



2025:KER:60773

Crl.Appeal 768/2021

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR.JUSTICE K. V. JAYAKUMAR

THURSDAY, THE 14TH DAY OF AUGUST 2025 / 23RD SRAVANA, 1947

CRL.A NO. 768 OF 2021

AGAINST THE JUDGMENT DATED 25.09.2020 IN SC NO.2 OF 2017

OF SPECIAL COURT FOR TRIAL OF NIA CASES, ERNAKULAM

APPELLANT/ACCUSED:

SUBAHANI HAJA @ ABU JASMINE, S/O.HAJA MOIDHEEN,
AGED 39 YEARS, MALIYEKKAL HOUSE, NEAR VYAPARA BHAVAN,
MARKET ROAD, THODUPUZHA, NOW RESIDING AT HIGH SECURITY
PRISON, VIYYUR, THRISSUR DISTRICT.

BY ADVS.
SHRI.M.A.AHAMMAD SAHEER
SHRI.E.A.HARIS
SRI.MUHAMMED YASIL
SRI.V.JOHN SEBASTIAN RALPH
SHRI. RALPH RETI JOHN
SMT.AAGI JOHNY

RESPONDENT/COMPLAINANT:

UNION OF INDIA, REPRESENTED BY NATIONAL INVESTIGATION
AGENCY, KOCHI, ERNAKULAM, REPRESENTED THROUGH SPECIAL
PUBLIC PROSECUTOR FOR NIA, HIGH COURT OF KERALA,
ERNAKULAM-682 018.

BY ADVS.
O.M.SHALINA, DEPUTY SOLICITOR GENERAL OF INDIA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07.07.2025,
THE COURT ON 14.08.2025 DELIVERED THE FOLLOWING:

**JUDGMENT****K. V. Jayakumar, J.**

This Criminal Appeal is preferred by the sole accused in S.C. No.2/2017/NIA impugning the judgment of the Special Court for NIA Cases, Ernakulam dated 25.09.2020. The appellant, Subahani Haja @ Abu Jasmine, was charged for the offences punishable under Sections 120B, 122 and 125 of the Indian Penal Code and Sections 20, 38 and 39 of the Unlawful Activities (Prevention) Act ('the UA(P) Act' for the sake of brevity).

2. The learned Special Judge after a full fledged trial found the appellant guilty, convicted and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- with default sentence of one month under Section 20 of the UA(P) Act. He was also sentenced to undergo imprisonment for various terms under the other Sections.

Prosecution case

3. This is a tale of one Subahani Haja, a young man aged 35 years, who joined a proscribed terrorist organisation Islamic State of Iraq and Syria ('the ISIS' for the sake of brevity) and fought for them in Mosul in Iraq in the year 2015. During 2015-2017, ISIS captured almost one third of Iraq and established a parallel Government there. The appellant, Subahani Haja, was inspired by the activities of



ISIS and had a cherished desire to join ISIS in Iraq. Since there was no airline service to Iraq, the accused had devised a plan to visit Istanbul, Turkey and then to reach Iraq by crossing the border of Turkey with the help of ISIS emissaries. On 08.04.2015, he proceeded to Istanbul, Turkey on a tourist visa for a fortnight. He concealed his objectives from his family members.

4. Thereafter, the appellant crossed the border of Turkey and reached Iraq as per his plan. He got physical training and arms training at Mosul in Iraq. He was deployed on the war front. While so, he sustained an injury during the physical training and was taken to hospital. At that time, he wanted to come back to India. He made several requests to the 'Amir' (boss in ISIS). But his requests were turned down. Since he was unable to participate in the war front, he was entrusted with guard duty in ISIS. When he made repeated requests to come back to his native country, he was incarcerated by ISIS. When he pressed his demand to come back to India, he was abandoned by ISIS in a street. Somehow, he arranged money for a return ticket and came back to India in September 2015.

5. After his arrival in India, he worked as a Salesman-cum-Accountant at Gold AIK, Kadayanellur, Tamil Nadu for about one year and resided in a rental house there. While so, NIA got credible information that the accused had joined ISIS, a proscribed terrorist organisation, and involved in activities affecting sovereignty and integrity of India. On 03.10.2016, a search was conducted in his house at Kadayanellur and NIA seized digital evidence, including mobile phones, in connection



with his illegal activities. The accused was arrested on 05.10.2016.

The proceedings before the trial court

6. The Special Judge for the trial of NIA cases, after hearing the appellant and the prosecution, framed charges under Sections 120B, 122 and 125 of the Indian Penal Code and Sections 20, 38 and 39 of the UA(P) Act. The accused denied the charges levelled against him and pleaded innocence. Thereafter, PWs.1 to 46 were examined and Exts.P1 to P81 were marked. Material objects 1 to 26 were identified and marked. On the side of the defence, Ext.D1 case diary contradiction was marked.

The findings of the learned Special Judge

7. The learned Special Judge, after a full fledged trial found the appellant guilty, convicted and sentenced him for the offences punishable under the Indian Penal Code and also under the UA(P) Act.

- (a) The convict was sentenced to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- with default prison term for one month under Section 20 of the UA(P) Act.
- (b) He was also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,00,000/- with default prison term for one month under Section 125 of IPC.



- (c) He was further sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/- with default prison term for one month under Section 120B of the IPC r/w Sections 20, 38 and 39 of the UA(P) Act.
- (d) The convict was also sentenced to undergo rigorous imprisonment for seven years each under Sections 38 and 39 of the UA(P) Act.

The submissions of the learned counsel for the appellant

8. The learned counsel for the appellant assailed the judgment of the Special Judge, urging the following grounds:

- (a) The appreciation of evidence by the trial court is incorrect and faulty. The prosecution has failed to aver and prove the charge against the appellant beyond reasonable doubt.
- (b) The trial court has committed a serious error by failing to note that no FIR was registered against the appellant, corresponding to the allegations in the final report laid by the investigating agency. It is further submitted that Section 173(2) of Cr.P.C. contemplates only one final report and therefore, filing of more than one final report is not permissible.
- (c) The recovery of MO-41 mobile phone from the house of the appellant is a concocted and fabricated evidence against him. Even though PW42 searched in his residence, MO-41 could not be recovered.



- (d) The recovery of MOs.20 to 23 jackets and sweaters allegedly purchased from Turkey, on the basis of his disclosure statement, is not properly proved and conviction cannot be sustained on the basis of the said recovery.
- (e) The Facebook and Gmail account extractions as mentioned in Ext.P25 are fake and not connected with the appellant.
- (f) Ext.P16 Visa ledger maintained in Akbar Travels was not proved by the prosecution.
- (g) The trial court has given undue weightage to the testimony of PW43, Scientist and Examiner from C-DAC.
- (h) It is further submitted that the Special Court ought not have relied upon the extra judicial confession allegedly given to PW29 (Dr. Krishnan B.), while in police custody.
- (i) The trial court ought not have relied on the uncorroborated testimony of the approver.

The submissions of the learned Deputy Solicitor General of India (DSGI)

9. The learned DSGI submitted that the prosecution has proved the charge against the appellant beyond a reasonable doubt. The oral and documentary evidence would clearly establish that the appellant had joined ISIS, underwent arms training from ISIS and he was deployed in the war-front in Iraq. The appellant had waged war against the Government of Iraq. After returning from Iraq, he has



attempted to wage war against the Government of India by attempting to procure explosive substances from Sivakasi. The evidence of PW34, the approver (J.S. Mohamed Kamal), PW43, the Scientist, C-DAC (Nabeel Koya A.), and PW29, the Forensic Surgeon, Medical College, Alappuzha (Dr. Krishnan B.), would convincingly prove the charge against the appellant.

The charge

10. The charge against the appellant is that he has joined ISIS, a proscribed terrorist organisation, in the year 2015, as a result of conspiracy hatched between himself and some other members. Later, he proceeded to Mosul, where he was deployed by the terror outfit in the war-front. He came back to India in September 2015 and attempted to procure explosives from Sivakasi as a preparation for waging war against the Government of India.

11. Before we delve into the evidence, it would be useful to consider the evidence adduced by the prosecution.

12. PW1 (Yashpal Singh Thakur) testified that while he was working as the Deputy Superintendent of Police, NIA Headquarters, New Delhi, he got an information from a source that a group of 15 persons in the States of Kerala and Tamil Nadu are secretly conspiring some terrorist activities, owing to their allegiance with the proscribed organisation named ISIS to commit terrorist activities affecting sovereignty and integrity of India. The information would further reveal that they



target to kill certain important persons and to attack some important public places. They were in the process of collecting explosives and other offensive materials for bomb blast and also recruiting, motivating and radicalising some Muslim youths.

13. PW1 conveyed this information to his superior officers. As directed by the superior officers, he approached NIA Office, Kochi and gave Ext.P1 complaint to PW45 (A.P. Shoukkathali).

14. After getting approval from the Government of India, FIR was registered on the basis of the complaint. In cross examination, he would say that in Ext.P1 complaint, there is no mention with regard to the appellant, Subahani Haja.

15. PW2 (Arjun Krishnan) was the Inspector of Income Tax Department, Ernakulam. He deposed that, on 05.10.2016, he witnessed the Cyber extraction process of accused named Swalih and also put his signature in Ext.P2 arrest memo and Ext.P3 body search memo.

16. PW3 (K. Naina Mohamed) is the owner of AIK Jewellery at Kadayanellur in Tamil Nadu. He would say that the accused, Subahani Haja, was an employee of his jewellery for about one year. During that period, the accused used to operate the computer in his shop. In October 2016, the police took the appellant to the shop and seized the hard disc of the computer. He would further say that Ext.P4 is the bill issued from his jewellery.

17. PW4 (Shahul Hameed M.) testified that he had worked as Accountant-cum-Salesman in AIK Jewellery from 2014 to 2017. The appellant had



also worked there during 2015-2016. He also stated that the accused used to check his mail using the computer system. The police seized the hard disc of the said computer in October 2016. In September 2016, the appellant was expelled from the jewellery due to poor customer relationship.

18. PW5 (J. Mohamed Ashik Ali) is an Accountant-cum-Salesman of AIK Jewellery. He would also say that the appellant had worked in that shop in the year 2015. According to PW5, the appellant contacted him in September 2016 in his mobile number 9944277192 and asked him whether he could arrange a job in a mutton shop. He replied that he would try to arrange a job.

19. PW6 (S. Kannan) is a wholesale dealer of fire crackers in Sivakasi. He deposed that in April 2016, he went to AIK Jewellery Kadayanellur and purchased gold worth Rs.72,000/-. At that time, they issued an Ext.P4 bill to him. NIA seized Ext.P4 bill as per Ext.P5 seizure mahazar. The accused was the salesman who attended him on that day. He identified the accused in the dock.

20. PW6 would further say that the accused introduced himself as Rahmath and told him that he wanted to get crackers from Sivakasi. Later, PW7 told him that the accused contacted him and made an enquiry as to the possibility of getting material like chloride, sulphur, aluminum powder which are used to make crackers. His friend Saravanan (PW8) advised him not to sell such materials as it might cause an explosion. Therefore, he did not sell the items to the appellant. The appellant contacted him on two or three occasions.



21. PW7 (P. Vino Karthik) is a wholesale dealer of crackers and doing business along with PW6. During May 2016, he got a call from a person named Abdul Rashid, AIK Gold Jewellery, Kadayanellur. He told him that he wanted to purchase crackers from Sivakasi for scaring away the animals. He again contacted and asked for 50 kilograms each of chlorate, phosphorus, sulphur and aluminum powder. PW7 informed him that a license is required for the purchase of such explosive materials. Later, the appellant came to Sivakasi and met him. He identified the accused in the dock.

22. PW7 would further say that he discussed the matter with PW6 and PW8 (Saravanan). Saravanan advised him that the sale of such materials involves high risk as it may cause an explosion. The accused contacted him in his mobile number 8015815604 from a number ending with 9463.

23. PW8 (Saravana Kumar R.) would say that PW6 and PW7 are his friends. In May 2016, PW6 and PW7 contacted him and discussed the enquiry made by the appellant for a large quantity of explosive materials. He advised PW6 and PW7 not to sell such materials as it involves high risk.

24. PW9 (N. S. Bisht) was the Under Secretary to the Ministry of Home Affairs, Government of India. He testified that he got information that about 15 persons are working as ISIS modules in Southern States of India for the purpose of committing acts prejudicial to the sovereignty and integrity of India. The Government directed that the matter should be investigated by the NIA as the offences are



scheduled offences. Accordingly, he issued Ext.P6 approval dated 01.10.2016.

25. Later, he issued Ext.P7 sanction to prosecute the accused, Subahani Haja, under Section 45(1) of UA(P) Act and Sections 188 and 196 of Cr.PC.

26. PW10 (Sadhique K.S.) was the proprietor of a shop named Mobile Tech at Thodupuzha. He deposed that one Salman used to visit his shop for repair of mobile phones. One day, the said Salman came to his shop, handed over a mobile phone and requested to keep it safely. On the next day, police came to the shop and seized the said phone as per Ext.P8 mahazar. He identified MO-1 Black Berry mobile phone entrusted to him by Salman.

27. PW11 (Rajan O.N.) witnessed the seizure of MO-1 Black Berry mobile phone. He also identified MO-1 in court. PW12 (Salman) is the nephew of the accused. He turned hostile to the prosecution.

28. PW13 (M. Sankar) was the Revenue Inspector. He witnessed the search conducted in the rented house of the accused at Kadayanellur. He put his signature in Ext.P10 search list. He deposed that PW42 conducted a search in the house of the accused on 03.10.2016 at 3.00 am and seized 20 items. He identified those articles. MO-2 series is the mobile phone with SIM card, MO-3 is the memory card, MO-4 is a SIM card of Vodafone company. He also identified MO-5 series, Aadhaar card, Election ID card and driving license of the accused. MO-6 series is the ATM cards and MO-7 is a Malayalam text book. He identified MO-8 Telephone card and MO-9 series, receipt, letter, certificates and police clearance certificate. MO-10 series are the



dongles. He also identified MO-11 super touch tablet and MO-12 Railway ticket.

29. PW14 (Mariappan) was the Village Administrative Officer, Kadayanellur, who accompanied PW45 in the search conducted in the rented house of the accused at Kadayanellur on 07.10.2016 at 10.00 am. In the search, MO-13 medicine packet and MO-14 a BlackBerry mobile was seized as per Ext.P11 mahazar.

30. Thereafter, they proceeded to AIK Jewellery and seized MO-15 hard disc of the computer used by the accused.

31. On 04.01.2017, the wife of the accused produced a diary and an inland letter to PW45 and he seized those articles through Ext.P13 mahazar in the presence of PW14. PW14 identified those objects as MO-16 and MO-17 respectively.

32. PW15 (Shajahan) stated that he had rented out a portion of the building in Kadayanellur to the accused. The monthly rent was Rs.2,750/-. There was no written rental agreement. The rent received from the accused was recorded in Ext.P14 diary which was seized by the NIA through Ext.P15 mahazar.

33. PW16 (Lal P.K.) is the Regional Manager of Akbar travels. He would say that on 17.10.2016, PW45 came to his office and seized the visa processing records of the accused in connection with his visit to Turkey. He seized those records as per Ext.P24 mahazar. Ext.P16 is the relevant page of Visa Ledger maintained in his office. The accused applied for a visa for a period from 05.04.2015 to 20.04.2015. After processing, the visa was obtained and handed over to the accused on 26.03.2015. He has also booked a Hotel at Istanbul in Turkey from 05.04.2015 to 20.04.2015.



34. PW17 (George) is the Special Village Officer, Kanayannur who witnessed the verification of email and other social media accounts of the accused by PW45 in the presence of the IT wing of NIA. His social media accounts, email, facebook were opened and screenshots were taken and recorded as Ext.P25 proceedings. Thereafter, the contents were transferred to MO-18 DVD.

35. PW18 (Syed Masood) is a relative of the accused. He testified that he was a witness to Ext.P26 seizure mahazar, through which the NIA officials seized a mobile phone used by the accused.

36. PW19 (Ayesha Beevi) is the former wife of the accused. Her marriage with the accused was solemnized on 24.08.2012. Thereafter, she resided in the house of the appellant at Market Road, Thodupuzha.

37. PW19 would further say that the accused told her that he went to Umrah in the month of April 2015. During that period, he contacted her only through whatsapp and never sent his photos. Thereafter, they resided at Kadayanellur in Tamil Nadu. At that time, the accused worked in AIK Jewellery. On 03.10.2016, the NIA officers reached their house Thayuba Manzil at Kadayanellur and seized the ATM card, Driving license, mobile phone, tablet etc from their house. She identified those objects as MOs.2, 5 and 6 series. Later, the NIA seized a mobile phone, MO-19, from her parents' house. MO-19 was earlier used by the accused. On 04.01.2017 she produced, MO-16 diary of the accused and MO-17 letter, to the NIA officials. In MO-17, a letter addressed to the accused, PW19, requested that he should not to go



for 'Jama Ath' and 'Jihad'. She added that the accused never told her that he went to Turkey, Syria and Iraq, instead she was told that he went to Umrah.

38. PW20 (M.K. Sajeevan) is the Village Officer of Maneed Village. He witnessed the seizure of MOs.20 and 21 jackets and MOs.22 and 23 sweaters from the house of the accused at Thodupuzha by PW45.

39. PW21 (Peer Mohamed) and PW22 (Moitheen Shah) are the siblings of the accused, who did not support the prosecution story. PW23 (Al Ameen) stated that the accused is his uncle, who also did not support the prosecution case.

40. PW24 (Dr. Simi) is the Assistant Director (Ballistic), FSL, Thiruvananthapuram, who examined two jackets and two sweaters seized by the NIA from the house of the accused at Thodupuzha. In MOs.22 and 23 sweaters, she found fiber disturbances, which according to her might be due to the carrying of hard surfaced objects like firearms. She submitted Ext.P32 report to the NIA officials.

41. PW25 (Molly George) is the Assistant Director (Explosives) FSL, Thiruvananthapuram. She examined MOs.20 to 23, the jackets and sweaters and detected potassium chlorate and potassium nitrate in MO-20. Potassium nitrate was detected in MOs.21 to 23. She submitted Ext.P33 report to the NIA. She further opined that the said chemicals are essential ingredients to explosives. She added that MOs.20 to 23 might have been in close contact with gunshot residue.

42. PW26 (K. Vijayakumar) is the Inspector who seized MO-19 mobile phone from the house of the wife of the appellant. MO-19 was forwarded to FSL,



Thiruvananthapuram on 02.02.2017. PW27 (Rajeevan P.) was the constable of NIA. He witnessed the seizure of some documents by PW45 as per Ext.P24 mahazar.

43. PW28 (Binoy Joseph) is an employee of the IT wing of NIA. He extracted the social media accounts and email of the appellant in the presence of PW45 and PW17 on 10.10.2016. The data was downloaded to the computer system and the file was copied to a DVD.

44. He opened those accounts using the username and password given by the accused. The screenshots of each account were taken and copied to a DVD. Ext.P25 is the extraction proceedings. He identified MO-18 DVD.

45. He opened usuphalikhan@gmail.com, the email account of the accused, which contained his personal information including mobile numbers such as 08089116051, 09447051638, land number as 04424454445, 04862227587 and his other email IDs as usuphalikhan@gmail.com and usuphalikhan@yahoo.co.in. His date of birth is shown as July 19, 1985. The search history of those accounts would reveal that he made search relating to Jihad and Islamic State of Iraq and Levant. Further, the history would reveal that he had login from Istanbul, Turkey on 14.09.2015. On 15.09.2015 at 13.29 hours, the accused sent a mail to muhdkamal4u@gmail.com as "Salam, its my pp copy, u may need it" and the scanned copy of the passport of the accused was forwarded from Black Berry 10 smart phone. When his Facebook account was opened, it was seen that he opened the account from Turkey on 13.04.2015 and from Iraq on 12.06.2015.



46. PW28 further deposed that when the yahoo account of the accused was opened and verified, it could be seen that he sent several messages to Mohamed Kamal (PW34) showing his interest in the activities of Islamic State. In one of the mail, the accused sought help for reaching Iraq. The mail reads as follows:

"I support IS,", "I wanna knw hw I can join IS", "OK, I am from India, if u check my wall, u can find where from exactly. I need a help. Hw can I manage to go to iraq", "Want to become jihadi In India, muslims are suffering a lot"

47. PW28 has also extracted the Gmail account of Mohamed Kamal (PW34) using the ID and password given by the accused. Ext.P35 is the extraction proceedings and MO-24 is the DVD to which the data is copied.

48. PW29 (Dr. Krishnan B.) is the Forensic Surgeon, who examined the accused as per the request of NIA. The accused revealed that he left India in April 2015 from Chennai and reached Istanbul from where he reached Mosul, Iraq. He undertook this trip to join and fight with ISIS in Syria and Iraq. He stayed for about 6 days in Istanbul and then reached the Syrian border and reached Mosul, Iraq. There he was given 25 days of "religious training" and 21 days of "weapon training". The weapon training was mainly about dismantling and assembling automatic rifles. All the steps of firearms training, except the actual firing were imparted. As part of the physical training, he was asked to do a sort of kicking exercise. During this exercise, he was supposed to land on his left foot after the completion of the kick with right foot. But when he took the jump and the kick, he failed to land properly on his left



foot and he immediately felt an "electric shock like pain" from his left knee and collapsed on to the ground which was a rough cement floor. He was later taken to a hospital in Mosul for treatment. Later, it was noticed by his trainers that he was not able to stand and perform his activities which included active warfare duty. He was then delegated to guard duty. While on guard duty, a shell exploded near him and that two of his fellow fighters died in that explosion. But he does not exactly remember the details of that incident except that he was not injured in that incident. After this incident, he wanted to return home but he was detained by ISIS in a prison for 54 days. After he was released from the jail, he returned to Istanbul from where he returned to India by September 2015.

49. PW30 (Salma) is the Assistant Professor of Tamil Language at Victoria College, Palakkad. She translated MO-17 letter from Tamil to English.

50. PW31 (S.Suresh) testified that he is residing in Chengalpattu, Tamil Nadu and he never took a Tata Docomo cell phone connection. When he went to Mumbai for a job in 2015, he lost his purse, ID proof and photograph. He has not submitted any customer application form to Tata Docomo company. However, his ID proof and photograph are seen in Ext.P38 series.

51. PW32 (Saravanan) is the AGM of IDBI Bank, Thodupuzha Branch. He furnished Ext.P39 bank statement of the appellant from 07.07.2011 to 15.10.2016. He would say that during the period from 08.04.2015 to 13.04.2015, amounts were withdrawn from Istanbul, Turkey. He has also proved Ext.P40 series, the account



opening form and ID proofs of the appellant. The phone number given by the customer is 8089116051.

52. PW32 further testified that MO-6(b) international Master-card was issued to the appellant. This card can be used anywhere in the world.

53. PW33 (Sylviya Jasmine) was the Sub Inspector of Kadayanellur Police Station in Tamil Nadu. She witnessed the seizure of a diary from PW15 (Shajahan) on 07.10.2016. She also witnessed the seizure of mobile phone produced by Rashid Ali (CW27), on 18.10.2016.

54. PW34 (J.S. Mohamed Kamal) has been doing export business in the name of Euphra Trading Co., since 2011. He had been using 9884956999 as his mobile phone number for a long time and he uses the said number for whatsapp as well. He is using two Facebook IDs as 'Mohamed Kamal' and 'Abu Jamaluddeen'. He had been using KIK, Surespot and Telegram to chat with many people who are related to ISIS, since he became interested in ISIS. From the discussions made with various persons, PW34 came to understand that, if a person wants to join ISIS in Syria or Iraq, he has to first reach Turkey and from there, he would be taken to a safe place by the ISIS members. He also understood that a person who embraces ISIS has to fight with certain opposing Islamic groups in Syria or Iraq or to wage war with the army of those countries, that he could not come back to his mother country, and thus he would destroy his passport once he joined ISIS.



55. He came to know about the accused from a person nicknamed 'Umm Hurayra' who is actually a lady named Fathima from South Africa. At that time, the accused was known as Abu Jasmine, an Indian who was fighting for ISIS in Mosul, Iraq. When PW34 asked Umm Hurayra to share his ID with Abu Jasmine (as PW34 also wanted to join ISIS), Abu Jasmine contacted him in Telegram (an online application used in mobile phones). Then the accused informed PW34 that he was fighting for ISIS in Mosul, that he joined ISIS by obtaining a visa to Turkey through a travel agent in Kerala and that he underwent the hijrah to ISIS in that way. When Abu Jasmine understood that PW34 was also a person from Tamil Nadu, he revealed that he was married to a Tamil girl. Both of them shared their whatsapp number and started to contact each other through whatsapp. Abu Jasmine told that he was fighting for ISIS in the battlefield and hence he would not be available online frequently.

56. PW34 had created a Telegram group consisting of himself, Abu Jasmine and another person named Abu Ammar, who was also a fighter for ISIS. During the discussion with Abu Jasmine, PW34 understood that Abu Jasmine started to blame himself and he wanted to go back to India as his wife was mentally ill. Then he sought permission from his Amir, but it was denied and eventually, he was even incarcerated by ISIS for two weeks when the accused repeatedly insisted, and at last, they left him in a street, from where he crossed the border to Turkey. PW34 understood all these facts through whatsapp communications, after Abu Jasmine



reached Turkey.

57. When PW34 discussed the matter with Umm Hurayra, she advised that Abu Jasmine should approach the Indian Embassy, Turkey, pretending to be a tourist who lost his passport (as Abu Jasmine also destroyed his passport). Later, Abu Jasmine told PW34 that though he went to the Indian Embassy, their plan did not work as the Embassy officials did not believe the said explanation, as he was not able to produce a return ticket which is invariably be available with all tourists. At this juncture, Abu Jasmine asked PW34 to arrange money or to procure a return ticket. Abu Jasmine had also sent him a scanned copy of his passport for arranging the ticket, from which PW34 understood the actual identity of Abu Jasmine as the accused. But PW34 did not arrange money or a return ticket (PW34, who was conversant with the colour photo of the accused from his passport, identified the accused during trial). PW34 has also contacted the brother of Abu Jasmine from a public telephone booth in the number given by the accused.

58. Later, the accused informed PW34 that he got money from his brother and thereby he arranged a ticket. During September 2015, PW34 received a whatsapp call from the accused and then he said that he reached Mumbai and was able to get through the airport security checking without any issues. After two weeks, the accused called him from a land-line number in Tamil Nadu and informed that he had reached home and his wife was doing well. In December 2015, he again called PW34 from a mobile phone and told that he got a job in a jewellery shop. The



accused further expressed his desire to meet PW34 and asked his number and he also asked for money. At this point, PW34 felt suspicion about his intention and thus he demanded the accused to stop contacting him and thereafter, he deleted all conversations made with him and also the mobile phone number of the accused which was saved in his phone.

59. MO-25 mobile phone was seized by NIA from PW34, as per Ext.P41, along with its SIM card and Memory card. When the Cyber forensic report was shown to PW34, he identified his phone number shown in that report against the name 'Euphra Trading Co.' as well as the number saved against the name 'Abu Jasmine'. He also identified emails received from the mail ID of the accused (usuphalikhan@gmail.com), including the one explaining about the incident that occurred in the Indian Consulate, Turkey. He also identified the email from which he got the number of the brother of the accused. MO-18(a), the scanned copy of the passport sent by the accused to PW34 in his email, was also identified by the witness. PW34 had given Ext.P44 series statement to the Magistrate under section 164 Cr.PC., as well, and it is consistent with the above version.

60. PW35 (Marshal D'Cunha) is the Nodal Officer of the Tata Teleservices, Kerala Circle. On 29.03.2017, he produced the certified copies of the Customer Application Form (CAF) and the original Call Detail Records (CDR) pertaining to the phone number 7845389463 to the Investing Officer.



61. PW37 (Ibrahim Hakki Guntay) is the Manager of Turkish Airlines in Mumbai. He produced Ext.P47 Passenger Manifesto of the said Airlines, Flight No.TK720 from Istanbul to Mumbai dated 21.09.2015. Serial No.92 of Ext.P47 shows that one Subahani Haja had travelled in the flight from Istanbul to Mumbai.

62. PW38 (Shahin Komath) is the Nodal Officer of Vodafone Idea Limited, Kerala Circle. He produced Ext.P48 series, the original customer application form along with the copy of ID proof submitted by the customer with respect to mobile number 9884956999. PW39 (Shibu John) is the Senior Superintendent, Regional Passport Office, Kochi. He produced Ext.P49 series, Passport Application Form of the appellant.

63. PW40 (Manesh Mani) is the Branch Manager of IDBI Bank, Thodupuzha. He produced Ext.P50 series, the Account Opening Form along with KYC documents and the bank account statement of the account No.1028104000010089 of the accused. He also produced Ext.P51, the extract of transactions of International Debit Card issued to the accused. As per Ext.P51, the debit card was used from 08.04.2015 to 21.09.2015 for withdrawal at Istanbul, Turkey.

64. PW41 (Siddharth Bhatt) is the Supervisor (Sales) of Saudi Arabia Airlines stationed at Kochi. He produced Ext.P52 Passenger Manifesto of Flight No.SV 771/SV261, which travelled from Chennai to Istanbul on 08.04.2015. He stated that the accused Subahani Haja had travelled in that flight from Chennai to Istanbul.



65. PW42 (B. Mukherjee) was the DYSP of NIA, Hyderabad. He conducted a search in the house of the accused at Kadayanellur as per the directions of PW45. He seized 20 articles as per Ext.P10 search list. He identified those articles as MO-2, MO-3, MO-4, MO-5 series, MO-6 series, MO-7, MO-8, MO-9 series, MO-10, MO-11 and MO-12

66. PW43 (Nabeel Koya A.) is the Scientist in C-DAC. He examined certain digital devices and submitted Exts.P53 and P54 reports. The data extracted from the digital devices is submitted to the court in a pen drive attached to the report. He identified those digital devices as MO-2, MO-3, MO-4, MO-10, MO-10(a) and MO-11. He further testified that he had examined MO-15 hard disc, MO-14 Black Berry mobile phone and MO-1 Black Berry mobile phone and submitted reports. He examined MO-18 and MO-24 DVDs and submitted reports.

67. PW44 (P. Sajimon) assisted PW45 in the investigation. He seized a MO-1 Black berry mobile phone from PW10.

68. PW45 (A.P. Shoukkathali) is the Investigating Officer in this case. He filed an affidavit on 29.05.2020 under Section 296 of Cr.PC, covering evidence of formal character.

69. PW45 testified that on 06.10.2016, he recovered MO-1, Black Berry mobile phone, on the basis of the disclosure statement given by the accused that his Black Berry mobile phone was kept in a medicine box in his room of the rental house at Kadayanellur. On 07.10.2016, he also recovered MO-14 Black Berry mobile phone



which was kept inside MO-13 carton box. On 07.10.2016, the Investigating Officer seized MO-15, hard disc of the computer being used by the accused in AIK Jewellery as per Ext.P12 mahazar. On 08.10.2016, on the basis of the disclosure statement of the accused, the Investigating Officer seized two jackets and two sweaters (MOs.20 to 23) purchased from Turkey, from the almirah of the house at Thodupuzha.

70. On 10.10.2016, on the basis of the confession statement of the accused, the Investigating Officer extracted the Gmail and social media accounts of the accused as per Ext.P25 mahazar.

71. PW46 (Bharath Kumar) was the Secretary of Indian Embassy Baghdad, Iraq from April 2015 to February 2017. He produced Ext.P74 to show the deep relationship between India and Iraq. He would say that during 2014, ISIS was in control over a large part of Iraq, almost one third of its area. When he reached there, the situation was war like. The part occupied by ISIS was Mosul, a major city in Iraq. There was a parallel Government run by ISIS in Mosul.

72. The prosecution case against the appellant is that he joined ISIS, a proscribed terrorist organisation, in the year 2015, as a result of a conspiracy hatched between himself and some other members of ISIS. Later, he proceeded to Mosul wherein he was deployed by the terror outfit in the war-front. Then, in September 2015, the appellant came back to India and attempted to procure explosives like sulfur, potassium nitrate and potassium chloride from Sivakasi intended to make bombs as a preparation for waging war against the Government of



India.

73. The learned Special Judge after a detailed evaluation of evidence, concluded that the NIA has succeeded in proving the charge against the appellant beyond reasonable doubt, convicted and sentenced the appellant under Section 120B of IPC read with Sections 20, 38 and 39 of UA(P) Act, Section 125 of IPC and Sections 20, 38 and 39 of the UA(P) Act. The accused is acquitted for the offence under Section 122 of IPC.

The defence version

74. The version of the appellant was that he was falsely implicated in the case by the NIA. According to him, on 03.10.2016 in the early hours, the NIA officials took him into custody and thereafter fabricated documents and records including digital and electronic devices. He has no connection with the mobile phones, computer hard disc, tablet and other electronic devices. It is further contended that the appellant was falsely implicated in this case in order to save PW34, who is an ISIS leader. The accused travelled to Turkey in a tourist Visa and he lost his passport there. Thereafter, he returned to India with the help of the Indian Embassy in Turkey.

75. The first contention of the learned counsel for the appellant is that sanction was not accorded under Section 6 of the National Investigating Agency Act, 2008 (NIA Act) from the Central Government for investigating the offences alleged in



this case and hence, the investigation conducted in this matter is invalid and unsustainable.

76. Ext.P7 sanction granted by the Central Government was proved through PW9 (N.S. Bisht). On a mere perusal of Ext.P7 order, it is evident that the sanctioning authority has examined all the materials placed before it and passed the order with proper application of mind. The learned Special Judge placed reliance on the dictum laid down in **Krishnamurthy v. State of Karnataka**¹. In **Krishnamurthy** (supra), wherein the Apex Court held that if the application of mind by the sanctioning authority has to be satisfied from the recitals in the sanction order itself, then the prosecution need to adduce only a formal evidence to tender such documents in evidence. In the case on hand, on a mere perusal of Ext.P7 sanction order, it could be seen that the sanctioning authority has applied its mind before granting the sanction. Therefore, we are not persuaded by the said argument.

The recovery of MO-14 Black Berry mobile phone

77. The learned counsel for the appellant submitted that MO-14 mobile phone was planted by the NIA in the residence of the appellant and later effected recovery in the presence of the witnesses. The learned counsel further submitted that even though PW42 (B. Mukharjee) conducted a search in the residence of the appellant on earlier occasions, he could not recover the same. PW42, the DYSP, NIA,

¹ [2005 (4) SCC 81]



Hyderabad, conducted a search in the house of the accused in Kadayanellur on 03.10.2016 at about 2.40 am, as per the directions of PW45. At the time of the search, the accused and his wife were present. The search was conducted in the presence of PW13 (M. Sankar). PW42 would say that he seized 20 articles as per Ext.P10 search list including MO-2 'YU mobile phone' with sim card, MO-3 sand disc memory card, MO-4 vodafone sim card and MO-5 series, the Aadhaar card, driving license and election ID card. The version of PW42 was corroborated by PW13 (M. Sankar) witness to the search list and PW45, the Investigating Officer.

78. PW45 (Shoukathali) conducted a search on 07.10.2016 in the house of the accused at Kadayanellur and seized MO-14 BlackBerry mobile phone from MO-13 carton box as per Ext.P11. The search was in the presence of PW14 (Mariappan). The version of PW45 get sufficient corroboration from the evidence of PW14, Mariappan. We do not find any reason to disbelieve the seizure of MO-14 BlackBerry mobile phone from the house of the appellant in Kadayanellur.

The recovery of jackets and sweaters

79. The learned counsel for the appellant pointed out that the recovery of MOs.20 to 23 jackets and sweaters is not proper and legal. PW45, the Investigating Officer, stated that on 08.10.2016, the accused made a disclosure statement to him that two jackets and two warm sweaters purchased from Turkey and the bus ticket used to travel in Turkey were kept in the almirah of his house. Based on the said



disclosure statement, PW45 recovered MOs.20 to 23 jackets and sweaters from the almirah of the family residence of the accused at Thodupuzha, as per Ext.P27 mahazar. PW20 has witnessed the recovery. He would say that he accompanied PW45 and as pointed out by the accused, the jackets and sweaters were seized from the almirah. He put his signature in Ext.P27 seizure mahazar. Out of the four wearing apparel, three were labelled 'Made in Turkey' and in the remaining one had a label that read 'Istanbul'. The version of the Investigating Officer with regard to the recovery of MOs.20 to 23, jackets and sweaters, is sufficiently corroborated by the evidence of PW20, an independent witness. Hence, we find no reason to disbelieve the version of PW45.

80. PW24 (Dr. Simi), Assistant Director (Ballistic), FSL, Thiruvananthapuram, examined the jackets and sweaters. She opined that the fiber disturbances found in MO-22 and MO-23, sweaters, might be due to carrying of hard surfaced objects like firearms. Ext.P32 is her report.

81. PW25 (Molly George), the Assistant Director (Explosives) FSL, Thiruvananthapuram, in her Ext.P33 report, opined that the chemicals like potassium nitrate, potassium chlorate etc. found in the jackets and sweaters are essential ingredients to explosives. She added that MOs.20 to 23 might have been in close contact with gunshot residue. The evidence of PW45, the Investigating Officer, PW24 and PW25 would probably be the prosecution narrative about the visit of the appellant to Turkey and his participation in the war.

**The authorship of Facebook and Gmail accounts**

82. The learned counsel for the appellant urged that the Facebook and Gmail account extractions recorded in Ext.P25 are fake and not at all connected with the appellant. The trial court ought not have considered Ext.P25 extractions for sustaining conviction to the accused. According to the counsel for the appellant, Ext.P25 extractions of the contents of the Facebook, email and other social media accounts are fabricated by the NIA. PW45 opened the Facebook and Gmail accounts with the assistance of an IT expert (PW28). On the basis of the disclosure of the user ID and password, the contents were extracted to MO-18 DVD. The said extraction process is witnessed by PW17 Special Village Officer, Kanayannur. PW28 (Binoy Joseph), an expert in IT wing of NIA, gave a meticulous description of the extraction process.

83. The Facebook account was maintained in the name of the accused himself and the photograph of the accused is saved in the Facebook account. The phone numbers and email were shown in the contact information of the said Facebook account. The extraction of the Gmail and Facebook accounts, contained in MO-18 DVD, reveals that the accused has several phone numbers such as 8089116051, 9544754503, 7845389463 and 8807966893 to chat with several persons including one Abdul Khader, Jomit M. J., Rony Thomas, Saju K.S., Subin, Fazal and Mithun. In many of these chats, he has given the above stated phone



numbers.

84. In chats with his Facebook friends named Fazal, Abhilash and Abdul Khader, he expressed his desire to buy a used Black Berry Z10 mobile phone and enquired about the availability of such type of phone. MO-14 mobile phone seized by the NIA is a Black Berry mobile phone. In his chat conversation with one Afsal Rahman on 28.12.2014, he declared that he was from Idukki in Kerala.

95. In respect of the identity of the user of Gmail account "usuphalikhan@gmail.com", similar evidence is available in Ext.P25 extraction proceedings and MO-18 DVD. The account holder has sent a mail on 15.09.2015 at 13.29 hours to "mohdkamal4u@gmail.com", wherein he attached a digital copy of the passport of the accused. In the said mail, the account holder stated that 'Salam, it's my pp copy u may need it'.

86. On a perusal of the materials on record, we find that there is overwhelming evidence to connect the appellant with the Facebook account and Gmail accounts. We are not persuaded by the arguments advanced by the learned counsel for the appellant that the Facebook and Gmail accounts are fabricated by the NIA.

87. The next submission of the learned counsel for the appellant is that Ext.P16 visa ledger maintained in Akbar travels is not proved by the prosecution. PW16 (Lal P.K.), the Regional Manager of Akbar travels was examined to prove the travel records of the appellant. PW45 seized Ext.P16 the relevant page of visa ledger



maintained in his office through Ext.P24 mahazar. As per Ext.P16 visa ledger, the appellant applied for a visa to Turkey from 05.04.2015 to 20.04.2015. After the processing, the visa obtained was handed over to the accused on 26.03.2015. He also booked a Hotel at Istanbul in Turkey from 05.04.2015 to 20.04.2015. PW37 (Ibrahim Hakki Guntay), the Manager of Turkish Airlines, has proved Ext.P47 Passenger Manifesto of Turkish Airlines Flight No.TK720 from Istanbul to Mumbai dated 21.09.2015. As per Ext.P47, Subahani Haja travelled from Istanbul to Mumbai on 21.09.2015. The evidence of PW16 and PW37 would convincingly prove the visit of the appellant to Turkey in the year 2015.

88. The next contention of the appellant is that the trial court ought not have given undue weightage to the testimony of PW43, the Scientist and Examiner of C-DAC, since he concealed that he filed the affidavit under Section 296 of Cr.PC in consultation with NIA officials.

89. PW43, the Scientist and Examiner of C-DAC conceded that he prepared the affidavit filed under Section 296 of Cr.PC after consulting with the Public Prosecutor of NIA and another NIA official. He has explained the reasons that he wanted to specifically include the matters to which the prosecution is giving emphasis, among various voluminous factors included in his report. PW43 is a Scientist possessing M.Tech in Digital Electronics and Communication. He deposed that he had given more than 600 reports in various courts in respect of Cyber forensic analysis made by him. The trial court rightly believed the version of PW43,



the scientific expert, in arriving at a conclusion as to the digital evidence. We do not find any fault with the reasoning of the Special Judge.

90. The next contention of the learned counsel for the appellant is that the trial court ought to have discarded the prosecution version that the appellant had worked as a salesman in AIK Jewellery. PW3 (Naina Mohamed) testified that he was the owner of the AIK Jewellery at Kadayanellur in Tamil Nadu. He would say that the accused, Subahani Haja, was an employee of his Jewellery for about one year. At that time the appellant used to operate the computer connected with internet in his shop. He added that in October 2015, the police took the appellant to the shop and seized the hard disc of the said computer. PW4 (Shahul Hameed) and PW5 (Mohamed Ashik Ali) would also say that the accused was their co-worker in AIK Jewellery.

91. Moreover, PW19 (Ayesha Beevi), the former wife of the accused would say that after their marriage, they resided at Kadayanellur and the accused worked in AIK Jewellery. The available evidence on record would clearly indicate that the appellant has resided at Kadayanellur and worked as a Salesman in AIK Jewellery.

The relevancy of confession to PW29

92. The learned counsel for the appellant pointed out that the confession to PW29 (Dr. Krishnan B.), Forensic Surgeon, Government Medical College, Alappuzha is hit by Section 26 of the Indian Evidence Act. Therefore, the confession is inadmissible in evidence.



93. On 21.10.2016, NIA produced the accused in front of PW29 for ascertaining the cause of injuries found on his body. PW29 deposed that he had recorded the statement made by the accused in relation to the history of the injuries found on his body. Ext.P36 is his report. PW29 testified that he explained to the accused that the history narrated by him would be reported to the court and it may be used as evidence against him. Admittedly, the confession was given by the accused to PW29 while he was in police custody and therefore, it is hit by Section 26 of the Indian Evidence Act. The learned Special Court by applying the doctrine of severability, considered the evidence as admission and acted upon such evidence. The trial court took the view that the statement given by the accused does not amount to confession, but still it comes within the fold of admission, as Section 26 of the Indian Evidence Act bars only confession made during police custody, and not admission, which is otherwise relevant under Section 21 of the Indian Evidence Act.

94. Reliance was placed on the principles laid down in **Kanda Padayachi v. State of Tamil Nadu**², **Nishi Kant Jha v. State of Kerala**³ and **Keshoram Bora v. State of Assam**⁴.

95. The accused revealed that he left India in April 2015 from Chennai and reached Istanbul, from where he reached Mosul, Iraq. He undertook this trip to join and fight with ISIS in Syria and Iraq. He stayed for about 6 days in Istanbul and then reached the Syrian border and reached Mosul, Iraq. There he was given 25 days of

² [AIR 1972 SC 66]

³ [AIR 1969 SC 422]

⁴ [AIR 1978 SC 1096]



"religious training" and 21 days of "weapon training". The weapons training was mainly about dismantling and assembling automatic rifles. All the steps of firearms training, except the actual firing were imparted. As part of the physical training, he was asked to do some sort of kicking exercise. During this exercise, he was supposed to land on his left foot after the completion of the kick with right foot. But when he took the jump and the kick, he failed to land properly on his left foot and he immediately felt an "electric shock like pain" from his left knee and collapsed on to the ground which was a rough cement floor. He was later taken to a hospital in Mosul for treatment. Later, it was noticed by his trainers that he was not able to stand and perform his activities which included active warfare duty. He was then delegated to guard duty. While on guard duty, a shell exploded near him and two of his fellow fighters died in that explosion. But he does not exactly remember the details of that incident except that he was not injured in that incident. After this incident, he wanted to return home but he was detained by ISIS in a prison for 54 days. After he was released from the jail, he returned to Istanbul, from where, he returned to India by September 2015.

96. In **Nishi Kant Jha** case (supra), a five Judge Bench of the Apex Court held that it is permissible to split up or separate confession or admission made by a person, but the rule is only that the whole of the confession or admission could be considered together and then decided whether it is possible to use one part, by making sure that the part which is separated does not make the reminder



meaningless. The dictum laid down in **Nishi Kant Jha** case (supra) was followed in **Kanda Padayachi** (supra) and **Keshoram Bora** (supra). The learned Special Judge separated the exculpatory portion of the confessional statement given by the appellant to PW29 and acted upon on the basis of that part. The trial court relied on the statements of the accused that he reached Mosul, Iraq from Istanbul by leaving India on April 2015 from Chennai, that he sustained a serious injury on his left knee while undergoing training, that he was taken to a hospital in Mosul to treat the injured knee, that after the said incident he wanted to return home, but he was incarcerated by the ISIS and thereafter he was able to return to Istanbul, are matters which do not amount to a confession. Those statements, even if taken as a whole, do not constitute a confession.

97. The trial court applied the doctrine of severability and relied on the exculpatory portion of the confession statement given by the appellant to PW29. We do not find any fault with the said reasoning of the learned Special Judge.

The evidence of approver

98. Yet another contention advanced by the learned counsel for the appellant is that the trial court ought not to have considered the testimony of PW34 (J.S. Mohamed Kamal), the approver.

99. According to the prosecution, the accused confessed to PW34 that he had migrated to join ISIS and was fighting for it in the battle field of Mosul in Iraq.



PW34, Mohamed Kamal, has been doing export business in the name of Euphra Trading Co., since 2011. His mobile number is 9884956999. He was also using two Facebook accounts as 'Mohamed Kamal' and 'Abu Jamaluddeen'. He came to know about the accused from a person nicknamed 'Umm Hurayra', who is actually a lady named Fathima from South Africa. PW34 came to know that one Abu Jasmine, an Indian, was fighting for ISIS in Mosul, Iraq. At that time, the accused was known as Abu Jasmine. PW34 also wanted to join ISIS; hence he collected the details of Abu Jasmine (appellant) from Umm Hurayra and contacted the appellant. They shared their whatsapp numbers and created a telegram group along with another person Abu Computer @ Abu Amar, who was also a fighter for ISIS. Through their whatsapp and telegram chats, PW34 came to know that Abu Jasmine had joined ISIS, fought for ISIS in the battle field and wanted to return to India. Later, the accused informed PW34 that he got money from his brother, arranged a ticket to India and reached Mumbai in September 2015.

100. The NIA seized MO-25 mobile phone from PW34 and sent it for forensic analysis. When the forensic report was shown to PW34, he identified the emails received from the mail ID of the accused as "usuphalikhan@gmail.com".

101. The learned Special Judge after a detailed evaluation of evidence took the view that the evidence of PW34 is also independently proved by the prosecution. Therefore, we find no merit in the argument advanced by the learned counsel for the appellant.



The conspiracy

102. The learned counsel for the appellant further contented that there is no reliable evidence to prove the alleged conspiracy. According to the prosecution, the accused has conspired with many persons to join ISIS. A conspiracy was hatched by one Umm Hurayra and the appellant and they persuaded PW34 (Mohamed Kamal) to join ISIS.

103. The learned counsel for the appellant vehemently argued that the prosecution has to prove that there was an agreement between two or more persons for the commission of an offence, mere suspicions, surmises or inferences which are unsupported by cogent evidence, are not sufficient. Mere sharing of thoughts and intentions by two persons are not enough.

104. In the case on hand, there is clear cogent evidence that the appellant interacted with several persons abroad through his Facebook account and finally, chalked out a plan to visit Turkey to join ISIS in Iraq. It appears that the accused contacted one Aboo Musaddas on 08.12.2014 and expressed his desire to join ISIS and he agreed to make all necessary arrangements. The said Aboo Musaddas asked the appellant to contact him when he reached Istanbul and then someone would take him to 'Al Dawlla' (the dynasty). The accused commenced his journey to Turkey on 08.04.2015, which is merely two months after the date of inclusion of ISIS into the first schedule as Item No.38, as a proscribed terrorist organisation.



105. PW34 (Mohamed Kamal) has created a telegram group to support ISIS in which the appellant and another person were members. PW34 testified that he got acquaintance with the appellant only through a person named Umm Hurayra. Ext.P25(a) contains the details of Umm Hurayra and the chats between them. PW34 (Mohamed Kamal), in furtherance of the discussion with Umm Hurayra, asked the appellant to approach the Indian Embassy in Turkey and to present a false story, to enable him to avert the legal consequences of joining ISIS. The chats and discussions between the appellant, PW34 and Umm Hurayra clearly indicate that there was an agreement between them to do an illegal act.

106. On a careful evaluation of the evidence, we concur with the view taken by the learned Special Judge that the NIA has succeeded in establishing a conspiracy between the appellant, Umm Hurayra and PW34 (Mohamed Kamal) and others.

107. On a careful analysis, weighing and testing of the evidence on record, we are of the firm view that the prosecution has succeeded in proving the charge against the appellant beyond reasonable doubt. The digital evidence collected from the rented house of the accused would unerringly point out the involvement of the accused, to further the objectives of ISIS, a proscribed terrorist organisation. On 08.04.2015, the appellant reached Turkey in a visiting Visa for a fortnight and over stayed for about five months. The available evidence on record would further prove that from Turkey, the appellant had crossed the border of Iraq and fought for ISIS at Mosul. The appellant got physical training and arms training from ISIS.



108. The learned counsel for the appellant submitted that the sentence imposed by the trial court is too harsh and excessive, particularly with regard to Section 20 of the UA(P) Act. Section 20 of the UA(P) Act reads thus:

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

109. A bare perusal of Section, it is clear that Section 20 of UA(P) Act gives wide discretion to the courts while imposing sentences. Anyone who is a member of a terrorist gang or organisation involved in terrorist acts shall be punished with imprisonment which may extend to life, and shall also be liable to fine. It is pertinent to note that no minimum sentence is described in this Section.

110. The learned counsel for the appellant submitted that when the statute does not provide a minimum sentence, but only the maximum limit, the courts have to impose a reasonable sentence proportionate to the crime. The learned counsel further pointed out that the learned Special Judge has not assigned any reason for imposing the maximum sentence under Section 20 of the UigatiigatiA(P) Act.

111. The learned counsel also pointed out certain mitigating circumstances. The appellant was aged only 35 years at the time of the commission of the offence and the possibility of his reformation has to be considered. He further argued that the only allegation against the appellant, after his return to India, is that he attempted to procure explosive materials like potassium chloride, potassium nitrate.



He made some enquiries about the possibility of obtaining such precursor explosive materials. He was unsuccessful in his attempt to collect the explosive substances.

112. It is submitted that the appellant has been in judicial custody for about the past nine years and now he has reformed and became a law-abiding citizen.

113. On the other hand, the learned DSGI would submit that the appellant has committed a grave and serious offence affecting the sovereignty and integrity of India. The sentence imposed by the trial court is proportional to the gravity of the offence and no interference is warranted on this point.

114. In **Krishna Mochi v. State of Bihar**⁵, a three Judge Bench of Apex Court observed that the criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to be fit with the crime.

115. In **Alister Anthony Pareira v. State of Maharashtra**⁶, the Apex Court held as follows:

70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket

⁵ [2002 KHC 625]

⁶ [2012 (2) SCC 648]



formula for sentencing an accused on proof of crime. The Courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

116. In **Karamjit Singh v. State (Delhi Admn.)**⁷, the Apex Court observed in paragraph 7 as under:

7. The punishment prescribed under S.3, 4 and 6 of the TADA Act are imprisonment for a term of not less than 5 years to life imprisonment and also fine. On a reading of these statutory provisions it is manifest that the Parliament has considered the culpability dealt with in these provisions as serious threats to society and the country, and therefore, has provided stringent punishment for the offences. Punishment in criminal cases is both punitive and reformatory. The purpose is that the person found guilty of committing the offence is made to realise his fault and is deterred from repeating such acts in future. The reformatory aspect is meant to enable the person concerned to relent and repent for his action and make himself acceptable to the society as a useful social being. In determining the question of proper punishment in a criminal case, the Court has to weigh the degree of culpability of the accused, its effect on others and the desirability of showing any leniency in the matter of punishment in the case. An act of balancing is what is needed in such a case a

⁷ [2001 (9) SCC 161]



balance between the interest of the individual and the concern of the society, weighing the one against the other. Imposing a hard punishment on the accused serves a limited purpose but at the same time, it is to be kept in mind that relevance of deterrent punishment in matters of serious crimes affecting society should not be undermined. Within the parameters of the law an attempt has to be made to afford an opportunity to the individual to reform himself and lead life of a normal, useful member of society and make his contribution in that regard. Denying such opportunity to a person who has been found to have committed offence in the facts and circumstances placed on record would only have a hardening attitude towards his fellow beings and towards society at large. Such a situation, has to be avoided, again with the permissible limits of law.

117. **State of M.P. v. Udham**⁸, the three Judges Bench of the Apex Court has laid down the principles for sentencing, crime test, criminal test and comparative proportionality test. Para 12 of the said judgment is as follows:

12.Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. 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 for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

⁸ [(2019) 10 SCC 300]



The sentence imposed by the Special Court

118. The sentence imposed by the Special Court is extracted hereunder:

- (1) The convict is sentenced to undergo imprisonment for life and to pay a fine of Rs.1,00,000/- with default prison term for one month under Section 20 of the UA(P) Act.
- (2) He is also sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,00,000/- with default prison term for one month under Section 125 of IPC.
- (3) He is further sentenced for rigorous imprisonment for five years and to pay a fine of Rs.10,000/- with default prison term for one month under Section 120B of the IPC r/w Sections 20, 38 and 39 of the UA(P) Act.
- (4) The convict is also sentenced to undergo rigorous imprisonment for seven years each under Section 38 and 39 of the UA(P) Act.

The Special Court made it clear that the sentence imposed shall run concurrently.

119. We have carefully considered the sentence imposed by the trial court, guided by the principles discussed above. No doubt, the offences committed by the appellant are of grave and serious nature. However, we have noticed certain mitigating circumstances:

- i. The appellant was aged 35 years at the time of the alleged commission of the offences.



- ii. No specific overt acts were alleged against the appellant after his return from Iraq, except an unsuccessful attempt to procure explosives.
- iii. Repentance and the possibility of reformation of the accused.
- iv. The absence of criminal antecedents.

120. In the case on hand, the learned Special Judge has not stated any reason for awarding the maximum sentence under Section 20 of the UA(P) Act. Applying the principles of law laid down in the aforementioned cases and having regard to the totality of facts and circumstance of this case, we are of the considered opinion that the ends of justice would meet, if we reduce the sentence of the appellant from imprisonment for life to rigorous imprisonment for ten years, imposed under Section 20 of the UA(P) Act. The rest of the findings of the learned Special Judge are upheld.

The Criminal Appeal is disposed of with the above modification.

Sd/-

RAJA VIJAYARAGHAVAN V
JUDGE

Sd/-

K. V. JAYAKUMAR
JUDGE