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UNION OF INDIA

v.

YASMEEN MOHAMMAD ZAHID @ YASMEEN

(Criminal Appeal No.1199 of 2019).

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AUGUST 02, 2019

[UDAY UMESH LALIT AND INDU MALHOTRA, JJ.]

Penal Code, 1860:

- ss.120B and 125 and ss.38, 39 and 40 of Unlawful Activities (Prevention) Act, 1967 – Conviction under – By trial/Special Court – Sentenced to three years RI on one count and seven years RI on four counts – High Court acquitted the accused u/s.125 IPC and ss.39 and 40 of the Act – Conviction u/s. 120B IPC and s.38 of the Act was upheld while reducing the sentence to one year and three years respectively – Appeal of State challenging the acquittal order and reduction of sentence – Appeal by accused challenging conviction order – Held: Evidence on record point to the existence of mens rea and hence conviction u/s.120B IPC and s.38 of the Act was correct – But the offences u/ss. 125 IPC and ss.39 and 40 of the Act are not made out, hence acquittal thereunder affirmed –*
- E However, reduction of sentence by High Court on the ground of sympathy is not sustainable – Therefore, sentence of three years and seven years imposed by trial Court is restored.*

Unlawful Activities (Prevention) Act, 1967:

- ss.38 and 39 – Scope of – Held: The scope of ss.38 and 39 and their fields of operation are different – On investigation of s.38, s.39 does not become superfluous.*

Partly allowing the appeal of the State and dismissing that of the accused, the Court

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HELD: 1 The evidence on record, establishes that A1 was propagating the ideology of IS and advocating, among other things, war against non-Muslims; that the classes were attended by A2 (appellant-accused) 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

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A1. These features definitely point to the existence of *mens rea*. The Courts below were therefore absolutely right in recording conviction against A2 in respect of offences under Section 120B IPC and Section 38 of the Unlawful Activities (Prevention) Act, 1967. [Para 15] [1003-G-H; 1004-A-B]

2. As regards the offence under Section 125 of the IPC the High Court was right in observing that there was evidence to prove that A2 had attended classes of Jihad propagating ISIS ideology by original Accused No.1 but there was nothing to indicate that she had taken any steps to wage a war or had attempted or abetted waging of such war against any Asiatic Power in alliance with or at peace with Government of India and as such there was no material to sustain the charge under Section 125 IPC. [Paras 6 and 7] [1001-B-C]

3. Sections 39 and 40 of the Act require certain elements in respect of which there is no material evidence on record. For Section 39 of the Act 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 A2. The acquittal in respect of charges under Sections 39 and 40 was therefore rightly recorded by the High Court. [Para 16] [1004-D-E]

4. The High Court was not right in observing “if a person is punishable under Section 38, Section 39 becomes superfluous”. 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. [Para 17] [1005-F-G]

5. The only ground that weighed with the High Court while reducing the sentence was sympathy. Even at the time of arrest of the appellant-accused, while leaving for Afghanistan, certain objectionable material was found on her person. The intensity of

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A her participation and involvement were clearly made out. In the circumstances, there was no room for invoking sympathetic considerations. The quantum of sentence imposed by the trial court was absolutely correct and adequate. [Para 19][1004-H; 1005-A]

B *State of Kerala v. Raneef* (2011) 1 SCC 784 : [2011] 1 SCR 590 – distinguished.

Arup Bhuyan v. State of Assam (2011) 3 SCC 377 : [2011] 2 SCR 506 – referred to.

Case Law Reference

C	[2011] 1 SCR 590	distinguished	Para 12
	[2011] 2 SCR 506	referred to	Para 14

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1199 of 2019

D From the Judgment and Order dated 04.10.2018 of the High Court of Kerala at Ernakulam in Crl. A. No. 506 of 2013
With
Criminal Appeal No. 1200 of 2019.

E Shailesh Madiyal, B.V. Balaram Das, Santosh Krishnan, Zulfiker Ali P.S., Faisal M. Aboobaker, Ms. Lakshmi Shree Puthenpurackal, Advs. for the appearing parties.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

F 1. Special leave to appeal granted.

2. The judgment and order dated 04.10.2018 passed by the High Court of Kerala in Criminal Appeal No.506 of 2018 has given rise to these two appeals, one by Union of India against acquittal of A2-Yasmeen Mohammad Zahid @ Yasmeen in respect of offences punishable under

G Section 125 of the Indian Penal Code (“IPC” for short), Sections 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 (UAPA for short) and also against reduction in sentence ordered by the High Court for offences under Section 120B of IPC and Section 38 of the UAPA, while said A2–Yasmeen is in appeal against her conviction and sentence under Section 120B IPC and Section 38 of the UAPA.

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3. The case of the prosecution, in brief, was as under:

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(a) Pursuant to complaint received on 10.07.2016 in Chandera Police Station, Kasaragod preliminary investigation was undertaken which revealed that 14 persons had left India to join Islamic State of Iraq and Syria (ISIS) which is declared to be a terrorist organisation (Serial No.38 in the First Schedule to the UAPA).

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(b) During the course of investigation, A2-Yasmeen was arrested on 01.08.2016 at Indira Gandhi International Airport, New Delhi while she was attempting to travel to Afghanistan along with her child.

(c) According to the prosecution, there was a criminal conspiracy between original Accused No.1 (husband of A2-Yasmeen) and A2-Yasmeen from 2015 pursuant to which conspiracy A1 and A3 to A15 left India and joined ISIS in Afghanistan; and A2-Yasmeen was an active participant supporting terrorist activities of ISIS; and she had raised funds to further the activities of ISIS and had received funds which were utilised for supporting the activities of ISIS.

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4. Out of 15 accused named in the charge-sheet all the other accused were declared to be absconding and A2-Yasmeen alone was sent up for trial for the offences punishable under Section 120B IPC, Section 125 IPC and under Sections 38, 39 and 40 of the UAPA. The charges were framed against her in respect of said offences. The prosecution examined 52 witnesses and relied upon various documents and material objects. Insofar as the role attributed to A2-Yasmeen was concerned, the relevant witnesses were PWs 4, 6, 7, 8, 11, 12 and 13.

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5. After going through the material on record, the Special Court for the trial of NIA Cases, Ernakulam, found that the prosecution had established the case against A2-Yasmeen and convicted her for the offences punishable under Sections 120B and 125 IPC and under Sections 38, 39 and 40 of the UAPA and sentenced her to suffer rigorous imprisonment for three years, seven years, seven years, seven years and seven years respectively under the aforesaid five counts. A2-Yasmeen was also directed to pay fine in the sum of Rs.25,000/- under Section 120B IPC, in default whereof she was directed to suffer three months rigorous imprisonment. The judgment and order dated 24.03.2018 passed by the trial court was the subject matter of challenge at the instance of A2-Yasmeen in Criminal Appeal No.506 of 2018.

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- A 6. The High Court by its judgment under appeal, set aside the conviction and sentence of A2-Yasmeen for the offences punishable under Section 125 IPC, Sections 39 and 40 of the UAPA while upholding her conviction for the offence punishable under Section 120B IPC and Section 38 of the UAPA. The High Court however reduced the substantive sentence from three years and seven years to one year and three years respectively on said two counts. The other elements, namely, sentence of fine and the default sentence were not varied or modified by the High Court.
- B 7. During the course of its judgment, the High Court observed as under:-
- C “The aforesaid evidence of PW4, PW6, PW18 and PW21 who had attended the class of 1st accused clearly proves the propagation of ideology of IS. Therefore there is absolutely no difficulty in assuming that the class attended by A2 in the house of PW7 and PW8 and taken by A1 was with reference to IS and the Jihad, which according to them was a war against non Muslims.....
- D The prosecution has thus proved that the account ending with 251 is of Sonia Sebastian who is the wife of the 1st accused and the amount was withdrawn from the said account on various dates from 3.6.2016 to 22.07.2016 by the 2nd accused. Contention is that the money was deposited by A1 in the account of Sonia Sebastian and the ATM card given to Sonia Sebastian was used by A2 for collecting the amounts. It is stated that the CCTV footage would show that the 2nd accused has withdrawn money from the bank accounts.
- E F The 2nd accused was arrested on 1.8.2016 and she was under judicial custody in Kannur women prison. At the time of admission, her personal belongings were entered in a register. Among the articles, there were two Idea SIM cards. The SIM cards were seized by PW41 as per P29 mahazar and produced as MO13 and MO14. The articles also contained a memory card marked as MO15. The memory card contained revelation videos and videos relating to ISIS, audio speech of Anwar Alwaki, a brief guide to Islamic State and women of Islamic State. This according to the prosecution further proved that she was preparing to go to Afghanistan at the instance of the 1st accused. When these facts
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are proved, the question is whether the accused had committed A
any such offence.”

In the backdrop of these proved facts, the High Court then considered whether the offences alleged against A2-Yasmeen under the aforesaid five counts were made out. It was observed that there was evidence to prove that A2 had attended classes of Jihad propagating ISIS ideology by original Accused No.1 but there was nothing to indicate that she had taken any steps to wage a war or had attempted or abetted waging of such war against any Asiatic Power in alliance with or at peace with Government of India and as such there was no material to sustain the charge under Section 125 IPC. As regards charge under Section 38 of the UAPA it was observed as under:

“There is evidence to prove that the 2nd accused was associated with A1 who propagated ISIS ideology and had gone even to the extent of joining him. Her attempt to proceed to Afghanistan was with a clear intention to meet 1st accused and to involve in IS related activities. Therefore she is punishable under Section 38(2).”

8. In respect of charge under Section 39 of the UAPA the High Court found that though A2 was certainly influenced by the ideology professed by A1, she herself had not arranged any of the acts falling under Clauses (a) to (c) of Section 39. The High Court went on to observe as under:

“She had already become a member of the organization as contemplated under Section 38 of the Act. If a person is punishable under Section 38, Section 39 becomes superfluous.”

9. As regards charge under Section 40 of the UAPA, the High Court found that she was not raising any funds for terrorist organisation; the amounts she received were for personal use and for purchasing tickets for travel and other arrangements for herself and for her son and as such charge under Section 40 of the UAPA was not made out.

10. Concluding that A2-Yasmeen was guilty of the offences punishable under Section 120B IPC and Section 38 of the UAPA, the High Court considered the case with a lenient view and reduced the substantive sentences in respect of these two offences as stated hereinabove.

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- A 11. In these appeals we heard Mr. K.M. Natraj, learned Additional Solicitor General for Union of India and Mr. Santosh Krishnan learned Advocate for A2-Yasmeen. According to the learned Additional Solicitor General, the material on record established the role played by A2-Yasmeen beyond any doubt and her acquittal in respect of offences punishable under Section 125 IPC and Sections 39 and 40 of the UAPA was incorrect and in any case there was no reason to reduce the substantive sentence in respect of offences under Section 120B IPC and Section 38 of the UAPA. Mr. Santosh Krishnan, learned Advocate for A2-Yasmeen not only supported the judgment of the High Court in respect of acquittal under Section 125 IPC and Sections 39 and 40 of the UAPA but submitted that A2 deserved acquittal even in respect of Section 120B IPC and Section 38 of the UAPA. Relying upon the decisions of this Court in *Arup Bhuyan v. State of Assam*¹ and *State of Kerala v. Raneef*² it was submitted that for an offence under Section 38 of the UAPA to get attracted the prosecution must establish requisite *mens rea*. He further submitted that in order to attract Sections 39 and 40 of the UAPA there must be material indicating that the acts in question were done by the accused in order to further the activity of a terrorist organisation.
- B 12. In *State of Kerala v. Raneef*², a practising Dentist was alleged to have given medical aid to a wounded accused and the matter arose from the order of the High Court granting bail to said Dentist. While affirming the order of the High Court, it was observed,

 - C “7. At this stage we are not expressing any opinion as to whether the allegations in the versions of the prosecution or defence are correct or not, as evidence has yet to be led. However, we would like to make certain observations.
 - D 8. We are presently only considering the bail matter and are not deciding whether the respondent is guilty or not. Evidence has yet to be led and the trial yet to commence. Hence the prosecution is yet to establish by proof beyond reasonable doubt that the respondent was part of a conspiracy which led to the attack on Prof. Jacob. The case against the respondent is very different from that against the alleged assailants. There is no allegation that the respondent was one of the assailants. We are of the opinion

H ¹(2011) 3 SCC 377

H ²(2011) 1 SCC 784

that at this stage there is no *prima facie* proof that the respondent was involved in the crime. Hence, the proviso to Section 43-D(5) has not been violated.

9. The respondent, being a doctor, was under the Hippocratic oath to attempt to heal a patient. Just as it is the duty of a lawyer to defend an accused, so also it is the duty of a doctor to heal. Even a dentist can apply stitches in an emergency. *Prima facie* we are of the opinion that the only offence that can be levelled against the respondent is that under Section 202 IPC, that is, of omitting to give information of the crime to the police, and this offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence.”

13. Mr. Krishnan, however relied upon certain observations in said decision to submit that mere membership of an unlawful organization was not enough and there must be clear proof that the accused intended to accomplish the aims of the organization by resort to violence. Those observations were made while considering the matter in the context of order of release on bail during trial which is clear from paragraphs 10 and 15 of the decision.

14. In the case of *Arup Bhuyan v. State of Assam*¹, the only material against the concerned accused was his confession to the police in which he had identified the house of the deceased and it was observed:-

“7. In the instant case, the prosecution case mainly relies on the alleged confessional statement of the appellant made before the Superintendent of Police, which is an extra-judicial confession and there is absence of corroborative material. Therefore, we are of the opinion that it will not be safe to convict the accused on the basis of alleged confessional statement.”

The subsequent portion of the decision, where the earlier decision in *State of Kerala v. Raneef*² was considered, was relied upon by Mr. Krishnan.

15. The evidence on record, as culled out by the High Court in the observations quoted hereinabove establishes that A1 was propagating the ideology of IS and advocating, among other things, war against non-Muslims; that the classes were attended by A2-Yasmeen; that the videos

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- A 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 A1. These features definitely point the existence of *mens rea*. The Courts below were therefore absolutely right in recording conviction against A2 in respect of offences under Section 120B IPC and Section 38 of the UAPA. The submissions advanced by Mr. Krishnan, therefore, cannot be accepted and the appeal preferred by A2-Yasmeen must fail.
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- 16. We now turn to the appeal preferred by the Union to see whether the acquittal of A2 for offences under Section 125 of IPC and Sections 39 and 40 of the UAPA was justified. As regards the offence under Section 125 of the IPC, the matter was rightly appreciated by the High Court and we are in complete agreement with the view taken by the High Court.
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- Coming to Sections 39 and 40 of the UAPA, these provisions require certain elements in respect of which there is no material evidence on record. For Section 39 of the 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 A2-Yasmeen. The acquittal in respect of charges under Sections 39 and 40 was therefore rightly recorded by the High Court.
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- 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.
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- 18. Lastly, we come to the quantum of sentence in respect of offences where A2-Yasmeen has been found guilty by both the Courts.

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- 19. The only ground that weighed with the High Court while reducing the sentence was sympathy. The material on record indicates the role played by A2-Yasmeen. Even at the time of her arrest, while

leaving for Afghanistan, certain objectionable material was found on her person. The intensity of her participation and involvement were clearly made out. In the circumstances, there was no room for invoking sympathetic considerations. The quantum of sentence imposed by the trial court was absolutely correct and adequate.

20. In the premises,

A] Appeal preferred by A2-Yasmeen challenging her conviction and sentence under Section 120B IPC and Section 38 of the UAPA is dismissed.

B] Appeal preferred by the Union challenging the acquittal of A2-Yasmeen in respect of offences under Section 125 of the IPC and Sections 39 and 40 of the UAPA is dismissed.

C] Appeal preferred by the Union as regards reduction of sentence awarded to A2-Yasmeen for offences under Section 120B IPC and Section 38 of the UAPA is allowed. The order passed by the High Court in that behalf is set aside and the sentence imposed by the trial court in respect of offences under Section 120B IPC and Section 38 of the UAPA against A2 is restored.

21. Appeals stand disposed of, in aforementioned terms.

Kalpana K. Tripathy

Appeals disposed of.