CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 25TH DAY OF AUGUST 2021 / 3RD BHADRA, 1943

CRL.MC NO. 2917 OF 2021

[AGAINST THE ORDER IN CRL.M.P. No. 41 of 2021 IN SC No.2/2018/NIA OF THE SPECIAL COURT FOR THE TRIAL OF NIA CASES,ERNAKULAM.]

PETITIONER:

ABDUL RAZAK @ ABU AHMED,AGED 37 YEARS
S/O. K.P.AHMED KUNJI, PANDARAVALAPPIL HOUSE, PALLIYATH, CHEKKIKULAM P.O., KANNUR-670 592

BY ADVS.
VIPIN NARAYAN
VISHNU BABU

RESPONDENTS:

1 UNION OF INDIA REPRESENTED BY NATIONAL INVESTIGATION AGENCY, KOCHI ,REPRESENTED BY ITS SPECIAL PUBLIC PROSECUTION, HIGH COURT OF KERALA P.O., ERNAKULAM-682 031

2 MIDHILAJ @ ABU MIS'AB, AGED 29 YEARS
S/O. MOIDEEN V.V., 'BAITHUL FARSANA', KAIPAKKAYIL, MUNDERI P.O., KANNUR-670 591

3 HAMSA U.K., AGED 60 YEARS
S/O. IBRAHIM, THOUFEEQ HOUSE, S.S ROAD, KUZHIPPANGAD, CHERAKKARA P.O., THALASSERY, KANNUR-670 104

BY ADVS.
FOR R1 BY SHRI.P.VIJAYAKUMAR, ASG OF INDIA
FOR R2 BY ADV.V.T.RAGHUNATH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 28.07.2021, THE COURT ON 25.08.2021 DELIVERED THE FOLLOWING:

O R D E R

The petitioner herein is the 2nd accused in SC No 2/2018/NIA pending before the Special Court for the Trial of NIA cases, Ernakulam. This Crl M.C challenges Annexure E order, passed by the Special Court allowing an application submitted by the National Investigation Agency (NIA) permitting examination of one Shajahan V.K as an additional witness in the above Sessions Case. According to the petitioner, the additional witness sought to be examined, is a co-accused who was tried and convicted by the NIA Court at New Delhi on the basis of the charge-sheet filed by NIA, New Delhi Unit, based on the very same transactions and is not a competent witness. The accused in a case can be examined as a witness only under Section 315 of the Criminal Procedure Code; the conditions under which are not satisfied in the present case.

2. We heard Sri Vipin Narayan, learned counsel for the petitioner and Sri P.Vijayakumar, the learned Assistant Solicitor General of India.

3. The learned counsel for the petitioner would point out that Annexure E order passed by the Special Court is not legally sustainable. He argues that even going by the pleadings of the prosecuting agency and also on the basis of the findings entered into by the Special Court, the accused as well as the proposed additional witness were being

prosecuted for the same offence. According to him, the permission granted to examine Shajahan as an additional witness, is against the basic principles of criminal jurisprudence; that an accused cannot be a witness against himself. That the accused and the witness were prosecuted for the same offence makes the latter an accomplice and his evidence cannot be used against the co-accused unless he is made an approver under Section 306 of Cr.P.C. Further, granting permission to examine such a witness who has been convicted for the very same offence would cause serious prejudice to the defence. The attention of this Court was drawn to Section 315 of Cr.P.C which contemplates the circumstances under which an accused person can be permitted to be examined as a witness. The provision only contemplates an accused person to be a competent witness for defence, to disprove the prosecution case and that too on the request of such accused in writing. The learned counsel relies on Article 20 (3) of the Constitution of India wherein it is stated that no person accused of an offence can be compelled to be a witness against himself which encompasses within its larger ambit, protection from the evidence of an accused being used against the co-accused, unless as specifically enabled under the Cr.P.C. In such circumstances, the learned Counsel prays for setting aside the impugned order and the dismissal of Annexure B application submitted by the prosecution.

4. Per contra, the learned Assistant Solicitor General (ASG) would contend that the contentions raised by the petitioner are not sustainable. The Crl. MC itself is not maintainable as it is an appealable order under section 21 of the National Investigation Agency Act. On merits, the learned ASG contends that, the Special Court has not committed any error by allowing the examination of the additional witness as the same is specifically contemplated under Section 311 of the Cr.P.C. Section 315 of Cr.P.C would not come into play as it deals with the situation, of an 'accused' being examined as a defence witness. It is further contended that, the charges levelled against the proposed additional witness by the Delhi Unit of NIA is completely different and under no circumstances he can be treated as a person who is charge sheeted along with the accused person in Annexure A charge sheet. Even if it is assumed that both the cases are arising from the very same transactions, there cannot be any bar against the examination of Shajahan, the proposed additional witness, as he is no longer an accused in the case charge sheeted by the NIA, Delhi Unit, since he now stands convicted by the Special Court at Delhi. Upon his conviction, he ceases to be an accused and hence the prohibition, if any, against the examination of a co-accused would no longer be applicable. He relies on the judgments of the Hon'ble Supreme Court reported is **AIR 1968 SC 938 (Lakshmipat Choraria Vs State of Maharashtra), 2010 (10) SCC 179 (State of Maharashtra Vs Abu Salem Abdul Kayyum**

Ansari), 2011 (5) SCC 161(Chandran @ Manichan @ Maniyan Vs State of Kerala), 2013 (14) SCC 461 (Rajaram Prasad Yadav Vs State of Bihar), 2020 (7) SCC 722 (Somasundaran @ Somu Vs State) and AIR 1968 SC 178 (Jamatraj Kewalji Govani Vs State of Maharashtra).

5. At first, we shall deal with the contention raised by the learned ASG regarding the maintainability of Crl.M.C. According to him, there is an appeal contemplated under section 21 of the National Investigation Agency Act, 2008, which was supposed to be filed within a period of 30 days. The appeal contemplated in the said provision is against a judgment, sentence or an order, not being an interlocutory order ie: an order which has an element of finality to it. A Full Bench of this Court in *Mastiguda Aboobacker vs. NIA* ***2020 (6) KHC 265*** found the Hon'ble Supreme Court categorised orders as final, interlocutory and intermediary; a charge framed being in the nature of an intermediary order. Reliance was placed on *Madhu Limaye v. State of Maharashtra* ***1977 (4) SCC 551*** and *V. C Shukla v. State through C.B.I.* ***(1980 Supp SCC 92*** which held "*the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment … " (sic)* In this case what is impugned is an

order by which an additional witness was permitted to be examined. The same is an interlocutory order and hence, there cannot be any appeal as contemplated under section 21 of the NIA Act. From a wealth of precedents the Full Bench culled out the following situations where there is a prohibition against invocation of Section 482 and when it is expedient to invoke; extracted here under:

> *The Prohibition:*
>
> *(1) The power shall not be resorted to, if there is a specific provision in the Code for redressal of the grievance of an aggrieved party*
> *(2) It should be exercised very sparingly to prevent the abuse of process of any Court or otherwise to secure the ends of justice.*
> *(3) It should not be exercised as against the express bar of law engrafted in any other provision of the Code*
>
> *The Expediency :*
>
> *(1) to give effect to an order under the Code*
> *(2) to prevent an abuse of the process of Court, and*
> *(3) to otherwise secure the ends of justice.*

The invocation of the inherent powers of this Court in circumstances of gross injustice caused, amounting to an abuse of process of Court is always permissible so as to secure the ends of justice. The specific ground on which the impugned order is challenged is serious and grave prejudice caused in examining a co-accused as witness, without he being granted pardon and without satisfying the conditions of Section 315 of Cr.P.C. We find that this petition under section 482 of Cr.P.C is maintainable.

6. The facts of the case in detail are as follows: The petitioner stands charge sheeted for offences punishable under sections 38, 39 and 40 of Unlawful Activities (Prevention) Act, 1967 and under sections 120B and 125 of Indian Penal Code. The specific case of the prosecution is that pursuant to a criminal conspiracy entered into by all the accused, including Shajahan, they associated themselves with a proscribed terrorist organization ISIS/Daish with the intention of furthering its activities by waging war against Syria, which is an Asiatic power at peace with Government of India, raised funds for furthering the activities thereof and attempted to travel to Syria following the call of ISIS//Daish to perform "Hijra" and for indulging in violent jihad. Annexure A is the charge sheet submitted by the prosecution agency, wherein details of the investigation conducted includes the name of the additional witness sought to be examined, as one of the conspirators who also travelled with the accused-petitioner. Crucial aspect to be noticed in this regard is that, even though 17 persons, including the petitioner herein were arraigned as accused persons, the additional witness was referred to as the person charge sheeted by the NIA, New Delhi Unit; which charge was also raised in connection with very same transactions. It is discernible from the contents of the instant charge sheet that the additional witness was not included in the array of accused, since he was already charge sheeted by NIA, New Delhi Unit in Crime No RC-12/2017/NIA/DLI, but his participation in the entire transaction which is

the subject matter of the crime has been specifically dealt with in various parts of the charge sheet.

7. The sum and substance of the allegations contained in Annexure A charge sheet is that, the petitioner herein along with Accused No 6, and Shajahan, (the proposed additional witness), in furtherance of their common intention to wage war against Syria, and to physically join the proscribed terrorist organisation ISIS, attempted to reach Syria together. During transit when they reached Turkey the petitioner and the additional witness, herein after referred to as Shajahan, were apprehended by Turkish officials and later deported to India, while one among them, the 6th accused managed to enter Syria. Upon deportation, both the petitioner and Shajahan arrived together at Delhi Airport on 1/07/2017 and were detained by the Special Cell of the Police at N.Delhi. Several documents and digital devices were seized from both of them. Shajahan was immediately taken into custody and a case was registered against him by NIA Unit of Delhi as RC 12/2017/NIA/DLI. The petitioner herein was however released and he came to Kerala, his native place. Upon reaching here, he was apprehended by the State Police and a crime registered, which was later taken over by NIA Cochin Unit, who filed Annexure A chargesheet after completion of investigation. As against Shajahan, the Delhi Unit of NIA filed a charge-sheet which is produced as Annexure F. Pertinently in Annexure F charge-sheet, the petitioner is arraigned as the 6th accused.

Annexure F charge-sheet detailed the investigation against several accused persons including the petitioner, but Shajahan alone was charge sheeted for the offences punishable under Sections 120B read with 125, 419, 20, or 67, or 68, 71 of the Indian Penal Code, and under Sections 18, 38 and 39 of Unlawful Activities (Prevention) Act, 1967 and Section 12 of Passports Act, 1967. In that charge-sheet in paragraph 17.15, it has been stated that as per the evidence collected so far, role of some more suspects has emerged. It is further stated that, as the prosecutable evidence needs to be collected against the other accused as regards their role, including that of the petitioner herein, investigation against them is being continued. Shajahan, pleaded guilty of the charges levelled against him as per Annexure F charge sheet and was later convicted. He is presently undergoing imprisonment in Tihar Jail, New Delhi. The investigation against the petitioner was continued by the NIA and the charge sheet, Annexure A was filed by their Cochin Unit in the Special Court at Ernakulam.

8. In the trial conducted by the Special Court on Annexure A chargesheet, all the witnesses cited by the prosecution have already been examined except the Chief Investigating Officer. At this juncture, the prosecution submitted Annexure B petition under Section 311 of Cr.P.C (Crl.M.P.No 41/2021) seeking permission to examine Shajahan, who was convicted in Delhi for an identical offence, which he carried out along with the petitioner-accused, as an additional witness. The

petitioner submitted detailed objections which are produced as Annexures C & D respectively, mainly raising the issue of maintainability of such a petition. The competence of Shajahan to be proffered as a witness was challenged since the allegation against both were that they together conspired and committed the offence, which makes the witness sought to be summoned a co-accused.

9. As is revealed from Annexure A charge sheet filed by NIA Kochi Unit and Annexure F charge sheet by the NIA, Delhi Unit, it can be seen that the transactions which were subject matter of both are one and the same. Involvement of the petitioner as well as the proposed additional witness are clearly mentioned in both the charge sheets and the conspiracy alleged against them is in respect of the very same transaction. Both the said persons conspired and travelled together to achieve their common objective and were apprehended together by the Turkish authorities. They were proceeding to Syria in furtherance of their common intention and in execution of the strategy/plan devised jointly by them along with other accused persons, when they were detained and eventually deported. Even going by the averments made by the prosecuting agency in Annexure B application, they do not dispute this aspect but on the other hand, they have categorically stated that from the very beginning of the conspiracy with regard to the conduct of "Hijara", the accused and Shajahan were together and were detained by the Turkish Police and deported together to India. Besides the above,

the Special Court in paragraph 13 of the impugned order, specifically found that the proposed additional witness was facing trial for the very same offence charged against him.

10. It is evident, from a reading of the impugned order that the competence of the witness was found in favour of the prosecuting agency by the Special Court, mainly relying upon the observations of the Hon'ble Supreme Court in **Laxmipat Choraria (Supra)**. A careful perusal of the said case would reveal that, the facts therein were different. The disputed witness who was examined in that case, was neither an accused nor an approver, subjected to procedure under sections 337 & 338 of Cr.P.C,1898 corresponding to sections 306 & 307 of Cr.P.C,1973. The witness, whose examination was challenged, was a person who participated in the commission of crime, but not charge sheeted by the prosecution. She was a carrier smuggling gold into the country, which was the offence alleged against the accused. On being confronted with the material unearthed in the investigation against her, she aided the prosecution; which obviously would have prompted the prosecution not to array her as an accused and proffer her as a witness so as to nail the kingpins. We extract the following paragraph:

> *7. Now there can be no doubt that Ethyl Wong was a competent witness. Under S. 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under S.132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly*

> *to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a proscution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court. Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks Section 132 (Proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection The section is further fortified by Article 20 (3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him. The evidence of Ethyl Wong cannot, therefore, be ruled out as that of an incompetent witness. Since Ethyl Wong was a self-confessed criminal, in conspiracy with others who were being tried, her evidence was accomplice evidence. The word accomplice is ordinarily used in connection with the law of evidence and rarely under the substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person. Therefore, Ethyl Wong's testimony was again that of a competent witness. It has been subjected to scrutiny and the usual checks for corroboration and was, therefore, received with due caution. The short question that remains is whether she could be administered an oath in view of the prohibition in Section 5 of the Indian Oaths Act.*

11. The contention raised by the defence therein was that, every person against whom an accusation has been made, whether there be a prosecution pending against him or not, is an accused person, more so a

person against whom an investigation is going on or has been made. It was also argued that the Court had a duty to put the witness on the dock, if her testimony revealed she was an accomplice; which was negatived relying on the interplay of the protection under the Proviso to Section 132 of the Evidence Act and that guaranteed under Art. 20(3) of the Constitution of India. It was held, unless the said witness is arraigned as an accused, there cannot be any prohibition in examining her as a witness. The finding was on the interpretation of Section 132, which gives the witness protection from prosecution, even if the testimony is incriminating.

12. The Honourable Supreme Court in **Chandran @ Manichan @ Maniyan** (supra), considered an identical issue and reaffirmed the position that even if the prosecution did not prosecute an accomplice, but used him as a witness; it was perfectly legal. **Somasundaram @ Somu** (supra) also dealt similarly with the challenge against the evidence of an accomplice and held that "*An accomplice and approver are competent witnesses. An approver is an accomplice, who has received pardon within the meaning of S.306. We would hold that, as between an accomplice and an approver, the latter would be more beholden to the version he has given having regard to the adverse consequences which await him as spelt out in S.308 of the Cr.Pc, as explained by us*" (sic-para 67). The principles set out in the said judgments cannot be made applicable to this case because, here is a

case where admittedly, the additional witness was an accused charged for the offences arising from the very same transactions. The only difference is that both the said accused were charge sheeted by two Units of the very same prosecuting agency, in two different locations as the said agency had the jurisdiction, so to do. The basic allegation in both charge sheets, is conspiracy to wage war against Syria which is a country at peace with India, in furtherance of the objects of a proscribed terrorist organisation and to do so, both of them attempted to physically enter into Syria and were caught in such process. For all practical purposes the charges levelled against them are one and the same and it occurred in the same transaction that too pursuant to a conspiracy alleged in which both of them were parties. Both of them were prosecuted as well, for the very same offences, though separately. Merely for reason of the prosecution of the two accused; for whatever reason, were carried out separately by two separate units of the very same investigating agency and to use a term in vogue; the trial, '*split-up*' to be conducted by two different Special Courts constituted under the very same enactment, it cannot be contended that one of the accused tried separately looses his status of co-accused, for reason of his conviction.

13. The learned Assistant Solicitor General also contends that the additional witness sought to be examined was charge sheeted for a completely different offence and the conviction of the said witness was

in respect of the charge of falsely creating a passport. A perusal of Annexure E charge sheet would show otherwise. It is true that the charge sheet against Shajahan contains allegation of creation of a fake passport in a fake name and the offence under Section 12 of the Passport Act was also incorporated in the charge sheet by NIA Delhi. At para 17.13 of Annexure F chargesheet it has been specifically mentioned as follows:

> *"Therefore, as per the averments made herein above and evidence collected, it is established that Shajahan VK @ Abu Awuad (A-1) was a member of proscribed international terrorist organisation ISIS, which is involved in many terrorist acts across the world. He associated himself with the said proscribed terrorist organisation with the intention to further the activities of ISIS. The investigation has established that accused A-1 has committed the offences U/s 120B read with 125, 419, 420, 467, 468, 471 of I.P.C, sections 18, 38 and 39 UA (P) Act, 1967 and Section 12 of Passport Act, 1967 and substantive offence under Sections 125, 419, 420, 467, 468, and 471 of I.P.C and sections 18, 38 and 39 of UA (P) Act, 1967 and Section 12 of Passport Act"*

14. In paragraph 17.1 to 17.12, the details of the acts committed by the accused persons as well as Shajahan have been specifically stated and the petitioner too is named in several parts of the charge sheet, as the person who participated in the conspiracy and also in taking such measures, for travelling to Syria in furtherance of their common intention. The aforesaid details are also specifically mentioned in Annexure A chargesheet as well, by naming the proposed additional witness Shajahan specifically, as one of the conspirators. Therefore it is evident that in both the charge sheets the acts which gave rise to the offence was identical and both Shajahan, the proposed additional

witness and this petitioner had an active role in the conspiracy as also the other acts constituting the offences charged. Merely because one among the accused has been charged for a distinct offence of forging or faking a passport, which the other accused are not charged with, does not detract from the fact that the accused acted in consort with common intention. The trial for more than one offence, committed in one series of acts so connected together as to form the same transaction can be tried at one trial by virtue of section 220 Cr.P.C. The essential facts which led to the charge sheet and the major offences charged against the accused are one and the same. In such circumstances, the contention of the learned ASG cannot be accepted.

15. It is also to be noted in this regard that, the aforesaid contention of learned ASG is completely against the averments made by the prosecuting agency in Annexure B application submitted by them before the Special Court, seeking permission to examine the additional witness. The relevant averments are as follows;

> *"3. In this case, A2 Abdul Razak made Hijra along with one Shajahan Valluva Kandy, the convict accused in RC/12/2017/NIA/DLI of NIA Court a daily and presently lodged in Tihar Jail, vide RP no… He himself admitted his guilt and the Honourable Court convicted and now he is under the sentence. From the very beginning of the conspiracy with regard to the "Hijra" they were together till they caught by the Turkey Police and deported to India. There is no possible eyewitness to this Hijra journey of A2 Abdul Razak, except this convicted accused Shajahan Valluva Kandy. This is the one of the best evidence available and to be adduced to this case. And it is highly essential to the just decision of this case. The role of both these two accused persons were been discussed throughout the case and all case records would show the same. Moreover, many of the witnesses deposed these combined journey and conspiracy*

> *and other related preparations. So this is not a new fact to this case but the fact is to be elicited through this witness. Only this witness can be said some of the fact."*

From a reading of the above averments, it is evident that even going by the case advanced by the prosecuting agency, the allegations against the petitioner as well as the additional witness were one and the same and are forming part of the very same transaction. The contention of the learned ASG goes against the contentions put forward by the prosecuting agency in the application submitted by them seeking permission for examination of the said additional witness.

16. This would lead us to the forcefull contention, whether a person accused of the very same offence arising from the very same transaction, can be permitted to be examined as a witness in respect of the trial that is being conducted against the co-accused. The right of an accused against self incrimination is a right embedded in the constitutional mandate of Article 20(3) and one of the basic tenets of criminal jurisprudence. The attempt of the prosecuting agency could be in their anxiety to see the accused punished; against whom serious charges of involving in terrorist activities have been raised. The intention, however bonafide it be, the constitutional or statutory protection cannot be overlooked or ignored. On carefully examining the statutory provisions, we can see only two exceptional circumstances where an accused can be examined as a witness against other persons accused of the very same offences i.e (i) if he has been tendered

pardon by following the procedure contemplated under Section 306 or 307 of Cr.P.C or (ii) under the circumstances mentioned in Section 315 of Cr.P.C. A detailed procedure has been contemplated in Section 306, enabling a Magistrate at any stage of the investigation or inquiry into or the trial of the offence to tender a full pardon on condition of a full and true disclosure being made of the whole of the circumstances relating to the offence and every person concerned, within his knowledge, whether as principal or abettor. Section 307 enables the Court to which the case is committed also to tender pardon before judgment is passed on the same conditions as in section 306. Section 308 further provides that, where, in regard to a person who has accepted a tender of pardon made under section 306 or 307, if the Public Prosecutor certifies that in his opinion such person has not complied with the condition on which the tender has been made, such person may be tried for the offence in respect of which the tender has been so made or for any other offences of which he appears to have been guilty in connection with the same matter and also for the offence of giving false evidence. In this regard it is to be noted that the moment a person in the array of accused is permitted to avail the benefit of pardon, he ceases to be an accused and would become a witness and would then be perfectly competent. However by virtue of section 308, the status of a witness so attained, would continue, only if he deposes before Court in the trial, as a witness in tune with the conditions imposed upon him by section 306. In other

words, in case, a person who was granted pardon under the said provisions, deposes against the prosecution in violation of the obligation incurred under section 306, he would cease to be a witness and he will revert back to the status of an accused and would incur the additional liability of a prosecution for giving false evidence; on a certificate to that effect issued by the Public Prosecutor.

17. In paragraph 21 of the judgment of the Hon'ble Supreme Court in **Abu Salem Abdul Kayyum Ansari** (supra) it is declared as follows:

> *"... The legal position that flows from the provisions contained in S.306, S.307 and S.308 CrPC is that once an accomplice is granted pardon, he stands discharged as an accused and becomes witness for the prosecution. As a necessary corollary, once the pardon is withdrawn or forfeited on the certificate given by the Public Prosecutor that such person has failed to comply with the condition on which the tender was made, he is reverted to the position of an accused and liable to be tried separately and the evidence given by him, if any, has to be ignored in toto and does not remain legal evidence for consideration in the trial against the co - accused, albeit such evidence may be used against him in the separate trial where he gets an opportunity to show that he complied with the condition of pardon. … "*

18. In paras 22 to 27, the Honourable Supreme Court referred to sections 114, 132 and 154 of Evidence Act, section 315 of Cr.P.C and also to Article 20 (3) of the Constitution of India. In paragraph 28 of the said judgment it was further observed as follows;

> *"We have referred to the aforesaid provisions of the Evidence Act, CrPC and Constitution to indicate that none of these provisions militates against the proposition that a pardon granted to an accomplice under S.306 or 307 CrPC protects him from prosecution and he becomes witness for prosecution but on forfeiture of such pardon, he is relegated to the position of an accused and his evidence is rendered useless for the purposes of*

> *the trial of the co - accused. He cannot be compelled to be a witness. There is no question of such person being further examined for the prosecution and, therefore, no occasion arises for the defence to cross - examine him."*

What is discernible from the observations made by the Hon'ble Supreme Court is that, the status attained by a person upon being granted pardon, is conditional and the moment such condition is breached, as certified by the Prosecutor, the protection provided to such person will be taken away and he would revert back to the position of an accused. The consequence of such reversion of his status to that of accused is that, the evidence tendered by him as the prosecution witness will be rendered useless as against the co-accused and himself. There is hence, a clear prohibition against using the evidence of a person accused of an offence against his co-accused, when he loses his status as a person who availed pardon, when there is breach of the terms of pardon. **Laxmipat Choraria, Chandran @ Manichan @ Maniyan and Somasundaram alias Somu** (all supra) were decided in respect of the question of examination of witnesses who were accomplices, not arraigned as accused persons. Both the said judgments contained observations in relation to admissibility of the evidence of accomplices who were not arraigned as accused persons in respect of which the trial was being conducted. Herein, the additional witness was an accused in respect of the offences arising from the very same transaction and the acts constituting the offences were so inextricably linked to be part of

the very same transaction. In the above circumstances the principles laid down in the above cited cases cannot be made applicable to the facts of this case.

19. The intention behind granting pardon to obtain the testimony of an accomplice as an approver, in **Abu Salem Abdul Kayyum Ansari** (supra) was held to be so:

> ***15.*** *The salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. …*

20. The salutary principle in section 306 could have been availed of by the prosecution before hand. But once, co-accused is convicted he cannot be called to the stand on behalf of the prosecution, to speak for them and against the other accused. A convict in the same offence is not an approver and though an accomplice, his trial and conviction, even if in separate proceedings, renders him an incompetent witness. In considering the aspect of delay in proffering the additional witness, the Special Court in the impugned order reasons that earlier he was undergoing trial and now he is convicted by the other Court. The prosecution cannot avail of such fortuitous circumstances to get over the prohibition in Article 20(3) read with section 315 Cr.P.C.

21. An exception to the general principle against self incrimination is Section 315 of Cr.P.C. The aforesaid provision is an enabling provision, and also an exceptional one which permits an accused person to be a witness on his own volition, in certain circumstances. Since, the permission envisaged under Section 315 is also an exception, culled out from the general principles against self incrimination, it has to be applied strictly in the circumstances mentioned therein. Section 315 reads as follows;

> *"315.* **Accused person to be competent witness**.*-(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial;*
> *Provided that-*
> *(a) he shall not be called as a witness except on his own request in writing;*
> *(a) his failure to give evidence shall not be made the subject of any comment by any of the parties on the Court or give rise to any presumption against himself or any person charged together with him at the same trial.*
> *(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, C or Part C or Part D of chapter X, may offer himself as a witness in such proceedings;*
> *Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."*

22. Thus, from the reading of the above provision it is evident that it contemplates only an exceptional circumstance where an accused is treated as a competent witness for the defence to disprove the charges against himself or his co-accused. It can be made applicable

only under the circumstances mentioned therein, namely (i) he can be called only as defence witness, and (ii) upon his own request in writing. In this case, a co-accused is being summoned to give evidence in the trial of a case, to prove the prosecution case. Certainly it is not a situation where section 315 would come into play.

23. From the above discussions, the only conclusion possible is that a person who is arraigned as an accused in a case, can be examined as a witness against the other accused persons, in a trial relating to very same offence (arising from very same cause of action) only in the circumstances covered by sections 306 or 307. Under S.315 an accused can be examined as a witness in the trial, on his request in writing and to disprove the charges against him. In which event the protection under Article 20(3) does not apply; since the accused voluntarily mounts the box as a witness and there is no element of compulsion. In this case, the additional witness sought to be examined is not a person who is subjected to the proceedings contemplated under Section 306 or 307 of Cr.P.C. From the materials available on record, it is evident that, even as per the case of the prosecuting agency, the transactions which formed the basis of the charge sheet submitted against the petitioner herein and the charge sheet submitted against the additional witness are one and the same. Therefore the entire proceedings against the petitioner herein are akin to a '*split-up*' trial based on very same charge sheet, where a co- accused cannot be

permitted to be examined as witness; even if he was tried and convicted before the instant trial. Both petitioner and Shajahan are accused of the very same offence, and the said Shajahan, is admittedly not subjected to the procedure contemplated under Section 306 or 307 of Cr.P.C and was not granted pardon as contemplated therein. Sections 306 or 307 cannot now be availed since pardon has to be granted before the final judgment is passed against the person who is sought to be examined. Section 315 also cannot be invoked, even with a request in writing, as the additional witness is not being tried and there is no question of his giving evidence in his defence. The additional witness for all these reasons cannot be treated as a competent witness for the prosecution. Thus, the request placed by the prosecution agency does not fall under any of the above exceptional circumstances.

24. The alternate contention of the learned ASG, is that the proposed additional witness cannot be treated as an accused person, as his trial is already over and has ended up in conviction. According to him, by virtue of his conviction by NIA Court, Delhi, he ceased to be an accused and now he is a convict. He submits that the prohibition of examination as a witness is applicable only in respect of an accused person and the same cannot be extended to a person convicted for the offence. We are afraid, we cannot accept the said contention. Merely because of the reason that allegations against the accused were found to be correct by the competent Court after trial, he will not cease to be

an accused. Of course finding of guilt would make him a convict, but we are of the view that the expression convict would include an accused as well. To be precise a 'convict' can only be a person who was 'accused' and though an accused is not always a convict, a convict is always an accused who stood trial, in which his guilt was established. It is also to be noted in this regard that, even in Annexure B application submitted by the prosecution before the Special Court, the proposed additional witness has been referred to as *"convicted accused"*. So the prohibition applicable to an 'accused' with respect to his examination as a witness, would be applicable to a 'convict' also with all its vigour as applicable to an accused, before he is convicted. Therefore on this aspect also the contention of the learned ASG has to be rejected.

25. In the impugned order, the Special Court referred to Section 118 of the Evidence Act which speaks about the competence of persons to testify before Court. It is true that as per the said provision all persons are competent to testify, unless they are prevented from understanding the questions put to them for the reasons stated therein. In our view the said provision is a general provision which has to concede to the special provision and the constitutional guarantee enshrined under Article 20(3) of the Constitution of India. Article 20(3) is a privilege extended to the accused not to incriminate himself, which in effect is his right to remain silent, further reinforcing the duty of the prosecution to establish the guilt by the higher standard of proof beyond

reasonable doubt. Section 315 is the enabling provision which allows the accused to speak in his defence, voluntarily, which exercise of the option available, has to be in writing, to be availed for the sole purpose of disproving the charges against him. An exception is also provided in sections 306 & 307 Cr.P.C which coupled with section 132 of the Evidence Act offers the prosecution a chance to bring home the guilt on the more serious offenders or to nail more offenders at the expense of one being let back into society. The entire scheme results in an inference that an accused cannot be called to the witness box by the prosecution in support of the charges if he is also accused of charges arising from the very same set of facts and in the course of the same transaction and this prohibition applies to even an accused tried earlier and convicted by the same or a different court.

26. Besides the inferred prohibition in granting permission to a co-accused being summoned by the prosecution as a witness, another crucial aspect to be noted is that, granting permission in such circumstances, may result in an opportunity to the prosecuting agency to misuse the same by manipulating one of the accused by compelling him to plead guilty or get the criminal proceedings split up so as to convict him and then either coerce or entice him with something short of a pardon to cite him as a witness against the other accused persons. This may cause serious prejudice to the defence of the other accused, who would be deprived of the protection available to them by reason of

a threat or enticement neither contemplated in the Cr.P.C, nor envisaged in the scheme of criminal trials. Law has provided a measure to the prosecution to meet a contingency where the assistance of one or more of the accused is necessitated for ensuring a successful prosecution, and that is the procedure contemplated under section 306 and 307 of Cr.P.C. They are not expected to adopt any other method than contemplated therein, for achieving the said object. Though we have no evidence to conclude any compulsion or inducement, we cannot ignore the fact that the convict is imprisoned in a State facility and there could be pressure exerted or inducement offered, for him to aid the prosecution, which would fall short of a pardon. That would run foul of the tenets of criminal jurisprudence as embodied in Article 20(3) and the prohibition inherent to section 315 Cr.P.C, since though a convict's evidence as a witness would not incriminate him further, it would be permitting the prosecution to do indirectly, what is prohibited from being done directly. This could also, as we noticed lead to widespread abuse in splitting up trials to enable one among the accused to depose in favour of the prosecution; which is permissible only when the witness-accused is granted a pardon. The permission granted would also run foul of Section 315 Cr.P.C which enables the examination of an accused in a trial, only to disprove the prosecution case and not as a witness for the prosecution to prove their case.

27. There is yet another aspect which would fortify our finding. The prohibition against examination of an accused as a witness to the prosecution is also evident from the provisions of the Oaths Act, 1969. Section 4 (2) of the said Act reads as follows;

> "4. Oaths or affirmations to be made by witnesses, interpreter and jurors.—
>
> (2) *Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."*

28. It is true that section 7 of the Oaths Act contemplates that omission to take oath as prescribed therein would not invalidate the evidence, nor would it affect the obligation of the witness to depose the truth. However it clearly postulates a restriction against the administration of oath to an accused in a criminal proceeding except as a defence witness and it clearly is a reiteration of the laudable mandate enshrined in Article 20 (3) of the Constitution of India and under section 315 of Cr.P.C.

29. On the above reasoning, we are of the definite view that, Annexure E order passed by the Special Court for trial of Offences of NIA cases, Ernakulam in Crl. M.P 41/2021 in S.C 2/2018/NIA is not legally sustainable. The said order is accordingly set aside and Annexure B

application submitted by the 1st respondent is dismissed. The Crl.M.C is accordingly allowed.

Sd/-

K.VINOD CHANDRAN
JUDGE

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

pkk