2023 LiveLaw (SC) 317

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
ABHAY S. OKA; J., RAJESH BINDAL; J.
April 17, 2023.
CRIMINAL APPEAL NO. 1153 OF 2023 (Arising out of Special Leave Petition (Crl.) No.10160 of 2021)
Yedala Subba Rao & Anr. *versus* **Union of India**

Unlawful Activities (Prevention) Act, 1967 - Section 43D(5) - Materials placed on record do not state reasonable grounds for believing that the accusations against the appellants of commission of offence under the UAPA are prime facie true - bail granted to two alleged Maoists.

(Arising out of impugned final judgment and order dated 15-12-2020 in CRLA No. 381/2020 passed by the High Court Of Andhra Pradesh At Amravati)

For Petitioner(s) Mr. Colin Gonsalvs, Sr. Adv. Ms. Mugdha, Adv. Mr. Satya Mitra, AOR

For Respondent(s) Mr. Tushar Mehta, Solicitor General Mr. K M Nataraj, A.S.G. Ms. Aakankasha Kaul, Adv. Ms. Deepabali Dutta, Adv. Mr. Vatsal Joshi, Adv. Mr. Rajat Nair, Adv. Mr. Navanjay Mahapatra, Adv. Mr. Arvind Kumar Sharma, AOR

J U D G M E N T

ABHAY S. OKA, J.

1. Leave granted.

FACTUAL ASPECTS

2. The appellants are accused nos.46 and 47 in FIR No. 65 of 2018 registered on 23rd September 2018 at Dumbriguda Police Station, District Vishakhapatnam, in Andhra Pradesh. The appellants, along with other co-accused, are being prosecuted for the offences punishable under Section 120B read with Section 302 of the Indian Penal Code, Sections 18, 19, 20 and 39 of the Unlawful Activities (Prevention) Act, 1967 (for short 'the UAPA'). The appellants are also charged with offences punishable under Sections 4 and 5 of the Explosives Substances Act, 1908 (for short 'the Explosives Act').

3. The incident is of 23rd September 2018. At about 12:10 hours, Shri Kidari Sarveswara Rao, a member of the Legislative Assembly and whip of the Telugu Desam Party in Legislative Assembly and one Shri Siveri Soma, a former MLA belonging to Telugu Desam Party, were killed near the village Livitiputtu, Pothangi Panchayat within the jurisdiction of Dumbriguda Police Station at Visakhapatnam. This incident took place when both of them were proceeding to village Sarai to attend a function. The allegation is that 45 accused persons who belonged to the Communist Party of India (Maoist), a terrorist organisation notified in the first schedule of the UAPA, stopped the convoy of vehicles of the aforesaid two leaders. The accused compelled them to get out of their cars. Both of them were taken towards YJunction. Thereafter, the MLA was taken to the left-hand side of YJunction and the Ex-MLA was taken to the right-hand side of YJunction. Both of them were killed by three gunshots. The Personal Secretary of the deceased sitting MLA lodged FIR on the same day in which he named 45 accused. Earlier, investigation was carried out by a Special Investigation Team, which was subsequently transferred to the National Investigation Agency (NIA). The case was registered by NIA as RC-02/2018 NIA/HYD on 6th December 2018. The appellants were arrested on 13th October 2018. A chargesheet was filed against them on 10th April 2019. It appears from the said chargesheet that there are 79 accused though initially there were 85 accused.

About 144 witnesses have been named in the charge sheet so far. The charge has not yet been framed. Some of the accused are absconding. The appellants have been in custody for the last four years and seven months.

SUBMISSIONS

4. Shri Colin Gonsalves, the learned senior counsel appearing for the appellants, has taken us through the relevant portions of the charge sheet filed against the present appellants. He pointed out that the recovery of landmine is shown at the instance of appellant no.1accused no.46, which on the face of it, is highly suspicious. He pointed out that there is no recovery shown at the instance of the accused no.47. He pointed out that the second allegation against accused no.46 is that the call details record of accused nos.46, 47 and 84 show that they were always in touch with each other which shows that they were partners in the criminal conspiracy. He pointed out that accused no.84 has been granted bail by the High Court. He pointed out that another allegation against accused no.46 is that he purchased huge quantity of medicines worth Rs.8,000/- which were to be handed over to a Maoist sent by accused no.84. He submitted that there is no material against both the accused to show that they provided shelter and logistic support to the Maoists as well as coaccused and that they planted landmines. He pointed out that there is no evidence to show that the alleged landmines had any connection with the offence of killing the aforesaid two leaders. He would, therefore, submit that there is no *prima facie* evidence of the involvement of the two appellants in the offence. He relied upon a decision of this Court in the case of ***Union of India v. K.A. Najeeb***[1]**.** He submitted that even charges have not been framed. Some of the accused are absconding. Considering the fact that there are 144 prosecution witnesses, the trial is going to take years and therefore, continuing incarceration of the appellants will amount to a violation of their rights under Article 21 of the Constitution.

5. Shri K.M. Nataraj, learned ASG appearing for the respondent, pointed out the Memorandum dated 13th October 2018 under Section 27 of the Indian Evidence Act, 1872 (for short 'the Evidence Act'), which shows that a steel can weighing about 10 kg containing bolts, nuts and filled with explosive material and connected to a detonator through a wire was recovered at the instance of accused no.46 near a kaccha road near village Sarai where the deceased political leaders were to visit. He also pointed out that the landmine was planted with the object of killing the said two leaders. He pointed out that the disclosure statement made by accused no.46 on 16th January 2019 shows that he purchased a huge quantity of medicines worth Rs.8,000/- and handed them over to a Maoist. He pointed out that the appellants-accused used different SIMs standing in the names of third parties to remain in touch with the co-accused. As regards accused no. 47, he submitted that the disclosure statement of 13th October 2018 records that both the appellants dug a pit near a kaccha road leading to Sarai village and planted a landmine therein. He also pointed out that the accused nos.46 and 47 were constantly in touch with each other on cell phones for 18 days prior to the incident and thereafter, the cell phone of accused no.47 was switched off. Shri Nataraj further urged that both accused nos.46 and 47 are involved in the offence and there is a strong *prima facie* material against them. He, therefore, submitted that in view of the proviso to sub-section (5) of Section 43D of UAPA, the appellants are disentitled to bail as there is material on record to believe that the accusations against the appellants are *prima facie* true.

[1] (2021) 3 SCC 713

OUR VIEW

6. We have given careful consideration to the submissions. We have perused the material against the appellants in the context of stringent provisions for the grant of bail incorporated under the proviso to sub-section (5) of Section 43D of UAPA. We have perused the chargesheet filed against the appellants. The allegation against the first appellant-accused no.46 is that he provided shelter and logistic support to Maoists and co-accused for facilitating the offence of murder of the two leaders. The second allegation is that the present appellants planted landmines near the village where the programme was to be held. It is further alleged that appellant no.1 - accused no.46 was in constant touch with accused no.84, who in turn was in touch with the Maoists. It is further alleged that the cell phone call record shows that the appellants were in touch with each other immediately after the incident. The accused no.46 purchased huge quantity of medicines and handed over the same to a Maoist sent by accused no.84.

7. The allegation against accused no.47 is that he had association with accused no.46. He was found in possession of certain pamphlets and literature of the terrorist organisation – CPI (Maoist). Another allegation is that accused no.47 had given shelter to Communist party workers.

8. One of the allegations in the chargesheet is that the present appellants were in touch with each other for about 17-18 days before the incident. Moreover, they were regularly conversing with accused no.84, who in turn was communicating with the workers of the CPI (Maoist) Party.

9. We may note here that by the judgment and order dated 15th December 2020 passed by a Division Bench of Andhra Pradesh High Court in Crl. Appeal No.229 of 2020, accused no.84 has been granted bail. We have perused the judgment, which is produced along with IA No.21015 of 2022. In the said judgment, the High Court has considered the CDR records of the telephonic conversation between accused no.46 and accused no.84. In paragraph 9, the High Court observed that accused no.46 was an Ex-Sarpanch of the village where accused no.84 was teaching in a government school and therefore, it was natural that being an Ex-Sarpanch, people were constantly approaching him. The calls were exchanged between these two accused on the date of the offence and after the offence. The High Court observed that when an offence of such a nature happened in the vicinity, it is not unusual that accused no.46, who was an ExSarpanch, would receive calls from many persons immediately after the commission of the offence. The High Court further observed that there was an allegation that medicines worth Rs.8,000/- were purchased at the instance of the accused no.84 which were handed over at his instance to one Kiran, who was also a Maoist. The High Court observed that in the chargesheet filed against accused no.46, it was noted that the said Kiran was arrested on 18th September 2018 and was in custody on the date of the offence. Therefore, the High Court opined that accused no.84 was *prima facie* not involved in the offence and, at the highest, was guilty of an offence punishable under Section 202 of IPC.

10. The grant of bail by the High Court to accused no.84 is very relevant in this case as in paragraph 17.19 of the chargesheet filed against the present appellants, the allegation is that call detail records of accused nos.46,47 and 84 show that they were exchanging calls which indicates that they are the parties to the conspiracy.

11. As regards the allegation of purchase of medicines worth Rs.8,000/- by accused no.46, the prosecution has relied upon a Disclosure Memo dated 16th January 2019. In the Disclosure Memo, it is alleged that accused no.46 disclosed that one Kiran

approached him in July 2018 to help him to purchase medicines. Thereafter, he received a call from accused no.84, who informed him that one person will give him a list of medicines and cash of Rs.10,000/- and he should help him to purchase medicines. The disclosure statement records that accused no.46 helped that person to purchase medicines from a medical shop and he led the police party to the said medical shop. In the disclosure statement, he also stated that on 23rd September 2018, he saw accused no.47 along with one person (Kiran) at a Xerox shop at Dumbriguda Junction. Accused no.46 stated that he will be able to show the said shop, and accordingly, he showed the said shop.

12. We fail to understand how the purchase of medicines worth Rs.8,000/- by accused no.46 at the instance of accused no.84 much before the incident has any connection with the incident which took place on 23rd September 2018. This is apart from the fact that accused no.84 has been granted bail by the High Court.

13. Now we will have to decide whether the disclosure statement dated 16th January 2019 is admissible in evidence. It is necessary to advert to the law laid down by a Bench of three Hon'ble Judges of this Court in the case of ***Jaffar Hussain Dastagir v. State of Maharashtra***[2]. This Court followed a decision of the Privy Council in the case of ***Pulukuri Kottaya v. King Emperor***[3] which is a *locus classicus*. In paragraph no.5 of the decision in the case of ***Jaffar***, this Court held thus:

"5. Under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. **The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of Section 411 IPC states to the police, "I will show you the articles at the place where I have kept them" and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact i.e. keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not the discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place.** In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that "I will show you the person to whom I have given the diamonds exceeding 200 in number". The only difference between the two statements is that a "named person" is substituted for "the place" where the article is kept. In neither case are the articles or the diamonds the fact discovered."

(emphasis added)

14. As held by this Court, Section 27 of the Evidence Act is an exception to the general rule under Section 25 that a confession made by an accused to a police officer is not admissible in evidence. The first condition for the applicability of Section 27 is that the

[2] (1969) 2 SCC 872

[3] (1946) SCC online Privy Council 47

information given by the accused must lead to the discovery of the fact, which is the direct outcome of such information. Only such portion of the information given as is distinctly connected with the said discovery is admissible against the accused. Now looking at the Discovery Memo dated 16th January 2019, at the highest, it means that accused no.46 showed the shop from which the medicines were purchased. Thus, he led the police to the shop. There was no discovery of any fact as a result of the information supplied by accused no.46. The same is the case with the other allegation that accused no.46 showed a Xerox shop where accused no.47 and one Kiran were allegedly standing on 23rd September 2018. Therefore, the statements of accused no.46 that he would show the medical shop and the Xerox shop may not be, *prima facie*, admissible under Section 27 of the Evidence Act. Moreover, as noted in the order of the High Court granting bail to accused no.84, the said Kiran, who was allegedly standing with accused no.47 near the Xerox shop on 23rd September 2018 was already in custody from 18th September 2018 and he continued to be in custody even on 23rd September 2018.

15. There is one more crucial aspect. A statement of one G.Narasinga Rao, who was allegedly running the said medical shop has been recorded during the investigation. In the statement, he has stated that on 16th January 2019, NIA team visited his shop and inquired about the sale of medicines involving a large amount in July 2018 and the team brought accused no.46 with them. This shows that the NIA team was already aware of the location of the shop from which a large quantity of medicines was allegedly purchased by accused no.46 in July 2018.

16. Now, we come to the material to show that there was a recovery of landmine at the instance of accused no.46. It must be noted here that it is not the case of the prosecution that the recovery of landmine was at the instance of the accused no.47. The recovery Panchama (Annexure A-1) to IA no. 74099 of 2022 is styled as "Mediators' Report and Seizure Panchnama". It records that at about 4 pm on 13th October 2018, the mediators were present at Livitiputtu village with ASP Amitabh for preparing the Mediators' Report and Seizure Panchanama. It is recorded in the Panchnama that ASP Amitabh, an IPS officer, along with other 9 or 10 police officials with a Bomb Disposal Team, visited Livitiputtu village. On the way, they saw four persons, including the accused nos.46 and 47, who were holding plastic bags. When they tried to flee, the police chased them and caught hold of them. In the same Panchnama, a long statement of accused no.46 is recorded, which is in the nature of a confessional statement. There is also a confessional statement of accused no.47 in the same Panchnama. *Prima facie,* these statements may not be admissible in evidence being hit by Section 25 of the Evidence Act. Going by the "Mediators' Report and Seizure Panchnama", the appellants gave confessional statements immediately after the police caught hold of them even before their arrest was recorded. Therefore, *prima facie,* it creates a doubt about the genuineness of the statements. The material portion of the "Mediators' Report and Seizure Panchnama" appears after the confessional statement of the accused no. 46. It reads thus:

"**After that He himself taken us to some far kuccha road towards Sarvai village. He then shown us the Land mine plotted along with the Electrical wire.** Thereafter Bomb Disposal team removed bomb in presence of us (Mediators), ASP Amitabh Bardar, IPS and by examining it was found to be a Steel Can weighing about 10 kg, containing Bolts, Nuts and filled with Explosive Material and connected to a Detonator through a hole. A 20 m long red wire is attached to operate it. After that Bomb Disposal Team Defused and recorded videos and took pictures and Seized Landmine, Detonator, Electrical Wire. We Mediators examined the plastic bag of Yedala Subbarao, found Brochures and banners along with his Karbonn mobile and has been seized."

[emphasis added]

17. It is pertinent to note that a long confessional statement of accused no.46 has been recorded within inverted commas in the said document, and thereafter, the aforesaid portion has been written. It is not noted in the confessional statement of accused no.46 that he stated that he would show the place where he had planted the landmine. If accused no.46 had made such a statement leading to the discovery of the landmine, the discovery of the fact that the landmine was planted by accused nos.46 at a particular place could have been proved, provided the landmine was to be used in the offence. However, there is no such confessional statement of accused no.46 recorded that he will show the place where landmine was planted by him. The Panchnama shows that the accused no.46 took them to a place and showed landmine. There is no confessional statement made by him giving information that he is in a position to show the place where he had planted landmine. Therefore, *prima facie,* "the Mediators' Report and Seizure Panchnama" is not helpful to the prosecution in proving that the landmine was discovered at the instance of the accused no.46.

18. As can be seen from the chargesheet, in paragraph 17.32, there were three material allegations against accused no.46. The first was of plantation of a landmine which we have already discussed. The second one was that he provided shelter and logistic support to the Maoists for facilitating the commission of the offence. The third circumstance that he purchased medicines worth Rs.8,000/- as per the suggestion of accused no.84 will also have to be kept out of consideration for the reasons already recorded. In paragraph 5 of the additional affidavit of the respondent, the material against the appellants has been set out in a tabular form. In the tabular form, it is not mentioned that there are statements of the witnesses who had seen accused nos.46 or 47 giving shelter to the Maoists. In any case, accused no.46 and 47 were not present at the time of the commission of the offence. Therefore, we cannot form an opinion that there are reasonable grounds for believing that the accusations against accused no.46 are *prima facie* proved.

19. Coming to allegations against accused no.47, we may note here that his confessional statement recorded under the Mediators Report and Seizure Panchnama is not admissible evidence as he has not disclosed any fact that led to any discovery. In his statement, it is recorded that he was carrying Maoist literature and banners. It is recorded in the Panchnama that eight brochures, two banners, and one landmine, along with electric wire and detonators, were seized from four persons. It is not specifically mentioned in the Panchnama that the brochures and banners were recovered from accused no.47. The prosecution case that accused no.47, with one Kiran, was found standing at a particular place on 23rd September 2018 appears to be very doubtful, as noted by us earlier. Then what is against accused no.47 is that he was in touch with accused no.46 on the telephone. The same was the allegation against accused no.84, who has been enlarged on bail.

20. Sub-section (5) of Section 43D of the UAPA reads thus: "(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

(emphasis added)

21. We have examined material relied upon against the appellants in paragraph 5 of the additional affidavit of the respondent as well as the chargesheet. Taking the material against the appellants as it is and without considering the defence of the appellants, we are unable to form an opinion that there are reasonable grounds for believing that the accusations against the appellants of commission of offence under the UAPA are *prime facie* true. Hence, the embargo on the grant of bail under proviso to sub-section (5) of Section 43D will not apply in this case. We, however, make it clear that the findings recorded in this Judgment are only *prima facie* observations recorded for the limited purposes of examining the case in the light of the proviso to subsection (5) of Section 43D of the UAPA. The trial shall be conducted uninfluenced by these observations.

22. As narrated earlier, the appellants are in custody for four and half years. The charge has not been framed and the prosecution proposes to examine more than 140 witnesses. Some of the accused are absconding. Thus, there is no possibility of the trial commencing in the near future.

23. It is obvious that while granting bail, stringent conditions will have to be imposed. We propose to leave it to the learned Special Judge to impose appropriate conditions.

24. Accordingly, we set aside the impugned orders. We direct the respondent to ensure that appellants are produced before the learned Special Judge for the trial of NIA cases at Vijayawada within a maximum period of one week from today. The learned Special Judge shall release the appellants on bail on appropriate conditions determined by him after hearing the appellants and respondent. The appeal is, accordingly, allowed.