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

+ **CRL.L.P. 735/2015**

STATE

..... Petitioner

Through: Ms.Radhika Kolluru, APP with Insp.
Vinay Kumar, P.S.Special Cell

versus

MOHD. ASLAM WANI @ AMIT KUMAR Respondent

Through: Mr.A.K.Srivastava, Advocate.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

ORDER

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31.10.2017

Crl.M.A.13829/2017 (delay in re-filing)

1. For the reasons stated in the application, the delay in re-filing is condoned. The application is disposed of.

Crl.M.A.13828/2017 (for leading additional evidence)

2. This is an application by the State under Section 391 of the Code of Criminal Procedure, 1973 (Cr PC) seeking permission to lead additional evidence in the form of the order passed by the District Magistrate (DM) and Secretary (Revenue)/Additional Commissioner of Police on 29th June, 2009 under Section 7 of the Explosive Substances Act, 1908 ('ESA') for initiation of criminal proceedings *inter alia* against the Respondent accused for the offence under Section 5 ESA. It is stated in the present application that the said order granting sanction to prosecute the Respondent under Section 7 of the ESA formed part of the chargesheet but could not be exhibited and proved in accordance with law "on account of bonafide inadvertence".

3. The background in which the present application has been filed is that by the judgment dated 29th November, 2010 the learned Additional Sessions Judge (ASJ), West-02, Delhi acquitted the Respondent of the offences under Section 121, 121A, 122, 123 and 120B of the Indian Penal Code ('IPC'), Section 5 of the ESA and Sections 17 and 23 of the Unlawful Activities (Prevention) Act, 1967 ('UAPA').

4. The ground on which the Respondent was acquitted for the offence under Section 5 of the ESA was that the prosecution had failed to prove the sanction under Section 7 of the ESA in support of the charge framed against the accused. The acquittal for the other offences was on merits as well. The State has filed the accompanying Criminal Leave Petition (Crl LP) against the judgment of acquittal for the above offences.

5. The only offence for which the trial Court convicted the Respondent was the one under Section 25 of the Arms Act, 1959. As regards the said conviction, by a separate order on sentence dated 7th December, 2010, the Respondent was sentenced to imprisonment already undergone (for approximately over 5 years by that time) and fine of Rs.10,000/- and in default of payment of fine to undergo 3 months in imprisonment.

6. Specific to the offence under Section 5 of the ESA, in the present application, it is pointed out that the sanction under Section 5 of the ESA was sought to be filed with the chargesheet but could not be proved. During the course of submissions, the learned counsel for the State referred specifically to the aforementioned sanction order dated 29th June, 2009

issued by the DM, GNCTD. It was pointed out that although the initial sanction to prosecute was issued by the Deputy Commissioner of Police in the Home Department at the time of filing of the chargesheet, in view of the amendment to Section 7 of the ESA, the sanction could be properly granted only by the DM, GNCTD. Reliance was placed on the decision of the Supreme Court in ***Deepak Khinchi v. State of Rajasthan (2012) 5 SCC 284*** to urge that although the initial sanction filed with the chargesheet may not have been valid, the subsequent sanction obtained in accordance with law having been issued by the competent authority ought to be permitted to be placed on record, exhibited and proved by the State since the acquittal was on a purely technical ground of lack of sanction by the competent authority.

7. A reply has been filed to the present application by the Respondent accused in which it is pointed out that a similar application had been filed before the trial Court itself by the prosecution in which was dismissed by a detailed order dated 14th May, 2010 a copy of which has been enclosed with the reply as Annexure-A-1. It is submitted that with the said application having been dismissed by the trial Court on 14th May, 2010 and that order not having been challenged by the prosecution and allowed to become final, the present application seeking the same relief ought not to be entertained by this Court. It is further pointed out that in the present application, there is no mention of the fact that an application seeking similar relief had already been filed before the trial Court and dismissed by it.

8. A perusal of the order passed by the trial Court on 14th May, 2010 reveals that the order dated 29th June, 2009 passed by the DM granting sanction to

prosecute the Respondent for the offences under Section 5 of the ESA was not placed along with the chargesheet. The chargesheet was in fact filed in the Court of the learned Chief Metropolitan Magistrate, Delhi on 24th November, 2005. It is noted by the trial Court in para-9 of the order dated 14th May, 2010 as under:

“9. I find on perusal of the sanction order No. F.1(10)/09/12/Div.Comm./Vig.(Hq)/832 dated 29th June 2009 that the police had requested for sanction vide letter dated 05.01.2009 (during the trial of the accused) and the sanction was granted on 25.06.2009. The present application under consideration has been filed on 15.04.2010. No explanation at all is coming forth from the prosecution as to why the sanction was applied for at a very delayed stage, much after the commencement of the prosecution and even after obtaining the sanction order dated 25.06.2009 it was not immediately filed in the Court and a delay up till 15.4.2010 was made.”

9. Thereafter, the trial Court observed in para-11 as under:-

“11. However, the application as such is not maintainable as the sanction is required to be taken and filed before the prosecution of the accused under the ES act. It was a condition precedent as elaborated in Section 7 of the ES Act that the sanction should have been obtained under the ES Act prior to the prosecution of the accused and not after the prosecution has commenced. There is restriction in trial if the mandatory sanction is not taken.”

10. The trial Court concluded that obtaining of sanction was a mandatory condition precedent for the prosecution of the accused under the ESA and, therefore, the application filed by the prosecution is not maintainable and that the “sanction order now cannot be taken on record nor can be

considered in evidence.”

11. There was no explanation why the said order dated 14th May, 2010 passed by the trial Court nearly 6 months prior to the final judgment (which is sought to be appealed against) was not challenged by the prosecution. The fact of such an application having been filed and its dismissal by the trial Court on 14th May, 2010 is also not mentioned in the present application.

12. From a perusal of the judgment in *Deepak Khinchi v. State of Rajasthan* (*supra*) it is seen that the Supreme Court relied on an earlier judgment in *State of Goa v. Babu Thomas (2005) 8 SCC 130* which held that a second sanction issued retrospectively after cognizance was taken, with the earlier sanction having been issued by an incompetent authority, could be taken on record by the trial Court. Therefore, the legal position sought to be advanced by the State to persuade the Court to permit it to place on record, exhibit and prove subsequently obtained sanction order was already known in 2005 itself.

13. Secondly, there had to be some good reason for the order dated 14th May, 2010 passed by the trial Court not being challenged by the prosecution and being allowed to become final qua the Respondent.

14. The Court is, therefore, unable to permit the State to once again make the same prayer of leading additional evidence qua the subsequently obtained sanction order under Section 7 of the ESA. For all of the above reasons, the present application is accordingly dismissed.

Crl.L.P.No.735/2015

15. As already noticed hereinbefore this Crl LP seeks leave to appeal against the decision dated 29th November, 2010 passed by the learned ASJ acquitting the Respondent for the offences under Section 121, 121A, 122, 123 and 120B IPC, Section 5 of the ESA and Section 17 of the UAPA.

16. As far as the acquittal for the offence under Section 5 of the ESA is concerned, this was on the ground of lack of valid sanction of the competent authority issued under Section 7 of the ESA. In this regard, it is not in dispute that the subsequent sanction by the competent authority dated 25th June 2009 was not placed before the trial Court by the prosecution till 15th April, 2010 (at the time when the trial was in progress). The application filed by the State before the trial Court seeking to exhibit and prove the said sanction order was dismissed by the trial Court on 14th May, 2010 and that order became final. This Court has in the earlier portion of this order dismissed the application filed by the State for again being permitted to exhibit and prove the said sanction order. In that view of the matter, the order of the trial Court acquitting the Respondent for the offence under Section 5 of ESA for absence of valid sanction under Section 7 of the ESA does not call for any interference.

17. Turning now to the other offences, the trial Court has given valid reasons for acquitting the Respondent of the offences under Section 17 of the UAPA. It has been concluded that “the investigating agency has not made any efforts to find any link for connecting the accused with any militant outfit or to unearth incriminating material against the accused. The

prosecution has also not been able to make an abortive attempt to establish connectivity of the accused with some militant on the basis of telephonic communications. The prosecution had not presented any telephonic conversation record nor the cell phones have been made case property.”

18. Further in the sanction order issued under Section 17 and 23 of the UAPA the words used were “it appears” showing that there was no application of mind by the sanctioning authority. Further, the prosecution witnesses had admitted that there was nothing to connect the accused with the militant activities or to show that the accused was member of any banned militant outfit. Further the trial Court has found that the prosecution failed to prove that the “accused had any contacts with enemy country”. Consequently, the prosecution was held to have failed to prove the guilt of the Respondent accused for the offences under Section 121, 121A, 122, 123, 120B of the IPC and Section 17 and 23 of the UAPA.

19. Having examined the record, the Court is satisfied that the trial Court did not commit any error in its analysis of the evidence or the conclusions reached. For all the aforementioned reasons, the Court finds no good ground to grant leave to appeal against the impugned judgment of the trial Court dated 29th November, 2010. The CrL LP is accordingly dismissed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

OCTOBER 31, 2017/‘anb’