allegiance (Bay'ah) to Baghdadi indicated loyalty to ISIS. He identified Ext. P3(e) as a message advocating leaving India to join ISIS and authenticated his mobile numbers and contact lists marked as Exts. P3(h) to P3(j). He also recognized Exts. P3(k) and P3(l), voice clips encouraging martyrdom as a religious duty.

27.8. In cross-examination, PW2 was asked whether he was an active ISIS member and had introduced Riyas to ISIS ideologies. He admitted that his meetings with PW1 often involved discussions about ISIS but reiterated that it was Riyas who narrated the story of Salahudeen Ayoobi. PW2 denied forwarding objectionable content to Riyas or persuading him to undertake Hijra during their meetings at Lulu Mall and Marine Drive. He refuted suggestions that his testimony was influenced by NIA officers to falsely implicate Riyas for refusing to become an approver.

28. PW4 is one Muhammed Bilal. He stated that he was engaged in the Attar business. He is acquainted with Muhammed Hafiz (PW9), who was also engaged in the same business. On Fridays, they used to go to the Salafi

Mosque at Neerikodu. He got acquainted with Riyas Aboobakkar during one such visit, in the month of August 2018. He identified the accused who was standing in the dock. He stated that PW9 called him and informed him that Riyas was not praying along with others and that his ideology differed from others. Later, they decided to invite PW5 (Nawshad) and PW13 (Salahudheen) to advise Riyas, for which purpose, PW9 hosted a feast in his residence. During the feast, PW5 and PW13 tried to interpret the Quran and to convince Riyas that his ideology and concepts were against the basic tenets of Islam. Riyas, however, refused to heed to their advice and rejected the same with sarcasm. They found his comments to be ugly and his ideologies aligned with that of terrorist organizations like ISIS. After the said meeting, PW5 and PW13 suggested that Riyas be avoided. In cross-examination, certain omissions were brought out. He stated that certain comments said to have been made by Riyas and stated by him in chief examination, were not stated by him to the police.

29. PW5 is Nowshad. He stated that he was working as a Khateeb in a Mosque. According to him, in 2018, he worked in the Kuniya Salafi Masjid at Kasaragod. During August 2018, he was invited to the residence of PW9, for a

feast. PW2, PW4, PW13, PW9, and the accused among others were present. In the course of the get-together, Riyas spoke against Saudi. He also used to offer prayers alone, without joining with the others. PW5 tried to cite the Quran and the teachings therein, so as to persuade him to change his ways. However, Riyas did not heed to his advice. He then advised the others present there to keep a distance from Riyas. Though he was cross-examined in length, nothing worthwhile was brought out to doubt his version.

30. PW9 is one Muhammed Hafiz. He stated that he was engaged in the Attar business. He contacted PW2 and requested for suggesting a person to assist him in his business. As suggested by PW2, Riyas came and joined him. They used to stay together and also go to the Mosque. He found that Riyas never offered prayers by standing along with others. He used to stand separately and offer his prayers. When he enquired, Riyas told him that others were followers of democracy and that he could not offer his prayers standing along with them. After a week, Riyas went to Kodungalloor. He stated that he had hosted a feast, during which PW5 and PW13 attempted to advise Riyas to change his ways. However, he did not budge. He was told by his friends to avoid Riyas and accordingly, he was sent off. The said witness was also

subjected to searching cross-examination, but he struck to his original version.

31. PW13 is Salahudheen, an Arabic Teacher. He stated that he had worked as a Khateeb in a Mosque at Neericode. He is acquainted with PW4, PW5, PW9, and the accused. PW9 told him that Riyas was in the habit of offering his prayers by standing separately from others, and he was asked to offer him some advice. As requested, PW13 and PW5 talked to Riyas and requested him to mend his ways. However, Riyas did not heed their advice.

B. <u>The Digital Evidence:</u>

32. As stated earlier, on 07.05.2019, the extraction of the data in Gmail and Facebook of the accused were carried out by the investigating officer, with the assistance of PW16, an IT Expert, in the presence of independent witnesses. The screenshot of the entire proceedings was taken and it was pasted in Ext.P7 Word Document. The entire data was copied to Ext.P23 DVD, and it is accompanied by Ext.P23(l) Certificate issued under Section 65B of the Indian Evidence Act, 1872.

33. When examined before the Court, PW16 narrated the manner in

which the data was extracted by him, in the presence of the witnesses. The accused had furnished his e-mail address, which was 'riyaschouhan@gmail.com', and his Facebook ID, which was 'abu dujana'. The Google account as well as Facebook was assessed using the computer at the IT wing on the NIA. The entire data was downloaded and the screenshot of the various steps taken were copied and pasted in a Word file. The Facebook account was then opened and the entire data was downloaded. The screenshot of the proceedings was taken and the same was pasted in Ext.P7 Word file. The entire data was then copied to Ext.P23 DVD. In cross-examination, he stated that the certificate under Section 65B of the Indian Evidence Act was produced before the Court, only on the date of his examination before the Court. The Data extracted include:

a) Facebook Data:

Ext.P23(b): Contact list of the accused.

Ext.P23(c): Comments made by the accused.

Ext.P23(d): Details of followers.

Ext.P23(e): Accounts followed by the accused.

Ext.P23(f): Folder containing Facebook friends of the accused.

Ext.P23(g): Activities in Facebook groups of which the accused was a member.

Ext.P23(h): Comments and posts made by the accused in the groups.

Ext.P23(i): Facebook pages liked by the accused.

Ext.P23(j): Chat data in the Facebook message inbox.

Ext.P23(k): Facebook chats made by the accused.

Ext.P23(l): Photos posted by the accused.

Exts.P23(m) and P23(n): Videos posted by the accused.

b) Google Data:

Ext.P23(o): History of Google search data.

Ext.P23(p): Profile photo of the accused in his Google account.

Ext.P23(q): Search data of images searched on Google.

Ext.P23(r): Google search data.

c) YouTube Data:

Ext.P23(s): YouTube search data.

Ext.P23(u): YouTube search history data.

Ext.P23(v): YouTube data history of watched videos.

d) Other Data:

Ext.P23(t): Photos used as profile photos in Google.

e) Call Detail Records (CDRs):

The prosecution relied on CDRs of mobile numbers linked to the accused

and other key individuals. The records were issued by the respective Nodal Officers and include:

Ext.P20: CDR for mobile number 7994692007, subscribed in the name of PW2.

Ext.P21: CDR for mobile number 9446454340, subscribed in the name of the accused.

Ext.P25: CDR for mobile number 7902371829, subscribed in the name of PW2.

Ext.P26: CDR for mobile number 9544365682, subscribed in the name of PW1.

Ext.P28: Another CDR for mobile number 9446454340, subscribed in the name of the accused.

Ext.P27: Decoded list of these records.

All the above records were accompanied by certification under Section 65B of the Indian Evidence Act, 1872.

C. <u>DATA from the mobile phone, SIM card, and Memory Card of the accused:</u>

34. PW12, Dy.S.P of NIA, Kochi Branch, conducted a search of House No.16/717, where the accused and his parents resided. The accused and his parents were present during the search. During the search, the accused

handed over his mobile phone and a SIM card to the NIA officials. Six DVDs, two religious books, two diaries, and an old air gun were seized as per Ext.P12 search list. Ext.P13 mobile phone, Ext.P13(a) SIM card, and Ext.P13(b) memory card were seized by PW12. PW10, the Village Officer, confirmed that he witnessed the search conducted by PW12. PW11, the Secretary, Muthalamada Grama Panchayath, issued Ext.P19, the ownership certificate for House No.16/717, confirming that the house belonged to Illias, S/o. Aboobakkar, as recorded in the assessment register. The investigating officer produced these items before the court along with Ext.P37 forwarding note, requesting to forward the same to the C-DAC for forensic examination. A mirror image of the data contained in the seized items was obtained by C-DAC for analysis. PW21, Scientist-F of C-DAC, deposed that he conducted a forensic examination of the digital devices received from the court. Ext.P30 is the report prepared by him, and Ext.P31 is the soft copy of the cyber forensic analysis data. Ext.P32 is the certification issued by PW21 under Section 65B of the Indian Evidence Act, certifying the authenticity of the retrieved data. Measures were taken to ensure that the digital devices in Ext.P13 (series), seized from the accused's residence, were forwarded to the Court and then to

the C-DAC in a tamper-proof condition. These items were forwarded to C-DAC as per Ext.P37, where PW21 conducted a forensic examination, with the retrieved data stored in Ext.P31 Pendrive. PW21 deposed that he examined the mobile phone marked as Ext.P13, referred to as Evd01(a) in his report. The SIM card, Ext.P13(a), was referred to as Evd01(b), the BSNL SIM card as Evd01(c), and the memory card, Ext.P13(b) as Evd01(d). Details of these items were described in Chapter III, page 6, of his report, including the hash values created for the items sent for examination. The data extracted from Ext.P13 (Evd01) mobile phone was separately marked as under:

A. Social media application chats (Ext.P31(c)).

B. Audio files (Ext.P31(d)).

C. Documents (Ext.P31(e)).

D. Images (Ext.P31(f)).

E. Video files (Ext.P31(g)).

F. Extracted report of the data (Ext.P31(h)).

G. Report of call logs (Ext.P31(i)).

H. Contact details in the mobile phone (Ext.P31(j)).

I. Search history (Ext.P31(k)).

J. Facebook chats (Ext.P31(l)).

K. Telegram chats (Ext.P31(m)).

L. WhatsApp chats (Ext.P31(n)).

M. Web history (Ext.P31(o)).

N. Detailed call logs (Ext.P31(p)).

O. Detailed contact data (Ext.P31(q)).

P. Keyword search data (Ext.P31(r)).

Q. Documents in the memory card (Ext.P31(t)).

R. Deleted or overwritten audio clips (Ext.P31(q)).

S. Deleted or overwritten audio files (Ext.P31(w)).

T. Normal audio files (Ext.P31(x)).

U. Deleted or overwritten video files (Ext.P31(aa)).

V. Normal video files (Ext.P31(ab)).

W. Deleted or overwritten picture files (Ext.P31(ac)).

X. Normal picture files (Ext.P31(ad)).

The search history in Ext.P31(k) revealed specific YouTube searches conducted by the accused, including:

A. On 13.02.2018: Searches for "ISIS 53 voice clips in Malayalam" and "ISIS 53 voice clips."

B. On 10.01.2018: Search for "ISIS new videos."

C. On 09.01.2018: Search for "ISIS Malayalam news."

D. On 28.12.2017: Search for "most wanted ISIS members in Kerala."

E. On 23.12.2017: Search for "ISIS new Malayalam news."

F. On 18.12.2017: Search for "refutation of Zakir Naik."

G. On 10.12.2017: Search for "MM Akbar speech about ISIS."

H. On 06.12.2017: Search for "ISIS Malayalam voice clips."

I. On 27.11.2017: Searches for "Rashid Abdulla all voice clips" and "ISIS Rashid Abdulla voice clips."

J. On 17.11.2017: Searches for "Rashid Abdulla Malayalam voice clips," "Rashid Abdulla voice clips," and "Abdulla Al Rashid."

K. On 17.10.2017: Search for "who arrested the Australian ISIS member."

35. PW22 deposed that one of the voice clips, marked as Ext.P31(d)(9), contains the voice of the accused introducing himself as Riyas from Palakkad. Ext.31(e)(1) is the PDF document of a "Rumia" magazine, which is stated therein that it is the official magazine of ISIS. Ext.P31(g) (1) is a video of ISIS militants which also displays the ISIS flag. Ext.31(e)(3) is another PDF document of "Dabiq" magazine, the mouthpiece of ISIS. Ext.31(e)(4) is the Malayalam translation of a speech rendered by Abu Bakr al-Baghdadi. Ext.31(e)(9) is an ISIS publication containing images of Abu Bakr al-Baghdadi and of ISIS militants. Ext.31(e)(12) is a PDF document containing

a picture of ISIS flag. Ext.P31(g)(2) contains a video showing burned dead bodies. Ext.P31(g)(3) to Ext.P31(g)(6) consist of videos related to ISIS. Ext.P31(g)(7) includes propagandist videos of ISIS with English subtitles, promoting the ideology that everyone should become militants, kill people of other faiths, and liberate various regions worldwide, including Kashmir. Ext.P31(g)(8) to Ext.P31(g)(30) contain videos of Zakir Naik.

Evaluation of the Evidence:

36. It has come out from the evidence of PWs 1 and 2 that they are known to each other and also that they had constant interactions with the accused, through various social networking sites. It was through PW2 that PW1 got in touch with Riyas Aboobakker. The evidence tendered by them discloses that PW1 was holding two mobile connections bearing subscription numbers 9544365682 and 9744448485. Ext.P2 series, Customer Application Forms (CAF) would clearly prove the same. Similarly, the prosecution had successfully proved by the production of Exts.P5 and P6 series Customer Application Forms (CAF) that subscriber numbers 7902371829 and 7994692007, are that of PW2. As is revealed from Ext.P3(h), the contact

number of PW2 is saved in the SIM card of the accused. It has also come out that the contact numbers of PW1 and PW2 were found in the contact list saved in the sim card of the phone of the accused, as is borne out from Ext.P3(g). Ext.P22 is the CAF of the Mobile Phone bearing number 9446454530, belonging to the accused. Ext.P20 is the Call Data Record of the mobile phone of PW2, Ext.P26 is the Call Data Record of the mobile phone of PW1, Ext.P21 and Ext.P28 are the Call Data Records of the mobile phone of the accused. The constant contacts between the accused, PW1, and PW2 are proved by the above documents. Ext.P23(b) the address book of Facebook of the accused also contains the contact details PW1 and PW2. Ext.P3 are the chat transcripts retrieved from "chat-187.text". These records emphatically prove the prosecution case that PW1 and PW2 were in constant contact with the accused through instant messaging applications, direct calling, and through Facebook Messenger. Furthermore, we also find that the accused is not disputing that he was in constant touch, but his contention is that he was persuaded by PW1 and PW2.

37. Both PWs 1 and 2 stated that, after having virtual interaction for quite some time, PW1 decided to meet the accused in person. In October

2018, PW2 and Riyas met PW1, at the parking area near Lulu Mall, Ernakulam and to have more privacy, they shifted their meeting to the bridge near Marine Drive, Ernakulam. Ext.P20 (CDR of PW2), Ext.P26 (CDR of PW1), Ext.P28 (CDR of accused), and Ext.P27 (Decoded Cell ID List) substantiate the fact that such a meeting had taken place at the time and date. We also find that the accused also does not dispute that such a meeting had taken place. The suggestion put to the witnesses was that the accused was being persuaded by PWs 1 and 2 to follow the ideology of ISIS and to do Hijra, which he refused.

38. The evidence tendered by PWs 1 and 2 is corroborated by the evidence extracted from the digital devices. The interaction between the appellant, PW1, and PW2, is discernible from Ext.P20 (CDR of PW2), Ext.P26 (CDR of PW1), Ext.P28 (CDR of accused), and Ext.P27 (Decoded Cell ID List), and Ext.P3 chats. This aspect of the matter is not even disputed by the accused. Ext.P20 CDR, details the calls through mobile phone, between PW2 (mobile number 7994692007), and the accused (mobile number 9446454530), on various days between 30.07.2018, and 22.01.2019. Similarly, Ext.P20 CDR also details the calls between PW2 (mobile number 7994692007) and PW1 (mobile number 9744448485) on various days between 03.10.2018 and

28.12.2018. Ext.P21 details the calls between the accused (mobile number 9446454530), and PW2 (mobile number 7994692007). Ext.P28 gives the details of the calls between the accused (mobile number 9446454530) and PW2 (mobile number 7994692007), between 08.08.2018 and 18.03.2019. Ext.P28 CDR details the calls between the accused (mobile number 9446454340), and PW1 (mobile number 9744448485). These records emphatically show that there were constant interactions between the accused and PWs 1 and 2. Exts.P20, P26, P27, and P28 (decoded Cell ID list), clearly show that the appellant and PWs 1 and 2, were found at the same time and place at Edappally North, Ernakulam and at Marine Drive Walkway on 26.10.2018. Furthermore, the presence of the appellant, PW1 and PW2 is not disputed by the accused, even while cross-examining PWs 1 and 2. As the defence has not disputed the presence of PWs 1 and 2 with the accused, at Edapally, near Lulu Mall and at Marine Drive Walkway, Ernakulam, it cannot be said that their presence at the place and time has not been established.

39. PWs 1 and 2 had deposed that the accused harbored intention and planned to execute a suicide attack in India. Ext.P23(i) revealed that the accused liked the English video pages of Dr. Zakir Naik, a person who has

been banned by the Government of India under the UA(P) Act. Ext.P23(j) revealed that the accused had chatted with Zahran Hashim, an ISIS leader in Sri Lanka who carried out the suicide attack known as the "Easter Blast" in April 2019. Ext.P23(l) is a message by the accused which essentially meant that no one can defeat Islam and that the accused and his brothers were jihadists even while they were in the womb of their mother. There are pictures posted by the accused on Facebook on 03.03.2016, 23.03.2016, and 19.06.2016 wherein he is seen pointing his index finger upwards. It is well known that Islamic Militants owing allegiance to ISIS use a single raised index finger as the symbol of their cause. It is a well-known sign of power and victory around the world, but for ISIS, it has a more sinister meaning. The said gesture refers to the tawhid, "the belief in the oneness of God and a key component of the Muslim religion." More specifically, though, it refers to their fundamentalist interpretation of the tawhid, which rejects any other view, including other Islamic interpretations, as idolatry. ISIS uses the gesture to affirm an ideology that demands the destruction of the West, as well as any form of pluralism, and thus to dominate the world.

40. The accused uploaded a photograph of himself on 28.02.2018

with the tagline "STAND WITH SYRIA," followed by a statement indicating that he is waiting for that day. Another post, marked as Ext.P23(l), proclaims that "Islam will dominate the world, and Freedom can go to hell." In a post dated 14.10.2017, the accused uploaded his photograph sporting a beard and wrote that there is no need to convince anyone, and others are free to associate him with Syria or Afghanistan. He further stated that whatever is required will happen. The accused also posted a message on 28.02.2018 exhorting his friends to "STAND WITH SYRIA." Posts marked as Ext.P23(l)(1) to Ext.P23(l)(10) contain statements such as "You can kill Muslims, but you can never kill Islam," and declarations that he and others are "the mujahideen of Islam." Ext.P3(m) to Ext.P3(y) are voice clips associated with Abdul Rashid Abdulla. In Ext.P3(k), the voice clip describes the method of carrying out a suicide attack. PW20 deposed that he recognized the voice as belonging to Abdul Rashid Abdulla and identified the voice clips. Ext.P23(o) contains the Google search history of the accused, which reveals that he searched for terms such as "Zahran Hashim," "Abu Maryam Al-Balkani," "Abu Esa," "Sameer Ali," "Abdhul Ghayoob," and "Midhilaj." PW22 deposed that Zahran Hashim was the Sri Lankan ISIS leader and this fact is not disputed. It was brought out in

evidence that Abu Esa is the Kuniya (alias) of the original first accused. PW22, while tendering evidence stated that Sameer Ali was the Facebook ID of Shajeer Mangalaserry, a Keralite who joined ISIS and was later killed in Afghanistan, with the Facebook ID subsequently used by the original first accused. He had also stated that Abdhul Ghayoob is an absconding accused in another ISIS case under investigation by the NIA and that Midhilaj is a convicted accused in the Valapattanam ISIS case. Additionally, PW22 stated that Nimisha Fathima, an accused in the Palakkad ISIS case, joined ISIS and subsequently migrated to Afghanistan.

41. Ext.P23(p)(1) reveals that the profile photo displayed is of ISIS militants raising the ISIS flag. Ext.P23(q)(1) searches in Google which reveals that on 30.03.2016, the accused searched for details about Sheikh Anwar Al-Awlaki in Malayalam. On 21.06.2016, searches were conducted for images of Abu Bakr al-Baghdadi and Hizbul Mujahideen. On 11.04.2017, the accused searched for an image of Shibi, missing people in Palakkad, and on 23.05.2017, he searched for images of Indian Mujahideen. While tendering evidence, PW22 stated that Sheikh Anwar Al-Awlaki was a cleric who preached violent Jihad in English. PW22 identified Baghdadi as Abu Bakr al-Baghdadi,

the founder and first Caliph of ISIS. He further stated that Hizbul Mujahideen is a banned terrorist organization operating in Kashmir and that Shibi is an accused in the Palakkad ISIS case. Ext.P23(v) path reveals the watch history of the accused's YouTube searches on 03.12.2018. These searches include topics such as "How to make a Coca-Cola color smoke bomb – FoBIRD," "Islamic State's 'chlorine gas' bombs – BBC News," "How to make a gas bomb," "Inside the mind of a suicide bomber," and "How To Make A Car Bomb." PW22 stated that the voice clips marked as Ext.P3(m) to Ext.P3(y) contain the voice of the original first accused, Abdul Rashid Abdulla, advocating ISIS ideology. These clips urge all true Muslims to join ISIS. Ext.P3(k) voice clip of Abdul Khayoom, details the manner in which Istishhad Operation is to be carried out. The said voice clip starts with a remark that the said clip is intended to be heard by Malayalis and comes from 'Dawlat al Islam' meaning ISIS. It says that true believers are those who will reach paradise in exchange for their wealth and bodies. The clip says that the Istishhad Operation (Martyrdom) was performed even before the establishment of the Caliphate of Islam. The clip glorifies the 19 brothers, who crashed Airplanes into the World Trade Center in the US and carried out the Istishhad Operation. It says that those 19

persons are the lions of the century and that they had acted under the leadership of Osama Bin Laden.

42. Exts. P23(c)(1) to P23(c)(25) are messages in Malayalam posted by the accused on social media, either independently or in response to other posts, as part of a conversation. For instance, in the message marked as Ext. P23(c)(6), the accused asks his friends whether they are prepared to declare war to secure "Deen" (the way of life that Muslims must follow to comply with divine law). He asserts that if someone sits and eats rice offerings, that person will lack the bravery to commit to war. He proclaims that if the person agrees to Jihad, not a single non-believer would remain in the world, and only two groups of people would exist: those who commit Shirk (a sin, often translated as idolatry or polytheism) and those who do not. In the message marked as Ext.P23(c)(7), the accused queries his friends and followers about whether any actions by ISIS can be considered against the tenets of Islam. He further remarks in the same message that India is assisting in eradicating ISIS, and questions whether it is "Haram" (forbidden under Islamic law) to live in India. Ext.P23(c)(15) contains a message where the accused suggests that voting in a democracy like India amounts to Shirk. In Ext.P23(c)(16), the accused has

posted a message to Thanseer, wherein he states that Prophet Muhammed has exhorted that "Kafirs who are competent to fight in a war are to be murdered. If that be the case, isn't it wrong for you to say that you can't fight against persons who do not take part in the war?". In Ext.P23(c)(21), the accused states that Muslims do not hold power in India, and warns that if Muslims denigrate their religion, Kafirs (non-believers) may abuse "Allah". He further states that anyone who abuses "Allah" may lose their tongue. In Ext.P23(c)(22), the accused advises Muslims not to show love or affection to people who follow other faiths. In Ext.P23(c)(25), the accused declares that respecting Kafirs is an act of stupidity. PW4, PW5, PW9 and PW13 has also spoken about the differing ideology and solitary prayer habits of the accused. They had attempted to advise the accused and to enlighten him the true meaning of the Quran but the accused had sarcastically rejected their interpretation of the Quran and expressed views aligned with terrorist ideologies like ISIS. PW5 and PW13 had even suggested that it would be better for them to distance themselves from the accused. The evidence accused has emphatically shown that the accused was associating himself with ISIS and promoting its ideology to further its activities. It also reveals that the

accused was radicalized through the ideologies of ISIS, a terrorist organization, that they entered into criminal conspiracy to further its activities and to garner support for the terrorist organization by migrating to ISIS controlled territories like Syria, Iraq, and Afghanistan. The evidence also discloses that the accused associated himself and professed to be associated with ISIS, with intent to further its activities, and that the accused with intent to further the activity of the terrorist organization, invited support for the terrorist organization and thereby committed the offences punishable under S.120B of IPC r/w S.38 and 39 of UAPA and S.38 and 39 of UA(P) Act.

Evaluation of the contentions advanced by the appellant:

A. Validity of the Sanction order:

43. The first contention advanced by the learned counsel is with regard to the grant of sanction. The question is whether the respondents have complied with Section 45(2) r/w. Rules 3 and 4 of the Rules, 2008.

44. In order to prove the grant of sanction, the prosecution examined PW18, the Under Secretary to the Government of India, Counter

Terrorism and Counter Radicalisation Division (CTCR) Division of the Ministry of Home Affairs. The witness stated that the said Department is responsible for issuing sanctions under Section 45 of the UA(P) Act. He stated that on 10.10.2019, a letter was received from the NIA along with the investigation report and enclosures of evidence seeking sanction of prosecution under Section 45(1) of the Act of the appellant for offences under Section 120B of the IPC, Sections 38 and 39 of the UA(P) Act. On receiving the said report, he forwarded the same to the authority set up under Rule 2(b) of Rules, 2008 for independent review and recommendation. The said authority submitted its report containing the recommendation to the Central Government recommending the issuance of sanction for prosecution against the accused under the Act on 15.10.2019. The said report by the authority set up for independent review along with the report of PW18 was considered by the Central Government and on 18.10.2019, by Ext.P24 order, sanction was issued. PW18 as a duly authorized person had signed on the sanction order and affixed his seal. As per Ext.P24, sanction was accorded to prosecute the appellant under Sections 38 and 39 of the UA(P) Act. In cross-examination, the suggestion was that Ext.P24 order was issued without any proper

application of mind and without any independent review, which the witness denied. He denied the suggestion that the sanction order was issued beyond the statutory limit. We find that under Section 3 of Rules, 2008, the authority is to submit its report containing the recommendations of the Central Government within 7 working days of the receipt of the evidence gathered by the investigating officer, and under Rule 3 of Rules, 2008, the Central Government is required to take a decision regarding sanction for the prosecution within 7 working days after receipt of recommendations of the authority.

45. In **Fuleshwar Gope v. Union of India and Other**s[6], the Apex Court had occasion to elucidate on the principles regarding the grant of sanction under Section 45 of the UA(P) Act. It was observed as under:

> 18. The UAPA does not provide for any such saving of the sanction. This implies that, in the wisdom of the legislature, the inbuilt mechanism of the Act of having two authorities apply their mind to the grant of a sanction, is sufficient. This emphasizes the role and sanctity of the operation to be carried out by both these authorities. In order to challenge the grant of sanction as invalid, the grounds that can be urged are that (1) all the relevant material was not placed before the authority; (2) the authority has

---

6 2024 SCC OnLine SC 2610

> not applied its mind to the said material; and (3) insufficiency of material. This list is only illustrative and not exhaustive. The common thread that runs through the three grounds of challenge above is that the party putting forward this challenge has to lead evidence to such effect. That, needless to say, can only be done before the Trial Court. In that view of the matter, we have no hesitation in holding that while we recognise the treasured right of an accused to avail all remedies available to him under law, in ordinary circumstances challenge to sanction under UAPA should be raised at the earliest possible opportunity so as to enable the Trial Court to determine the question, for its competence to proceed further and the basis on which any other proceeding on the appellate side would depend on the answer to this question. [See: State of Karnataka v S. Subbegowda 2023 SCC OnLine SC 911]

46. In the case on hand, the appellant has not been able to establish that the grant of sanction as invalid on any ground which include that the relevant material was not placed before the authority or that the authority had not applied its mind to the said material or that the order is vitiated for insufficiency of material or on any other count. It is for the appellant to place adequate material or to lead evidence to substantiate the said contention. Having evaluated the entire records, we are of the considered view that the order cannot be held to be vitiated on any ground. Furthermore, the time stipulation under Rules 3 and 4 of the Rules, 2008 has been scrupulously complied with. In that view of the matter, the argument advanced by the

learned counsel that the sanction order is vitiated as it has not been issued in accordance with law cannot be accepted.

B. <u>The evidence of approvers:</u>

47. The next contention is with regard to the credibility of the evidence tendered by PWs 1 and 2. PWs 1 and 2 were originally arrayed as accused Nos. 19 and 20. Based on an application filed by the NIA, a pardon was tendered to the accused by invoking Section 307 of the Cr.P.C. Under Section 307 of the Cr.P.C., discretion is conferred on the Court to tender a pardon to an accused, with a view to obtaining evidence, where the person is directly or indirectly concerned in or privy to any such offence.

48. It would be apposite at this juncture to refer to the observations of the Apex Court as regards the principles that are to be borne in mind and the credibility that is to be attached to the evidence tendered by an approver. In **Dagdu And Others v. State of Maharashtra**[7], the Apex Court explained the position in the following words:

> 20. Before considering that evidence, it would be necessary

[7] AIR 1977 SC 1579

to state the legal position in regard to the evidence of accomplices and approvers. Section 133 of the Evidence Act lays down that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Section 114 of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (b) to Section 114 says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

21. There is no antithesis between Section 133 and Illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court "may" presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, insofar

as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

49. After referring to the observations in **King v. Baskerville**[8], **Rameshwar v. The State of Rajasthan**[9], **Bhiiboni Sahu v. King,** and **Ravinder Singh v. State of Haryana**[10], it was held that the testimony of an accomplice is evidence under Section 3 of the Evidence Act and has to be dealt with as such. The evidence is of a tainted character and as such is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars.

---

[8] (1916) 2 KB 658
[9] AIR 1952 SC 54
[10] (1975) 3 SCC 742

50. In **Haroon Haji Abdulla v. State Of Maharashtra**[11], it was observed as under:

> "An accomplice is a competent witness and his evidence could be accepted and a conviction based on it if there is nothing significant to reject it as false. But the rule of prudence, ingrained in the consideration of accomplice evidence, requires independent corroborative evidence first of the offence and next connecting the accused, against whom the accomplice evidence is used, with the crime."

51. In **Ravinder Singh v. State of Haryana**, it was laid down as follows:

> "An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected brevi manu. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be

[11] [AIR 1968 SC 832]

corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

52. What has been laid down above is that an approver's evidence to be accepted must satisfy two tests. The first test to be applied is that his evidence must show that he is a reliable witness. That is a test that is common to all witnesses. The test obviously means that the Court should find that there is nothing inherently improbable in the evidence tendered by the approver. The second test which thereafter still remains to be applied in the case of an approver, and which is not always necessary when judging the evidence of other witnesses, is that his evidence must receive sufficient corroboration. This is not to say that the evidence of an approver has to be considered in two water-type compartments; it must be considered as a whole along with other evidence. [See: **Lachhi Ram v. State of Punjab**[12], **Saravanabhavan and Govindaswamy v. State of Madras**[13]]

---

[12] [AIR 1967 SC 792]
[13] [AIR 1966 SC 1273]

53. Having evaluated the evidence of PWs 1 and 2, we find that both of them were young men, who were persuaded by the inflammatory messages, voice clips, and videos forwarded to them by the appellant. Their version before the Court is sufficiently corroborated by the Call Data Records and digital evidence. We are of the view that the contentions advanced by the learned counsel appearing for the appellant is that they are unreliable and no reliance can be placed on the same cannot be accepted. All that is required to act upon the evidence of an approver is that their evidence has a ring of truth and that there is other evidence brought on record, rendering the evidence tendered by them before the Court, probable.

54. Before parting with the appreciation of the evidence of the approver, we would like to notice another facet of the matter. The learned Special Judge has noted in Paragraph No.40 of the judgment as under:

> "The evidence of PWs.1 and 2 gets corroboration from their own previous statements recorded under Section 164 of the Cr.P.C.

55. We find that the statements of PWs 1 and 2 were initially recorded under Section 164 of the Cr.P.C. by the learned Magistrate. The learned Special Judge, obviously being aware of the law that omnibus marking

of the 164 statement is not permitted, proceeded to initially take down the evidence by the witness as narrated by him and thereafter proceeded to mark piecemeal the relevant portion of the 164 statement as an exhibit. Exts.P1 to P1(i) are the marked portions of the 164 statement of PW1 and Exts.P4 to P4(g) are the portions of the 164 statement insofar as it relates to PW2. Obviously, the said procedure was followed to get over the directions issued by the Apex Court to the effect that omnibus marking of the 164 Statement of the witnesses shall never be done.

56. The Apex Court **Criminal Trials Guidelines regarding Inadequacies And Deficiencies, in Re. v. State of Andhra Pradesh and Others**[14], while noticing deficiencies that occur in the course of criminal trial and certain practices adopted by trial courts, had issued the following directions concerning Section 164 of the Cr.P.C.

> 10. References to statements under Section 161 and 164 CrPC.
>
> (i) During cross-examination, the relevant portion of the statements recorded under Section 161 CrPC used for contradicting the respective witness shall be extracted. If it is not possible to extract the relevant part as aforesaid, the Presiding Officer, in his discretion, shall indicate specifically the opening and

---

[14] [(2021) 10 SCC 598]

closing words of such relevant portion, while recording the deposition, through distinct marking.

(ii) In such cases, where the relevant portion is not extracted, the portions only shall be distinctly marked as prosecution or defence exhibit as the case may be, so that other inadmissible portions of the evidence are not part of the record.

(iii) In cases, where the relevant portion is not extracted, the admissible portion shall be distinctly marked as prosecution or defence exhibit as the case may be.

(iv) The aforesaid rule applicable to recording of the statements under Section 161 shall mutatis mutandis apply to statements recorded under Section 164 CrPC, whenever such portions of prior statements of living persons are used for contradiction/corroboration.

(v) Omnibus marking of the entire statement under Sections 161 and 164 CrPC shall not be done. (emphasis supplied)

57. In tune with the guidelines issued by the Apex Court, Rule 56A was inserted in the Criminal Rules of Practice, Kerala, 1982, regarding the recording of depositions. Rule 56A reads as under:

Rule 56A: Recording of Deposition:

(1) The court shall while recording the deposition divide the same into separate paragraphs assigning paragraph numbers.

xxxxx xxxxx xxxxx

(7) During cross-examination, the relevant portion of the statements recorded under section 161 of the Code used for contradicting the respective witness shall be extracted. If it is not possible to extract the relevant part as aforesaid, the Presiding Officer, in his discretion, shall indicate specifically the opening and closing words of such relevant portion, while recording the deposition, through distinct marking.

(8) In such cases, where the relevant portion is not extracted the portions only shall be distinctly marked as prosecution or defence exhibit as the case may be, so that other inadmissible portions of the evidence are not part of the record.

(9) In cases, where the relevant portion is not extracted, the admissible portion shall be distinctly marked as prosecution or defence exhibit as the case may be.

(10) The aforesaid rule applicable to the relevant statements under section 161 of the Code shall mutatis mutandis apply to statements recorded under section 164 of the Code when such portions of prior statements are used for contradiction/corroboration.

(11) Omnibus marking of the entire statements under Section 161 and 164 of the Code shall not be done.

58. In **George and Ors. v. State of Kerala and Anr.**[15], the Apex Court had laid down that it is a fundamental rule of Criminal jurisprudence

---

[15] [AIR 1998 SC 1376]

that a statement of a witness recorded under Section 164 of the Cr.P.C. cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating the witness. In **Utpal Das v. State of West Bengal**[16], it was held that the statement recorded under Section 164 of the Cr.P.C. can never be used as substantive evidence of the truth of the facts but may be used for contradiction and corroboration of a witness, who made it. The statement made under Section 164 of the Cr.P.C. can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. In an appropriate case, the defence can invite the attention of the witness to the statement made under Section 164 of the Cr.P.C., for the purpose of bringing out the contradictions, if any, in his/her evidence. In the absence of the same, the Court cannot read the 164 Statement and compare the same with the evidence of the witness. In **P.V Narasimha Rao and Others v. State through CBI**[17], a Single Judge of the Delhi High Court had occasion to notice the practice of seeking corroboration of the evidence of a witness, with his statement under Section 164 of the

16 [AIR 2010 SC 1894]
17 [2002 Crl J 2401]

Cr.P.C. It was observed as under:

> "The statement of PW-1 is being sought to be corroborated by his statement under Section 164 Code of Criminal Procedure. Such corroboration is impermissible. The statement under Section 164 Code of Criminal Procedure cannot be used to corroborate the testimony of a witness who needs to be corroborated by material particulars by independent evidence. The corroboration must necessarily come from source de hors, the Approver or an accomplice. There is no such material in the entire case and the only corroboration is the statement under Section 164 Code of Criminal Procedure of the Approver. It is well settled that a witness who needs corroboration cannot corroborate himself by any statement made earlier or later. His evidence needs to be corroborated by independent evidence and his own previous statement cannot be said to be independent evidence. (emphasis supplied)

59. The observations made above reflect the correct proposition of law. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of such witness. Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is

not affected by the prohibition contained in the said Section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof. (See **Ramprasad vs State Of Maharashtra** [18]). The Apex Court in **Kehar Singh and Ors. v. State (Delhi Administration**[19] had held that a perusal of Sections 145, 155 and 157 of the Indian Evidence Act indicates that there are two purposes for which a previous statement can be used. They are i) for cross examination and contradiction and ii) for corroboration. When the defence wants to use the previous statement of a witness it would only be to contradict a witness and not to corroborate. A previous statement of a witness recorded under Section 164 of the Cr.P.C. can be used for impeaching the credit of a witness and cannot be used as substantive evidence.

60. In view of the discussion above, we are of the view that the

---

[18] AIR 1999 SC 1969

[19] [AIR 1988 SC 1883]

observation made by the learned Sessions Judge that the evidence of PWs.1 and 2 gets corroboration from their own previous statements recorded under Section 164 of the Cr.P.C. cannot be said to be correct. Corroboration to the evidence of an accomplice must proceed from an independent and reliable source and the previous statement made by the accomplice himself though consistent with the statement made by him at the trial are insufficient for such corroboration.

C. <u>The Certification under Section 65B of the Indian Evidence Act:</u>

61. The next contention advanced by the learned counsel is with regard to the certification issued under Section 65B of the Indian Evidence Act insofar as it relates to and the documents produced before court by PW16. The learned counsel would highlight that the said officer had extracted the data from the google and facebook accounts of the accused and the entire data were copied to a DVD. However, when the witness was examined as PW16, he stated that the certification under Section 65B was not issued at the time of extraction as he omitted to do the same. However, at the time of recording of the evidence, he produced Ext.P23 (l) certification under Section

65B of the Act. The learned counsel points out that the said procedure adopted cannot be approved. We find that the very same issue was considered by the Apex Court in **Arjun Panditrao Khotkar** (supra), wherein a Bench of Three Judges of the Apex Court, were called upon to interpret Section 65B of the Indian Evidence Act, 1872. One of the issues that was considered was the stage at which such a certificate must be furnished to that court. While deciding the issue, the Apex Court took note of the observations in **Anvar P.V. v. P.K.Basheer**[20], **State By Karnataka Lokayukta, Police Station, Bengaluru v. M.R. Hiremath**[21], the observations made by the High Court of Rajasthan in **Paras Jain v. State of Rajasthan**[22] and that of the Delhi High Court in **Kundan Singh v. State**[23] and it was observed as under:

> "**52.** We may hasten to add that Section 65-B does not speak of the *stage* at which such certificate must be furnished to the Court. In *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473] , this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record.

---

[20] (2014) 10 SCC 473
[21] (2019) 7 SCC 515
[22] [2015 SCC OnLine Raj 8331]
[23] 2015 SCC OnLine Delhi 13647

However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

53. In a recent judgment, a Division Bench of this Court in *State of Karnataka* v. *M.R. Hiremath* [*State of Karnataka* v. *M.R. Hiremath*, (2019) 7 SCC 515], after referring to *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473] held : (*M.R. Hiremath case* [*State of Karnataka* v. *M.R. Hiremath*, (2019) 7 SCC 515 : SCC p. 523, paras 16-17)

> "*16*. The same view has been reiterated by a two-Judge Bench of this Court in *Union of India* v. *Ravindra V. Desai* [*Union of India* v. *Ravindra V. Desai*, (2018) 16 SCC 273 : (2020) 1 SCC (Cri) 669 : (2019) 1 SCC (L&S) 225] . The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu* v. *State of Haryana* [*Sonu* v. *State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663], in which it was held : (*Sonu case* [*Sonu* v. *State of Haryana*,

(2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , SCC p. 584, para 32)

> '32. … The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.'

17. Having regard to the above principle of law, the High Court [*M.R. Hiremath* v. *State*, 2017 SCC OnLine Kar 4970] erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

xxxxx xxxxx xxxxx

56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced

> by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.
>
> xxxxx xxxxx xxxxx
>
> **59.** Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

62. The position has been clarified and it has been held that so long as the hearing in a trial is not yet over, the requisite certification can be directed to be produced by the learned Judge at any stage, so that the information contained in electronic record form can then be admitted, and relied upon in evidence. Recently, **in State of Karnataka (s) v. T.Naseer @ Nasir @ Thadiyantavida Naseer @ Umarhazi @ Hazi and Ors** (supra)**,** the question before the Apex Court was whether the delay in producing the certificate under Section 65B of the Indian Evidence Act was a valid ground for rejection. After referring to the law laid down in **Arjun Panditrao** (supra), it

is observed that in paragraph No. 15 as follows:

> 15. Fair trial in a criminal case does not mean that it should be fair to one of the parties. Rather, the object is that no guilty should go scot-free and no innocent should be punished. A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now. It is meeting the requirement of law to prove a report on record. By permitting the prosecution to produce the certificate under Section 65B of the Act at this stage will not result in any irreversible prejudice to the accused. The accused will have full opportunity to rebut the evidence led by the prosecution. …

63. In the case on hand, a soft copy of the extracted material was admittedly handed over to the accused and the certificate under Section 65B of the Indian Evidence Act was produced when PW16 had appeared before court for tendering evidence. In that view of the matter, it cannot be said that the belated production of the certificate under Section 65B has resulted in any prejudice to the accused.

D. <u>The Conspiracy meeting</u>:

64. The next contention is that the evidence adduced by the Investigating agency would not go to show that the appellant and PW1 and 2 had assembled at Lulu Mall or Marine Drive, Ernakulam, with the intent to

further ISIS activities and that the appellant had persuaded them to carry out proscribed activities. It is true that the prosecution has not placed on record any CCTV footage to show that they were together at any of these places. However, as noted by us earlier, Ext.P23(b) clearly shows that the contact details of PW1 and PW2 were in the address book of the accused. Both PW1 and PW2 deposed that on 26/10/2019, they had met first near Lulu Mall and then at Marine Drive. This meeting is substantiated by several pieces of evidence, including Ext.P20 (the call detail record of PW2), Ext.P26 (the call detail record of PW1), Ext.P28 (the call detail record of the accused), and Ext.P27 (the Decoded Cell ID List). Furthermore, the meeting is not disputed even by the accused while cross examining the witnesses.

E. <u>Extraction of incriminating materials from Google and Facebook.</u>

65. A contention was taken during cross-examination of PW16 that the accused had not furnished the User ID and Password of the Google Account as well as the Facebook account and that the contents of Ext.P23 has no connection whatsoever with him. However, we find from Ext.P7 that after

entering the e-mail ID and Password of the accused, the account protection window appeared, and the Mobile Number 9446454340 and another Gmail ID 'kollaathadi@gmail.com' was displayed. The mobile number admittedly belonged to the accused, as is borne out from Ext.P22 Customer Application Form (CAF). This fact is admitted by the accused when he was questioned under Section 313 of the Code. The account recovery number is also that of the accused. Furthermore, the entire extraction was carried out in the presence of PW3 and PW17.

66. We are unable to accept the contention of the learned counsel appearing for the appellant that the procedure adopted by PW22 is illegal. As held by a learned Single Judge of the Karnataka High Court, in **Virendra Khanna v. State of Karnataka and Ors.**[24], the Investigating Officer, during the course of an investigation could always issue any direction and/or make a request to the accused to furnish information and in such manner, can direct the accused to furnish the Password, Passcode, or Biometrics to facilitate the opening of the Smartphone or the Email Account. It would be open to the accused to accede to the said request. If he refuses, appropriate steps in

---

[24] [MANU/KA/0728/2021]

accordance with law will have to be initiated. If the accused willingly provides such a Password, Passcode, or biometrics, it would be open to the Investigating Officer to utilize the same and gain access to the account. The Investigating Officer, however, is required to follow a transparent procedure while carrying out the extraction with the assistance of an expert. The Data so gathered would have to be treated like any other document and/or object secured during the course of the investigation. The Data gathered will have to be proven during the course of the trial, in accordance with law. In the case on hand, the accused had voluntarily given his credentials with which DATA extraction was carried out in the presence of witnesses, in a transparent mode, by following proper procedure, and by recording the entire process.

F. <u>Extraction of Data from the mobile phone, Memory Card and SIM Card:</u>

67. The next contention raised before us is that the reliance placed by the Special Court on Exts. P30 and P31—the reports submitted by C-DAC—to further the claim of the prosecution that the appellant contacted PWs 1 and 2 through social networking sites to motivate them to join ISIS and

spread its ideologies is misplaced. We have dealt with this issue earlier. Though a contention was raised that the appellant was living separately from his parents and that the mobile phone and memory card are not his, there is a wealth of evidence linking the said electronic items with the appellant. We find that the seizure of the digital devices has been duly proved through the testimony of witnesses present during the seizure. The devices have been promptly handed over to the concerned court immediately after their seizure, ensuring proper procedural compliance. The metadata and properties of each retrieved file indicate that the files predate the arrest of the accused, further corroborating their authenticity. Personal details of the accused, retrieved from the digital devices, were not even denied by the accused while he was questioned under Section 313 of the Code. He has stated that the mobile bearing number "9446454340" including the CAF actually belongs to him. He has also admitted that the photos found in the memory card belong to him. The hash values of the digital devices, as recorded by C-DAC, confirm the integrity of the retrieved data, and the data was transferred to the Special Court ensuring its authenticity. The events and information contained in the digital devices are also corroborated by the respective witness. Furthermore,

we find that the IMEI number of the mobile phone of the accused, marked as Ext.P13 (Oppo Golden Colour Mobile Phone) matches the CDR and the C-DAC report. This establishes conclusively that Ext.P13 belongs to the accused and the chain of custody of the digital evidence ensures its credibility.

G. <u>Whether the ingredients of the offence charged is attracted:</u>

68. The next contention is that the offences under Sections 38 and 39 of the UA(P) Act and Section 120B of the IPC will not be attracted in the instant case.

69. Before dealing with the ingredients of the offence, we may collate the evidence that has been established by the prosecution to bring home the charge. They are:

a) The accused actively propagated ISIS ideology and advocated war against non-Muslims.

b) He posted ISIS-related content on Facebook, shared videos of Abdul Rashid Abdulla and Abdul Khayoom, and disseminated links to ISIS Telegram channels.

c) Organized and addressed conspiracy meetings with PW1 and PW2 near Lulu Mall and Marine Drive on 26.10.2018.

d) Discussed Hijra (migration) to ISIS-controlled regions and the furtherance of ISIS activities with PW1 and PW2.

e) Intended to perform Hijra to wage war against nations allied with India.

f) Planned and encouraged suicide attacks in India for which purpose he instigated PW1 and PW2.

g) PW1 and PW2 confirmed the meetings at Lulu Mall and Marine Drive, where ISIS activities were discussed and narrated about the intention of the accused to conduct suicide attacks and narrated the story of Salahudeen Ayubi to persuade PW1 and PW2.

h) PW4, PW5, PW9, PW13, and PW14 testified to the accused's alignment with ISIS ideology and his proclivities.

i) They stated about the refusal of the accused to perform Namaz with those who believed in democracy, citing his ideological allegiance to ISIS.

j) Digital evidence including images, videos, and content depicting ISIS symbols, flags, and pledges of allegiance (Exhibits P3(b) to P3(e) and P23(l)(2) to P23(l)(4)).

k) Voice clips (Exts. P3(k), P3(l) to P3(y), P31(d)(11)) and search history (Exts. P23(o)(1), P23(q)(1)) confirm the accused's communications and plans.

l) The evidence of PWs 1 and 2 is further corroborated by the Call detail records (CDRs) of the accused, PW1, and PW2 (Exts. P20, P26, P28) and Decoded Cell ID List (Ext.P27) establish the presence of the accused at the meetings.

70. Now we shall deal with the question as to whether the offences charged have been attracted in the case. Section 38 of the UA(P) Act reads as follows:

> 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.

71. Section 38 of the UA(P) Act, 1967 criminalizes association with or professing to be a member of a terrorist organization if done with the intention of furthering its activities. This provision is aimed at preventing individuals from becoming involved with groups listed as terrorist organizations under the First Schedule of the Act. The key element is the association with a Terrorist Organization. A person can be held liable under this section if he/she associates themselves with a terrorist organization, or claims or professes to be associated with such an organization. There should also be materials to establish that the person nursed an intention to further the activities of the terrorist organization. Mere membership without intent to promote its

objectives may not suffice. However, there are certain safeguards. The person concerned cannot be held liable if he is able to establish that the organization was not declared a terrorist organization at the time they became a member or began claiming association with it. He/She can be exempted from liability if they are able to establish that he/she has not participated in any activities of the organization during the period it was listed as a terrorist organization in the First Schedule.

72. Section 39 of the Act reads as under:

> 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 organization; 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 organization; or
>
> (ii) to further the activity of the terrorist organization; 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 offenc erelating to support given to a

terrorist organisation under subsection (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

73. Section 39 of the UA(P) Act, criminalizes any act committed by a person supporting a terrorist organization with the intent to further its activities. A person can be held liable under the said provision if the evidence establishes that he/she with intent to further the activity of a terrorist organization, which has been listed in the schedule, invites support for such organisation. It has been made clear that the support is not restricted to providing money or other property within the meaning of Section 40. Such a person can also be held liable if he/she with intent to further the activity of a terrorist organization has arranged, managed, or assisted in arranging or managing a meeting that he knows is with a view to i) support the terrorist organization, ii) further the activity of the terrorist organization and iii) if the meeting is arranged, assisted or managed by him, then the said meeting is addressed by a person who associates or professes to be associated with the terrorist organization. The provision also says that if the said person with an intention to further the activity of the terrorist organisation, addresses the meeting for the purpose of encouraging support for the terrorist organization

or to further its activity, he can be held liable. The Section emphasizes the intent to further the organization's activities and the knowledge of the nature or purpose of the meeting or support. Section 39 is designed to curtail the spread of terrorism by targeting those who promote or facilitate terrorist organizations. It criminalizes indirect participation and ensures that even non-violent acts, such as organizing meetings or addressing gatherings, are penalized if they aim to further the terrorist organization's objectives.

74. In **Union of India v. Yasmeen Mohd. Zahid**[25], the Union of India had preferred an appeal against the judgment rendered by this Court in **Yasmeen Mohammad Zahid v. Union of India Rep. by NIA, Kochi**[26], the 2nd accused in the very same crime wherein this Court had acquitted the accused in respect of the offence punishable under Section 125 of the IPC, Sections 39 and 40 of the UA(P) Act and had reduced the sentence ordered by this Court for the offence under Section 120B of the IPC and Section 38 of the UA(P) Act. The case against the 2nd accused was that she entered into a criminal conspiracy to raise funds for a terrorist organization and a part of the funds were transferred to the accused who in turn had transferred the same to the 1st

---

[25] (2019) 7 SCC 790

[26] [2018 SCC ONLINE KER 18630]

accused to arrange their travel to the territory controlled by the Islamic State. Another allegation was that the 2nd accused had tried to exit India through the Indira Gandhi International Airport, New Delhi. This Court, while partly allowing the appeal, had held that if a person is punishable under Section 38 of the UA(P) Act, Section 39 of the Act would become superfluous. The Apex Court, after appreciating the facts, held as follows in paragraphs No. 15 to 17 of the judgment.

> 15. The evidence on record, as culled out by the High Court in the observations quoted hereinabove establishes that A-1 was propagating the ideology of IS and advocating, among other things, war against non-Muslims; that the classes were attended by A-2 Yasmeen; that the videos relating to such speeches were found on her person when she was arrested; and that she was attempting to go to Afghanistan at the instance of A-1. These features definitely point to the existence of mens rea. The courts below were therefore absolutely right in recording conviction against A-2 in respect of offences under Section 120-B IPC and Section 38 UAPA. The submissions advanced by Mr Krishnan, therefore, cannot be accepted and the appeal preferred by A-2 Yasmeen must fail.
>
> 16. We now turn to the appeal preferred by the Union to see whether the acquittal of A-2 for offences under Section 125 IPC and Sections 39 and 40 UAPA was justified. As regards the offence under Section 125 IPC, the matter was rightly appreciated by the High Court and we are in complete agreement with the view taken by the High Court. Coming to Sections 39 and 40 UAPA,

> these provisions require certain elements in respect of which there is no material evidence on record. For Section 39 UAPA to get attracted, support to a terrorist organisation must be within the meaning of either of three clauses viz. clauses (a), (b) and (c) of sub-section (1). Similarly, Section 40 requires certain elements on satisfaction of which a person can be said to be guilty of raising funds for a terrorist organisation. None of those features are established as against A-2 Yasmeen. The acquittal in respect of charges under Sections 39 and 40 was therefore rightly recorded by the High Court.
>
> 17. We must however state that the High Court was not right in observing "if a person is punishable under Section 38, Section 39 becomes superfluous". In our view, the scope of these two sections and their fields of operation are different. One deals with association with a terrorist organisation with intention to further its activities while the other deals with garnering support for the terrorist organisation, not restricted to provide money; or assisting in arranging or managing meetings; or addressing a meeting for encouraging support for the terrorist organisation.

75. While allowing the appeal, the Apex Court noted that the evidence established that the accused was propagating the ideology of ISIS, a proscribed organization, and advocating, among other things, war against non-Muslims. It was also noted that the videos relating to inflammatory speeches advocating violence were found on her person when she was arrested. Records also revealed that the accused was attempting to go to Afghanistan at the instance of the 1st accused. It was held that these actions

definitely point to the existence of mens rea. While allowing the appeal, it was held that this Court was not right in observing "if a person is punishable under Section 38, Section 39 becomes superfluous". It was observed that the scope of these two sections and their fields of operation are different. One deals with an association with a terrorist organization with the intention to further its activities while the other deals with garnering support for the terrorist organization, not restricted to providing money; or assisting in arranging or managing meetings, or addressing a meeting for encouraging support for the terrorist organization. We have no doubts in our mind that the acts proven against the accused would clearly attract Sections 38 and 39 of the UA(P) Act and the findings of the learned Sessions Judge to that effect does not warrant any interference.

76. The next question is whether the offence under Section 120B of the IPC is attracted in the instant case. We may refer to the provisions of Section 120A of the Indian Penal Code which defines criminal conspiracy. It provides that when two or more persons agree to do or cause to be done, (1) an illegal act or (2) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy; provided that no agreement

except an agreement to commit an offence shall amount to criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Thus, a cursory look at the provisions contained in Section 120A reveals that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for the accomplishment of an act which by itself constitutes an offence, then in that event, no overt act is necessary to be proved by the prosecution because in such a fact situation criminal conspiracy is established by proving such an agreement. In other words, where the conspiracy alleged is with regard to the commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A of the IPC, then, in that event, mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that

each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of the conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in Section 120B since from its very nature a conspiracy must be conceived and hatched in complete secrecy because otherwise the whole purpose may be frustrated and it is a common experience and goes without saying that only in very rare cases one may come across direct evidence of a criminal conspiracy to commit any crime and in most of the cases it is only the circumstantial evidence which is available from which an inference giving rise to the conclusion of an agreement between two or more persons to commit an offence may be legitimately drawn. (See: **Suresh Chandra Bahri (supra)**].

77. In **Noor Mohammad Mohd. Yusuf Momin v. State Of Maharashtra**[27], the observations made by the Apex Court can be quoted with advantage which read as under:

"Criminal conspiracy differs from other offences in that mere agreement is

[27] [(1970) 1 SCC 696]

made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Section 107 IPC. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. [See also V. C. Shukla v. State (Delhi Administration) (1980) 2 SCC 665)]

78. We have already dealt with Sections 38 and 39 of the UA(P) Act. Section 38 of the UA(P) Act will be attracted if a person associates himself, or professes to be associated, with a terrorist organization with the intention to further its activities. Section 39 of the UA(P) Act, on the other hand, will be attracted if a person, with intent to further the activity of a terrorist organization, which has been listed in the Schedule, invites support for such

organization in the manner mentioned therein. In that view of the matter, going by the principles laid down by the Apex Court above in the light of the proven facts, mere proof of an agreement between the accused for the commission of the objectionable acts under Sections 38 and 39 would be enough to bring about a conviction under Section 120B of the IPC r/w. Sections 38 and 39 of the UA(P) Act and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions in such a situation do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of the conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established the act would fall within the trapping of the provisions contained in Section 120B of the IPC. This is because by its very nature, a conspiracy must be conceived and hatched in complete secrecy because otherwise the whole purpose may be frustrated.

79. Having evaluated the entire facts and evidence, we are of the view that the trial court has rightly held that the prosecution has succeeded in proving that PWs 1 and 2 and the accused were radicalized through the

ideologies of ISIS, a terrorist organization. It has also been established that the accused was a party to the criminal conspiracy to further the activities of the terrorist organization and to garner support by migrating to ISIS controlled territories. It has also been established that the accused had associated himself and had professed to be associated with ISIS, with intent to further its activities. Materials also clearly reveal that the accused with intent to further the activities of the proscribed organization had invited support and thereby committed the offence punishable under Section 120B of the IPC r/w. Sections 38 and 39 of the UA(P) Act and Sections 38 and 39 of the UA(P) Act.

H. <u>Whether the sentence imposed by the Special Court is in order:</u>

80. Now, what remains is the sentence that is to be imposed. The learned counsel appearing for the appellant pointed out that the 16th accused had pleaded guilty of the offence and he was convicted and sentenced to undergo imprisonment for five years. The 2nd accused faced trial and she was sentenced to undergo rigorous imprisonment for seven years by the trial court, which the Apex Court upheld. However, insofar as the appellant is concerned, he has been granted the maximum punishment for the offence

under Sections 38 and 39 of the UA(P) Act. For awarding the maximum punishment provided for the offences, the learned Special Judge has given reasons. The learned Special Judge has held that the accused is a highly radicalized person in ISIS ideologies and he has been spreading the ideology through social media platforms for the past several years. The court felt that the uploads, posts, and comments made on social media supporting ISIS would have caused an increase in the growth of radicalization due to the widespread reach and influence of the social media online platform. The court also observed that as the offence committed was against public order affecting the morale of the society, a clear signal of deterrence was to be sent. The question is in the facts and circumstances, the imposition of maximum punishment for the offences under Sections 38 and 39 of the UA(P) Act was warranted.

81. In **Sunil Dutt Sharma v. State [Govt. of NCTI, Delhi]**[28], the appellant therein was tried for the offence under Sections 302 and 304B of the IPC. He was acquitted for the offence under Section 302 of the IPC by extending the benefit of doubt but was found guilty for the offence under

---

[28] [2013 AIR SCW 5889]

Section 304B of the IPC, following which the sentence of life imprisonment was imposed. The Apex Court issued notice to the limited question as to the determination as to whether the imposition of the maximum sentence of life imprisonment was in any way excessive or disproportionate warranting interference. The Apex Court held that the power and authority conferred by use of the different expressions indicate the enormous discretion vested in the courts in sentencing an offender who has been found guilty of the commission of any particular offence. Nowhere, either in the Penal Code or in any other law in force, any prescription or norm or even guidelines governing the exercise of the vast discretion in the matter of sentencing have been laid down except perhaps, Section 354(3) of the Code of Criminal Procedure, 1973 which, inter alia, requires the judgment of a court to state the reasons for the sentence awarded when the punishment prescribed is imprisonment for a term of years. In the above situation, naturally, the sentencing power has been a matter of serious academic and judicial debate to discern an objective and rational basis for the exercise of the power and to evolve sound jurisprudential principles governing the exercise thereof. After referring to the principles laid

down in **Jagmohan Singh v. State of U.P.**[29], **Bachan Singh v. State of Punjab**[30], and **Machhi Singh and Ors.v. State of Punjab**[31], which are all celebrated judgments laying down the jurisdictional principles in the matter of sentencing, the Apex Court observed as follows in paragraph Nos. 12 and 13 of the judgment:

> "12. Are we to understand that the quest and search for a sound jurisprudential basis for imposing a particular sentence on an offender is destined to remain elusive and the sentencing parameters in this country are bound to remain Judge-centric? The issue though predominantly dealt with in the context of cases involving the death penalty has tremendous significance to the Criminal Jurisprudence of the country inasmuch as in addition to the numerous offences under various special laws in force, hundreds of offences are enumerated in the Penal Code, punishment for which could extend from a single day to 10 years or even for life, a situation made possible by the use of the seemingly same expressions in different provisions of the Penal Code as noticed in the opening part of this order.
>
> 13. As noticed, the "net value" of the huge number of in-depth exercises performed since Jagmohan Singh (1973) 1 SCC 20 has been effectively and systematically culled out in Sangeet (2013) 2 SCC 452 and Shankar Kisanrao Khade (2013) 5 SCC 546. The identified principles could provide a sound objective basis for sentencing thereby minimising individualised and Judge-centric perspectives. Such principles bear a fair

---

[29] [(1973) 1 SCC 20]
[30] [1980) 2 SCC 684]
[31] [(1983) 3 SCC 470]

amount of affinity to the principles applied in foreign jurisdictions, a résumé of which is available in the decision of this Court in State of Punjab v. Prem Sagar (2008) 7 SCC 550. The difference is not in the identity of the principles: it lies in the realm of application thereof to individual situations. While in India application of the principles is left to the Judge hearing the case, in certain foreign jurisdictions such principles are formulated under the authority of the statute and are applied on principles of categorisation of offences which approach, however, has been found by the Constitution Bench in Bachan Singh (1980) 2 SCC 684 to be inappropriate to our system. The principles being clearly evolved and securely entrenched, perhaps, the answer lies in consistency in approach."

82. In **Sadiya Anwar Shaikh v. National Investigation Agency**[32], a learned Single Judge of the Delhi High Court had occasion to render a scholarly exposition with the regard to sentencing in terrorism related offences. It was observed that insofar as sentencing is concerned, specifically in terrorism and similar/related offences, no guidelines have been framed in India at a policy level. However, in foreign jurisdictions such as the UK, US, Sweden etc., specific guidelines have been framed for the purpose of sentencing in the case of terrorist acts. Furthermore, in certain jurisdictions, there are also general guidelines that are to be followed for awarding sentences in the absence of guidelines specific to the offence at hand. After

[32] [2024 DHC 8801]

referring to the guidelines in the UK, US, and Sweden, the learned Single Judge has referred to India and has laid down as under:

> "31. In India, though there are no specific sentencing guidelines, recommendations recording the need to introduce such guidelines were made way back in March, 2003. The Committee on Reforms on the Criminal Justice System (Malimath Committee) was of the opinion that such guidelines would minimize the uncertainty in the awarding of sentences. Such a need has been reaffirmed by the Draft National Policy on Criminal Justice (Madhava Menon Committee). Certain news reports also suggest that such a measure was under consideration to remove the uncertainty in sentencing.
>
> 32. On the judicial side, the following are the judgments, which discuss the factors in the awarding of sentences. In Pramod Kumar Mishra v. State of UP [(2023) 9 SCC 810] the Supreme Court upheld the general factors that are to be considered while sentencing, mentioned in Santa Singh v. State of Punjab [(1976) 4 SCC 190]
>
> - Prior Criminal Record
> - Age of the Offender
> - Employment Records
> - Background of an offender with respect to Education, Homelife, Sobriety, and Social Adjustment.
> - Emotional and mental conditions of the offender
> - Prospects of rehabilitation
> - Possibility of the sentence acting as a deterrence to the criminal and others.
>
> 33. In Sunder Singh v. State of Uttaranchal [2010) 10 scc 611], the Supreme Court listed out and classified various aggravating and mitigating

factors. The Aggravating Factors include,

- Whether the offence involves extreme brutality,
- Whether the offence is targeted towards a large number of people of a particular caste, religion or locality, committed with previous planning.

Similarly, the mitigating factors include,

- extreme mental/ emotional disturbance of the offender,
- young/old age of the offender,
- reduced probability of committing the crime again,
- offence committed under duress/ domination, mental impairment

34. The Supreme Court in the State of Madhya Pradesh v. Udham Singh7 laid down the basic principles in awarding sentences based on the fulcrum of three tests.

(i) Crime test - involves assessment of factors like the extent of planning, choice of weapon, modus of crime, disposal modus (if any), the role of the accused, antisocial or abhorrent character of the crime, and state of the victim.

(ii) Criminal test - involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions, or social background of the criminal, motivation of crime, availability of defence, state of mind, instigation by the deceased or anyone from the deceased group, adequately represented in the trial, disagreement by a judge in the appeal process, repentance, possibility of reformation, trial, criminal record (not to take pending cases), and any other relevant factor (not an exhaustive list)

(iii) Comparative Proportionality Test

35. In terms of general principles, the Supreme Court in Hazara Singh

v. Raj Kumar & Ors [2013) 9 SCC 516, observed that sentencing should be proportional to the crime committed. Similarly, the Court also observed that the process of sentencing shall have to balance the rights of the victim and that of the society at large. Further, the Delhi High Court in Bilal Ahmed & Ors v. NIA and Anr 2024:DHC:4113-DB while dismissing the case for not providing reasons in awarding the highest sentence, clearly observed that the enormity of the allegation cannot be the sole determinant factor for finalizing the quantum of sentence. A balanced approach should be taken upon considering mitigating circumstances such as age, previous antecedents, and the candid act of pleading guilty.

36. A perusal of the above factors and principles would show that though specific guidelines have not been introduced on a policy level in India, the factors to be seen in awarding sentences are similar to those of other jurisdictions. While awarding sentences for terrorism-related activities, the Courts will have to, not merely bear in mind the crime committed but also the impact of the same and the propensity of the person to indulge in a similar crime in future. The intent behind providing a range of punishment that could be awarded for an offence is to give the Courts sufficient discretion to consider various aggravating and mitigating factors while awarding sentences. Though there is no doubt that the discretion has to be exercised judiciously, it cannot be expected to be uniform. In a country like India, where there are possibilities of innocent persons being encouraged towards terrorism, it is not merely the rights of the convict that have to be considered but also the impact of the said convict being allowed to integrate back into society which has to be considered.

83. In **Shailesh Jasvantbhai v. State of Gujarat**[33], the Apex Court had occasion to lay down the principles that are to be borne in mind while imposing sentence. It was observed as under:

> "7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: 'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

84. The observations in **State Of Punjab v. Prem Sagar And**

---

[33] [(2006) 2 SCC 359]

Others[34], are pertinent, which read as under:

> "5. Whether the Court while awarding a sentence would take recourse to the principle of deterrence or reform or invoke the doctrine of proportionality, would no doubt depend upon the facts and circumstances of each case. While doing so, however, the nature of the offence said to have been committed by the accused plays an important role. The offences which affect public health must be dealt with severely. For the said purpose, the courts must notice the object for enacting Article 47 of the Constitution of India.
>
> 6. There are certain offences which touch our social fabric. We must remind ourselves that even while introducing the doctrine of plea bargaining in the Code of Criminal Procedure, certain types of offences had been kept out of the purview thereof. While imposing sentences, the said principles should be borne in mind.
>
> 7. A sentence is a judgment on conviction of a crime. It is resorted to after a person is convicted of the offence. It is the ultimate goal of any justice-delivery system. Parliament, however, in providing for a hearing on sentence, as would appear from sub-section (2) of Section 235, sub-section (2) of Section 248, Section 325 as also Sections 360 and 361 of the Code of Criminal Procedure, has laid down certain principles. The said provisions lay down the principle that the court in awarding the sentence must take into consideration a large number of relevant factors; sociological backdrop of the accused being one of them.
>
> 8. Although a wide discretion has been conferred upon the court, the

[34] [AIR 2008 SCW 4805]

> same must be exercised judiciously. It would depend upon the circumstances in which the crime has been committed and his mental state. Age of the accused is also relevant.
>
> 9. What would be the effect of the sentencing on the society is a question which has been left unanswered by the legislature. The superior courts have come across a large number of cases which go to show anomalies as regards the policy of sentencing. Whereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine."

85. Having evaluated the principles above, we note that the interest of justice shall be subserved if the sentence imposed on the appellant for the offence under Sections 38 and 39 of the UA(P) Act is modified as 8 years of Rigorous Imprisonment instead of 10 years Rigorous Imprisonment as imposed by the learned Special Judge. To arrive at the said finding, we have taken note of the following aspects:

a) The accused was 29 years old at the time of the commission of the offence.

b) The 16th accused who had pleaded guilty to the charge was imposed prison sentence of 5 years RI after recording his plea of guilty and the

2nd accused was imposed imprisonment for 7 years by the Trial Court, which was confirmed by the Apex Court. We have noted the nature and gravity of the accusations against the appellant vis a vis that of the accused Nos. 2 and 16.

c) There is no case for the respondents that the appellant is involved in any other crimes.

d) His actions were motivated by religious ideologies.

e) The appellant being an Indian citizen, the sentence imposed must be stern but tempered with some amount of mercy.

f) There are prospects of rehabilitation and at the same time, the sentence imposed by us will act as a deterrent to the appellant and others.

g) The virtual and physical contact of the accused to seek support for the proscribed organization and further its activities attracting Sections 38 and 39 of the UAPA was only with PWs 1 and 2 and not a large number of persons.

g) We have also taken note of the nature of the crime committed by the appellant, the manner in which it was planned and committed, the motive for the commission of the crime, and the conduct of the accused during trial.

86. Resultantly, these appeals are disposed of as under:

a) We confirm the findings of the learned Special Judge finding the appellant guilty for the offence under Sections 38 and Section 39 of the UA(P) Act and under Section 120B of the IPC r/w. Sections 38 and Section 39 of the Act.

b) The sentence imposed by the learned Sessions Judge for Five (5) years for the offence under Section 120B of the IPC r/w. Sections 38 and 39 of the UA(P) Act are confirmed.

c) For the offence under Section 38 of the UA(P) Act, we are of the view that Rigorous Imprisonment of Eight (8) years and to pay a fine of Rs.50,000/- and in default to undergo Simple Imprisonment for one year will subserve the interest of justice.

d) For the offence under Section 39 of the UA(P) Act, Rigorous Imprisonment of Eight (8) years and to pay a fine of Rs.50,000/- and in default to undergo Simple Imprisonment for one year will subserve the interest of justice.

e) To that extent the sentence imposed by the learned Sessions Judge will stand modified.

f) The substantive sentence of imprisonment ordered by us shall run concurrently. The appellant shall be entitled to set off under Section 428 of the Cr.P.C. All other conditions shall remain as such.

Sd/-

RAJA VIJAYARAGHAVAN V,
JUDGE

Sd/-

JOBIN SEBASTIAN,
JUDGE

PS & APM /09/12/24