

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Crl. A. 953/2013

+ Date of Decision: 16th December, 2013

AAMIR ABBAS DEV Appellant

! Through: Mr. Ravi Qazi, Advocate

versus

\$ STATE THROUGH NIA Respondent

**Through: Mr. Amit Sharma & Ms. Shilpa
Singh Spl. PP for NIA &
Mr. Som Prakash, Advocate**

CORAM:

*** HON'BLE MR. JUSTICE P.K. BHASIN
HON'BLE MR. JUSTICE V.P. VAISH**

ORDER

P.K. BHASIN, J:

This is an appeal by an accused turned approver against the order dated 5th June,2013 of the Special Court constituted under the National Investigation Agency Act,2008('NIA Act' in short) whereby his application for his release from jail, where he was lodged after his arrest for his involvement in the bomb blast which took place on 7th September,2011 near the reception booth in between entrance gate nos.4 and 5 of Delhi High Court, was dismissed.

2. On 7th September, 2011 at about 10.14 a.m. a bomb blast took place near the reception counter between entrance gate nos. 4 and 5 of the Delhi High Court where large number of litigants que up every morning to get entrance passes. Due to that bomb blast 15 persons died while 79 persons sustained serious injuries. Huge loss to the public property was also caused. Though FIR in respect of that incident was registered same day by the Delhi Police but investigation was entrusted to the National Investigation Agency(NIA) constituted under the NIA Act in pursuance of the orders issued by the Ministry of Home Affairs, Government of India, New Delhi since one of the offences invoked was punishable under Section 16 of the Unlawful Activities (Prevention) Act, 1967 and that offence was required to be investigated by the NIA. During the investigation NIA arrested four persons, including the present appellant. During the investigation stage the appellant herein had got recorded his confessional statement under Section 164 of the Code of Criminal Procedure, 1973(Cr.P.C.) on 14th October, 2011. Upon conclusion of the investigation by the NIA charge-sheet was filed against three accused persons, including the appellant, in the Special Court constituted under Section 11 of the NIA Act for the offences under Sections 120-B/302/307/323/325 of the Indian Penal Code(IPC), Sections 3, 4 and 5 of the Explosive Substances Act as well as Section 16 of the Unlawful Activities (Prevention) Act, 1967. The case in respect of the fourth arrested accused on his being found to be a juvenile was referred to the Juvenile Justice Board. Two more persons

were also found to be involved in the conspiracy to the cause the bomb blast at the entrance of the High Court premises could not be arrested and so they were got declared proclaimed offenders. Subsequently two of the proclaimed offenders(A-5 & 6 as per the charge-sheet) were reported to have died.

3. After filing of the charge-sheet Special Court, the appellant moved an application in the Special Court for grant of pardon to him upon his making a full and true disclosure of the facts and circumstances leading to the bomb blast at the entrance of the Delhi High Court on 7th September, 2011. Thereafter, another statement of the appellant under Section 164 Cr.P.C. was recorded by the Additional Chief Metropolitan Magistrate, New Delhi on 2nd May, 2012. After going through the statements of the appellant recorded under Section 164 Cr. P.C. during the investigation and then after filing of the charge-sheet and upon getting no objection for grant of pardon to the appellant herein from the special public prosecutor the learned Presiding Officer of the Special Court vide his order dated 11th May, 2012 came to the conclusion that the appellant had disclosed the facts in detail and further that some of them incriminated himself also. Accordingly, the appellant was tendered pardon “..... *subject to his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence(s) and to every other persons concerned in the commission thereof, during trial of this case.*”

4. The learned Special Judge also ordered in his order granting pardon to the appellant that the appellant shall remain in custody till the recording of his statement during the trial of his case.

5. After grant of pardon to the appellant by the Special Court he was examined as a prosecution witness(PW-1). Then the appellant moved an application for his release from jail alleging that since he had been examined and fully cross-examined he was no more required to be kept behind the bars and further that as and when the Court would require his presence during trial he would appear.

6. The prosecution(NIA) filed its reply to the said application of the appellant giving no objection for his release since he had made full and true disclosure of the whole of the facts and circumstances within his knowledge relating to the offences in question. The Special Court, however, vide its impugned order dated 5th June, 2013, by which date a new Judge had taken over that Court, dismissed the application of the appellant for his release from jail relying upon Section 306(4)(b) Cr.P.C. whereunder it is provided that the accused accepting a tender of pardon made under sub-section 1 of Section 306 Cr.P.C. shall, unless he was already on bail, be detained in custody until the termination of the trial.

7. Feeling aggrieved by the dismissal of his release application the appellant(approver) filed a petition under Section 482 Cr.P.C. in this

Court (being CrI.M.C. 2643/2013). That petition was, however, dismissed as not maintainable by a Single Judge Bench vide order dated 12th July, 2013 on the ground that the order of grant or refusal of bail is appealable under Section 21(4) of the NIA Act. Liberty was, however, given to the appellant to file an appeal. Accordingly, the present appeal under Section 21(1) & (4) of the NIA Act came to be filed by the appellant-approver.

8. The NIA filed its reply in this Court also and once again gave its no objection for the release of the appellant from jail.

9. It was argued by Mr. Ravi Qazi, learned counsel for the appellant-approver that the Special Court had erred in law in rejecting the appellant's release application by placing reliance upon Section 306(4)(b) Cr.P.C. and ignoring the earlier order of his predecessor Judge passed while tendering pardon to the appellant wherein it had been specifically stated that the appellant shall be kept in custody till the recording of his statement during the trial which already stood recorded when the impugned order was passed. Learned counsel further contended that in this case Section 307 Cr.P.C., which deals with grant of pardon to an accused by the Court upon commitment and which Court obviously has to be a Court of Session only, gets attracted in this case since the trial is being conducted by an Additional Sessions Judge, though without commitment to it by a Magistrate in view of Section 16(1) of the NIA Act. It was further argued that, unlike under

306(4)(b), it is not provided in Section 307 that an accused who turns approver has to be kept in custody during the entire trial period and, therefore, the learned Special Judge was not right in rejecting the release application of the appellant by making a reference to Section 306(4)(b) Cr.P.C.. It was also contended that even if it is held that Section 306(4)(b) is attracted this Court can still release the appellant-approver from jail exercising the power under Section 482 Cr.P.C. Strong reliance was placed by Mr. Qazi on a Full Bench decision of this Court in the case of **“Prem Chand vs. State”, 1985 CrL. L.J. 1534**, in support of the appellant’s plea for his release from jail since the approver of that case, which was for an offence triable by Sessions Court, was ordered to be released from jail even when the trial had not concluded and it had also been held that Section 306(4)(b) Cr.P.C. was mandatory and attracted also.

10. Section 306 Cr.P.C. reads like this:

“306. Tender of pardon to accomplice.

- (1) *With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.*

- (2) *This section applies to-*
 - (a) *any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);*
 - (b) *any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.*
- (3) *Every Magistrate who tenders a pardon under sub- section (1) shall record-*
 - (a) *his reasons for so doing;*
 - (b) *whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.*
- (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.*
- (5) *Where a person has, accepted a tender of pardon made under sub- section (1) and has been examined under sub- section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,-*
 - (a) *commit it for trial-*
 - (i) *to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;*
 - (ii) *to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;*
 - (b) *in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.*

307. Power to direct tender of pardon - *At any time after commitment of a case but before Judgment is passed, the Court to which the commitment is made may, with a view, to obtaining at the trial the evidence of any person supposed to*

have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.”

11. In our view, the cognizance in the present case was taken by the Special Court without commitment as a Court of original criminal jurisdiction. It was held by the Supreme Court way back in the year 1984 in the case of “A.R.Antulay vs Ramdas Srinivas Nayak”, AIR 1984 Supreme Court 718, that the Special Court constituted under the Prevention of Corruption Act is a Court of original criminal jurisdiction even though it has to be presided over by an Additional Sessions Judge. This view was reiterated by the Supreme Court in its subsequent decision in the case of “Harshad S. Mehta vs State of Maharashtra”, AIR 2001 Supreme Court 3774. It was held that the Special Court was a Court of exclusive jurisdiction in respect of the offences exclusively triable by the Special Court and in respect of which cognizance could be taken by the Special Judge without an order of commitment and further that even Section 306 Cr.P.C. gets attracted in the proceedings before the Special Court which in that was constituted under the Special Court(Trial of Offences Relating to Transactions in Securities) Act, 1992 and which Court was to be presided over by a sitting High Court Judge. bare reading these two Sections of Cr.P.C. does not support the contention raised on behalf of the appellant that Section 306(4)(b) does not get attracted in the present case since pardon here was granted by an Additional Sessions Judge.

12. In the Full Bench decision of this Court in Prem Chand's case(supra), which was cited by the appellant's counsel, the accused were being prosecuted for an offence triable exclusively by a Court of Session and it was held that the provisions of Section 306(4)(b) being mandatory the approver had to be kept in custody till the conclusion of the trial. The reasons given by the Full Bench for taking such a view are to be found in para nos. 6 to 10 and 15 of the judgment which are reproduced below:-

“6. Section 306 of the Cr. P.C. makes provision for tender of pardon to an accomplice. It is provided that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into or the trial of the offence may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. Sub-section (4) of this Section next reads as under:

(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.

7. Under Section 308, in case the Public Prosecutor certifies that in his opinion the person who has accepted a tender of pardon has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he

appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence. Such person, however, has not to be tried" jointly with any of the other accused. Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under Section 164, or by a court under Sub-section (4) of Section 306 can be given in evidence against him at such trial. At the same time, the accused person is left entitled to plead at such trial that he has complied with the condition upon which such tender was made, in which case, it is for the prosecution to prove that the condition has not been complied with. If the Court then finds that he, in fact, complied with the terms of grant of pardon, it shall, notwithstanding anything contained in the Code, pass judgment of acquittal.

8. It is the provisions of Section 306(4)(b) providing that every person accepting a tender of pardon, shall unless he is already on bail, be detained in custody until the termination of the trial which have come up for interpretation. Its constitutional validity has also been challenged.

9. So far as the language used in Section 306(4)(b), it is quite explicit that the person accepting tender of pardon unless already on bail, has to be detained in custody till the end of the trial. The word used is "shall", and there is almost a unanimity of opinion of different High Courts that the legislature has not envisaged grant of bail to a person during the trial after he has accepted pardon. The underlying object of requiring the approver to remain in custody until the termination of trial is not to punish him for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, and secondly to prevent him from the temptation of saving his erstwhile friends and companions, who may be inclined to assert their influences, by resiling from the terms of grant of pardon. In fact, the Madras High Court in the case Karuppa Servai v. Kundaru , has observed that this provision is based on very salutary principles of public policy and public interest. The approver's position was considered to be like a sealed will in a will forgery case, and he should not be allowed to let off on bail. The Rajasthan High Court has in Ayodhya Singh v. State 1973 Cri LJ 768 and Lallu v. State 1979 Raj LW 465 taken the view that the provisions in this regard are mandatory, and that Court cannot go behind the wisdom of the legislature as*

*expressly laid down under Section 306, Cr. P.C. In the former case the * circumstance that the disposal of the case was likely to take a long period of time as" the prosecution had cited 174 witnesses, was not considered as valid ground for bail when the law prohibits any such release till the termination of the trial. In Mukesh Ramchandra Reddy, 1958 Cri LJ 343, the Andhra Pradesh High Court has as well interpreted the word "shall" in the said provisions as primarily obligatory and casting a duty on the Court to detain an accused to whom pardon has been tendered, in custody until the termination of the trial. The Punjab High Court in A. L. Mehra v. State , declined to draw an analogy from the power available with the Court to grant bail to accused at any stage of the trial, and it was observed that it was not within the competency of the Court to admit an approver to bail when the law declares in unambiguous language that the approver shall not be released until the decision of the case. These special provisions were treated to override the general provisions entitling the Court to grant bail.(emphasis supplied)*

10. There is, therefore, little doubt that so far as the plain reading of Section 306(4)(b), Cr. P.C., the same leaves no manner of doubt that a person accepting a tender of pardon has to be kept in custody till the trial is over unless he was on bail at the time of the grant of pardon. This has been almost the uniform view of judicial decisions, and the use of the word "shall" has been interpreted to leave no flexibility in this regard. The general power of grant of bail available to the Courts under the Code is thus circumscribed by the special provisions. In fact, an accused loses his character as such when pardon is granted to him. He is, of course, an accomplice. However, the character of accused can be again attributed to him if his case falls under Section 308, Cr. P. C. That is when the Public Prosecutor certifies that he has by willfully concealing anything essential, or by giving false evidence has not complied with the condition on which the tender was made. Rather even at this stage he is entitled to show that he has, in fact, complied with the condition upon which such tender was made. If he succeeds in doing so, that is the end of the matter. If, however, the Court is satisfied with the certification by the Public Prosecutor in spite of the submission by the approver, then his trial starts and he acquires the character of accused. It is as such that in Sub-section (4) of Section 308 the word used qua him for the first time is "accused".(emphasis laid)

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15. In both the Session cases, the petitioner has not been impleaded as an accused. As already noted above, the scheme of different provisions of law, as referred to above, is that an approver does not acquire the character of an accused till after the trial, and that too when the Public Prosecutor certifies that he has by willfully concealing anything essential or by giving false evidence has not complied with the conditions on which the pardon was given. Rather even at this stage, he is entitled to show that he has in fact complied with the conditions upon which the same was tendered. If he succeeds in doing so; that is the end of the matter. If, however, the Court is satisfied with the certification by the Prosecutor in spite of the submissions of the approver then his trial starts and he acquires the character of the accused. It is as such that in Sub-section (4) of Section 306 the word used qua him for the first time is "accused". During the course of the trial of the main accused, his position remains that of a witness. Can such a person who is at this stage not being formally accused of an offence, be detained? The legislature has permitted this, as he is treated differently from the other witnesses appearing in criminal trials. He was, in fact, associated with the crime, and would have been treated as an accused in normal course, but for his volunteering to make a clean breast of himself and lay before the Court the full and true facts involved in the crime as are known to him. He is, therefore, not unoften termed as accomplice witness. His detention, therefore, has been considered advisable, and the object discernible which has been taken note of in judicial decisions is that he should be kept away from susceptibilities and influences of his confederates from retracting what he has already volunteered to speak, and at the same time to protect him from their wrath in case he resists their pressures. However, in cases where his evidence has already been -recorded, and there is nothing to show that the prosecution at any stage sought to get him declared hostile, and the Prosecutor too has not even raised a resemblance of the contention that there would be likelihood of his moving later under Section 308, Cr. P. C. and further that in spite of his detention for a long time, there is little possibility of early conclusion of the trial, the question to be considered is whether it would not amount to an abuse of process of

Court to still detain him and his release not in the interest of justice. As already noted above, the opposition to his release is coming from the side of the accused, while the State has not appeared to contest the same before us. In our opinion, the accused should have little say in such matter, for patronage to individual vendetta has no place in the administration of justice.”

13. In a recent judgment delivered by a learned Single Judge of this Court in the case of “Bangaru Laxman vs State”, 2011 Apex Decisions (Delhi) 53 also it was held, relying upon the Full Bench judgment in Prem Chand’s case(supra), that accused who is given pardon by a Special Judge has also to be detained in jail as provided under Section 306(4)(b) Cr.P.C. till the conclusion of the trial.

14. It was then contended by the learned counsel for the appellant that since in the Full Bench decision in Prem Chand’s case (supra) the Full Bench had ordered release of the approver despite holding that Section 306(4)(b) Cr. P.C. clearly provides that an approver shall not be released till the conclusion of the trial, if he was not already on bail when pardon was tendered to him, in exercise of powers under Section 482 Cr. P.C. and therefore same power should be exercised by this Court in the present case also since the appellant-approver has already been examined as PW-1 and now no useful purpose would be served by detaining him in prison and also because the prosecution is not even opposing his release from jail.

15. From the record of this appeal we find that the appellant himself had while getting his statement recorded under Section 164 Cr. P.C.

informed the ACMM that he had received threat from his co-accused Wasim through one Adil from Pakistan who was also lodged in Tihar Jail no.1 that in case he would depose against Wasim Akram Malik, he as well as his family would be killed. He also had stated that he was being threatened through one or other two persons also who were lodged in his jail. Similar apprehension was expressed by him before the ACMM at the time of recording of his second statement under Section 164 Cr.P.C after he had moved the application for grant of pardon to him. In view of these threats to his life and of his family received by the appellant we are not inclined to entertain his request for his release from jail even in exercise of the powers under Section 482 Cr.P.C., which the Full Bench had exercised in the facts and circumstances of that case.

16. This appeal, therefore, is dismissed.

P.K. BHASIN, J

V.P. VAISH, J

DECEMBER 16, 2013