
(2010) 10 KL CK 0226
In the High Court Of Kerala
Case No : B.A. No's. 6203 and 6215 of 2010

Shammi Firoz

APPELLANT

Vs

National Investigation Agency

RESPONDENT

Date of Decision : 14-10-2010

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 164, 306, 307, 337(3), 437
Explosive Substances Act, 1908 — Section 3
National Investigation Agency Act, 2008 — Section 11, 16(1)
Penal Code, 1860 (IPC) — Section 120(B), 153, 324, 34
Unlawful Activities (Prevention) Act, 1967 — Section 16(1), 18, 23

Citation : (2011) CriLJ 1529 : (2010) 4 KLT 409

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : K.A. Salil Narayanan, for the Appellant; T.P.M. Ibrahim Khan, Asst Solicitor General, for the Respondent

Final Decision : Allowed

Judgement

V. Ramkumar, J.—In these petitions filed u/s 482 Code of Criminal Procedure the common Petitioner who is the common 7th accused in Crime Nos. 5 and 6 of 2009 of the National Investigation Agency, New Delhi (formerly Crime Nos. 80 and 81 of 2006 of Kasaba and Nadakkavu Police Stations, Kozhikode) for offences punishable u/s 120B, 153A and 324 read with Section 34 I.P.C. and Section 16(1)(b), 18 and 23 of the Unlawful Activities (Prevention) Act, 1967 and Section 3 of the Explosive Substances Act, 1908, seeks his enlargement on bail.

THE PROSECUTION CASE

2. The case of the prosecution is that infuriated by the attitude of the Executive and the Judiciary in not granting bail to the Muslim accused persons involved in the Marad Case, the accused persons (9 in number) hatched a criminal conspiracy to make, plant and explode bombs in the K.S.R.T.C. bus stand and

Moffusil bus stand in Kozhikode City. The specific allegation as against the Petitioner is that he made telephone calls to the Kozhikode Collectorate and office of the Calicut Times daily intimating the planting of bombs.

3. The Investigation of the case from the local police was transferred to the CB CID SIG - III on 13.6.2006. Subsequently in the year 2009 the National Investigation Agency was entrusted with the investigation of the above crime by the Government of India.

4. Out of the 9 accused persons mentioned in the F.I.R. A5 was deleted and the remaining 8 persons alone were charge-sheeted by the police and from among the 8 persons A6 was killed in an encounter at Jammu and Kashmir and A2 and A8 are absconding. A3 has been granted bail by this Court. A9 is in judicial custody. A1 and A4 are in custody in Bangalore Jail and are presently not being produced before the Special Court for Trial of N.I.A. cases, Ernakulam presumably due to security reasons or due to lack of sufficient force.

THE PETITIONER'S CONTENTION

5. It is the case of the Petitioner that he has been made an approver to whom pardon has been tendered. The grievance of the Petitioner is that on account of the interdict u/s 306(4)(b) Code of Criminal Procedure the Petitioner who was arrested on 19.3.2010 and who was subsequently made an approver is continued to be detained in custody and he will not be released from custody until the termination of the trial in the above cases. Since according to the Petitioner, Section 439 Code of Criminal Procedure cannot be invoked by him in view of the aforementioned interdict, he is invoking the inherent power of this Court u/s 482 Code of Criminal Procedure for his enlargement on bail. Petitioner assures this Court that he will not resile from his statement when examined before the Magistrate that he will make a full and true disclosure of the entire circumstances within his knowledge relating to the offence and relating to every other person concerned and that he will not willfully conceal anything essential or give false evidence during the trial of the case. According to the Petitioner the trial of the case may not take place in the near future and if his detention is continued ad infinitum it will offend the Constitutional guarantee of his right to life enshrined under Article 21 of the Constitution of India. The Petitioner relies on the following decisions in support of his request for bail u/s 482 Code of Criminal Procedure:

(1) Prem Chand Vs. State, .

(2) Noortaki @ Mammu v. State of Rajasthan -1986 Cri.L.J. 1488 (Raj.)(F.B.).

(3) Unreported decision dated 24.1.2002 in Cri.M.C. 537 of 2002 by a learned Judge of this Court in Shyjan v. State of Kerala.

THE REGISTRY'S OBJECTION

6. When these bail applications were filed invoking Section 482 Code of Criminal Procedure the Registry of this Court raised an objection that a bail application

cannot be filed invoking Section 482 Code of Criminal Procedure and accordingly refused to number the applications. In the light of the decisions cited by the Petitioner and referred to above, this Court, noticing the judicial precedents to the effect that notwithstanding the bar u/s 306(4)(b) Code of Criminal Procedure the High Court can in appropriate cases grant bail to an approver u/s 482 Code of Criminal Procedure directed the Registry to number the bail applications and send up the same for orders. That is how these applications were heard by me.

7. I heard Advocate Sri. Salil Narayanan, the learned Counsel appearing for the common Petitioner and Advocate Sri. T.P.M. Ibrahim Khan the learned Assistant Solicitor General of India.

8. Where there is no enabling provision for bail in the Code of Criminal Procedure to deal with contingencies as in the present case and there is no statutory prohibition as well, then for reasons to be discussed hereafter, recourse to the inherent power u/s 482 Code of Criminal Procedure will be fully justified.

THE OBJECT OF TENDING PARDON TO AN ACCOMPLICE

9. The object of the provision for tendering pardon to an accomplice is to get evidence in cases involving grave offences alleged to have been committed by several persons under circumstances making it difficult to get any evidence otherwise. No clue or trace of the offence might have been left behind by the perpetrators of the crime. The dominant purpose of pardon is that the culprits behind such heinous and grave crimes do not go unpunished if a co-participant of the crime comes forward offering to make a clean breast of his own complicity as also the complicity of the other offenders. Evidence is accordingly collected by tendering pardon to a person supposed to have been directly or indirectly concerned with or privy to the offence. What is tendered is a conditional pardon. The condition is that he will make a full and true disclosure of the entire circumstances within his knowledge concerning the offence and concerning every other person involved in the commission of the offence. The conditional pardon so tendered is thus a contract between the accomplice and the State and the consideration for the same qua the accomplice is the exoneration from liability and the consideration qua the State is the agreement to make a full and true disclosure. (See *In Re : Chief Judicial magistrate, and Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra*, . Once pardon is granted to an accused he ceases to be an accused person and becomes a witness for the prosecution. Vide *State v. Vasu* 1954 KLT 515 and *District Collector, Chittoor and Others Vs. Chittoor District Groundnut Traders Association and Others*, . When the approver resiles from the agreement and breaks the conditional pardon, the contract is broken and the State becomes entitled to prosecute him by recourse to Section 308 Code of Criminal Procedure (Vide para 6 of *In Re : Chief Judicial magistrate*, . It is to ensure that the approver who has accepted the conditional pardon, makes a full and true disclosure of the entire fact within his knowledge, that he is examined as a witness before the Magistrate taking cognizance of the offence u/s 306(4)(a) of Code of Criminal Procedure The said provision further

mandates that the approver shall be examined in the subsequent trial also. An approver will be exempted from the trial in the main case for the offences in respect of which pardon was granted and will be exonerated from punishment in that case only if he complies with the conditions of pardon during the trial of his erstwhile co-accused. If he, however, resiles from the conditions under which pardon was tendered, then as provided u/s 308 Code of Criminal Procedure he is liable to be tried in the main case, though not jointly with the erstwhile co-accused.

THE MECHANICS OF TENDERING PARDON TO AN ACCOMPLICE

10. It may be relevant in this context to examine the mechanics behind the tender of pardon to an accomplice and his examination before the Magistrate. While the Chief Judicial Magistrate or the Metropolitan Magistrate as well as a Magistrate of First Class have the power to tender pardon to an accomplice u/s 306(1) Code of Criminal Procedure a close reading of the said provision will indicate that in the case of a Chief Judicial Magistrate or a Metropolitan Magistrate, the power to tender pardon to an accomplice is available not only during the stage of inquiry or trial but also during the stage of investigation and such Chief Judicial Magistrate or Metropolitan Magistrate, as the case may be, need not be himself enquiring into or trying the offence. But in the case of a Magistrate of the First Class, the power to tender pardon to an accomplice can be exercised only by the Magistrate enquiring into or trying the offence and the power is available to be exercised only at the state of such inquiry or trial and no such power is given at the stage of investigation. Vide *A. Deivendran Vs. State of T.N.*, . The above provision will further show that the person to whom the pardon is tendered need not be an accused. It is enough if he is directly or indirectly concerned in or privy to an offence of the category falling u/s 306(2). That is presumably why the title of the. Section only mentions the word "accomplice" and not "accused". Section 306(2) indicates the category of offences to which tender of pardon to an accomplice could be given under the said provision. Section 306(3) lays down the procedure for tender of pardon Every Magistrate who tenders a pardon under Sub-section (1) of Section 306 is bound to record:

(a) his reason for so doing

(b) whether the tender was or was not accepted by the person to whom it was made.

Sub-section (2) of Section 308 indicates that the statement of the person accepting the tender pardon is to be recorded by the Magistrate u/s 164 Code of Criminal Procedure By virtue of Section 306(1) tender of pardon to an accomplice can only be on condition that he will make a full and true disclosure of the entire circumstances within his knowledge relating to the offence. Thus, when the accomplice in his statement u/s 164 Code of Criminal Procedure accepts the tender of pardon made by the Magistrate, it is subject to the condition that he will make a full and true disclosure of the entire circumstances within his

knowledge.

11. Sub-section (4) of Section 306 Code of Criminal Procedure reads as follows:

(4) Every person accepting a tender of pardon made under Sub-section (1) -

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall unless he is already on bail, be detained in custody until the termination of the trial.

The object of requiring an approver (who is not on bail) to continue to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but

(i) to protect him from the wrath of the confederates whom he has chosen to expose

(ii) to prevent him from the temptation of saving his erstwhile friends and companions by turning hostile to the prosecution; and

(iii) to secure his presence to await the judgment of the law Vide A.L. Mehra Vs. The State,

12. Once an accused person is granted pardon he ceases to be an accused person and becomes a witness for the prosecution. Since an approver is not a person accused of an offence, Section 437 and 439 Code of Criminal Procedure cannot be pressed into service by an approver for his enlargement on bail. In such a contingency, notwithstanding the bar u/s 306(4)(b) Code of Criminal Procedure it has been held in the decisions relied on by the Petitioner that the High Court can in a given case release the approver on bail by invoking the inherent power u/s 482 Code of Criminal Procedure. Formerly, Courts were very rigid in enforcing the legislative mandate u/s 306(4)(b) corresponding to Section 337(3) of the old Code (See A.L. Mehra Vs. The State, ; Bhawani Singh v. The State AIR 1956 Bho 4; In Re: Pajerla Krishna Reddi (1953 Cri.L.J. 50) (Mad.); Haji Ali Mohammed v. Emperor (AIR 1932 Sind 40); Dev Kishan Vs. State of Rajasthan, . But after the fundamental right guaranteed under Article 21 of the Constitution of India has been laid on a wider canvass through the epoch making judicial pronouncements of the Apex Court, Courts have diluted the rigour of Section 306(4)(b) Code of Criminal Procedure to make it in conformity with the rights under Article 21 of the Constitution of India. That explains the emerging view that despite the embargo u/s 306(4)(b) Code of Criminal Procedure the High Court may in a given case release the approver on bail by calling into aid its inherent power u/s 482 Code of Criminal Procedure

FACTS SPECIFIC IN THE CASE ON HAND

13. But in the present case, Section 306(4)(b) Code of Criminal Procedure does not really apply. The case is now pending before the Special Court (SPE/CBI-I),

Ernakulam which is the Special Court constituted u/s 11 of the National Investigation Agency Act, 2008 ("N.I.A. Act" for short). The said Special Court is a Sessions Court and by virtue of Section 16(1) of the N.I.A. Act the Special Court is empowered to take cognizance of an offence either upon a complaint or upon a police report without the accused being committed to it for trial.

14. This Court had called for a report from the Court below to inform this Court as to which Court had granted pardon to the Petitioner and under what provision of law. As per the reports submitted by the Special Judge it has been informed that on the strength of CrI.M.P. No. 735/2010 filed by the N.I.A. requesting to tender pardon to the Petitioner and on the strength of the application filed as CrI.M.P. 1056 of 2010 by the Petitioner himself it was the Special Judge who tendered pardon to the Petitioner on 2-09-2010 and the Petitioner accepted the same by promising to stick to his statement recorded u/s 164 Code of Criminal Procedure by J.F.C.M. -I Ernakulam on 30-03-2010. The Special Judge has clarified that pardon was tendered to the Petitioner u/s 307 Code of Criminal Procedure

15. If pardon was granted to the Petitioner u/s 307 Code of Criminal Procedure by the Special Court itself which is a Sessions Court competent to take cognizance of the offence without a committal, then the bar u/s 306(4)(b) does not apply. The said provision will be attracted only in the case of a person who has accepted a tender of pardon made under Sub-section (1) of Section 306 Code of Criminal Procedure by a Magistrate. Here, the pardon was tendered by the Special Judge who is a Sessions Judge and that too u/s 307 Code of Criminal Procedure and, therefore, Section 306(4)(b) is not attracted. I am fortified in this conclusion by the decision of the Karnataka High Court in *Lakshamma v. State of Karnataka* 1980 (2) Kar. L.J. 178. Hence, in the absence of any statutory prohibition against the release of the Petitioner on bail, I am inclined to grant bail to the Petitioner who has been in custody since 19-3-2010 onwards. Accordingly, the Petitioner is directed to be released on bail in each of the above crimes on his executing a bond for Rs. 25,000/- (Rupees twenty five thousand only) with two solvent sureties each for the like amount to the satisfaction of the Special Court for trial of N.I.A. Cases, Ernakulam in each of the above crimes and subject to the following conditions:

- (i) The Petitioner shall file an affidavit before the above Court undertaking that his release shall be at his own risk.
- (ii) The Petitioner shall report before the Chief Ministerial Officer of the Court below between 10 a.m. and 1 p.m. on all Tuesdays until exempted by the trial Court.
- (iii) The Petitioner shall not influence or intimidate the prosecution witnesses nor shall he attempt to tamper with the evidence for the prosecution.
- (iv) The Petitioner shall remain confined to the limits of Ernakulam District until further orders to be passed by the trial Court.

(v) The Petitioner shall not attempt to communicate or establish any contact with any of the accused persons in both the above crimes.

(vi) The Petitioner shall not commit any offence while on bail.

These applications are allowed as above.

Dated this the 14th day of October, 2010.