

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on 22-10-2019Judgment delivered on 20-12-2019CRA No. 1213 of 2019

1. Abhay Nayak S/o Devdas Nayak Aged About 34 Years
Currently Incarcerated At Jagdalpur Central Jail, Civil Lines,
Jagdalpur, Chhattisgarh 494 001.

---- Appellant

Versus

1. State Of Chhattisgarh Through - Station House Officer, Police
Station Mardum, District - Bastar, Chhattisgarh.

---- Respondent

CRA No. 1146 of 2019

1. Abhay Nayak S/o Devdas Nayak Aged About 34 Years
Currently Incarcerated At Jagdalpur Central Jail, Civil Lines,
Jagdalpur, Chhattisgarh 494 001.

---- Appellant

Versus

1. State Of Chhattisgarh Through Station House Officer Police
Station Darbha, District Bastar Chhattisgarh.

---- Respondent

CRA No. 1216 of 2019

1. Abhay Nayak S/o Devdas Nayak Aged About 34 Years
Currently Incarcerated At Jagdalpur Central Jail, Civil Lines,
Jagdalpur, Chhattisgarh 494 001.

---- Appellant

Versus

1. State Of Chhattisgarh Through Station House Officer, Police Station Kodenar, District - Bastar, Chhattisgarh

---- Respondent

For Appellant	Dr. Yug Mohit Choudhary, Sr. Adv. with Ms Payoshi & Shri Kishore Narayan, Advocates
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For Respondent/State	Ms. Fouzia Mirza, Addl. Adv. General with Shri K.K. Singh, Govt. Advocate
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Hon'ble Shri Prashant Kumar Mishra, J.

Hon'ble Shri Gautam Chourdiya, J.

CAV Judgment

The following judgment of the Court was delivered by
Prashant Kumar Mishra, J.

1. These three connected appeals under Section 21 (4) of the National Investigation Agency Act, 2008 (for short 'the NIA Act') would call in question three separate orders passed by the trial Court (NIA Court) rejecting the appellant's prayer for his release on bail under Section 439 of the Cr.P.C.
2. The details of the police station, crime number, offence, etc., in respect of the all three appeals, as mentioned in the cause title of respective memo of appeal, are as under :

CRA No.	Spl. ST No.	Cr.No.	Police Station	Offence u/S
1213/19	109/2018	7/2017	Mardum, Dist. Bastar	120-B of the Indian Penal Code; 13(1)(b), 18, 38 & 39(2) of the Unlawful Activities (Prevention) Act, 1967 ; and 8(1)(3)(5) of the Chhattisgarh Special Public Security Act, 2005
1146/19	105/2018	7/2017	Darbha, Dist. Bastar	120-B of the Indian Penal Code; 4 & 5 of the Explosive Substances Act, 1908; 13(1)(b), 18, 38 & 39(2) of the Unlawful Activities (Prevention) Act, 1967; and 8(1)(3)(5) of the Chhattisgarh Special Public Security Act, 2005
1216/19	110/2018	7/2017	Kodenar, Dist.Bastar	120-B of the Indian Penal Code; 4 & 5 of the Explosive Substances Act, 1908; 13(1)(b), 18, 38 & 39(2) of the Unlawful Activities (Prevention) Act, 1967; and 8(1)(3)(5) of the Chhattisgarh Special Public Security Act, 2005

3. The prosecution case, in brief, is that on 28-1-2017 an information was received by the concerned police that on the road between village Bastanar-Dankapara towards village Kandoli a banner has been put on along with pamphlets

containing anti national contents. On receipt of the information the team of a Kodanar police led by the Station House Officer reached to the place and found a banner and anti national contents and few naxal pamphlets written in English propagating naxal movement. When the near by places were searched the police team found an explosive like material and few wires, which were further dug out with proper security. On this search a 7 kg. Tiffin Bomb with 20 meters long wire and pamphlets were found. The pamphlets were having signature of 'Vikalp' as Spokesperson, Dandakaranya Special Zonal Committee CPI (Maoist) and 'Abhya' as Spokesperson, Central Committee CPI (Maoist). This organization has been banned by the Government of Chhattisgarh. Dehati Nalsi was recorded and on return the subject crime was registered at Police Station Kodanar primarily under Section 120-B of the IPC; Sections 4 & 5 of the Explosive Substances Act, 1908; and Sections 38 & 39 (2) of the Unlawful Activities (Prevention) Act.

4. During further investigation, it came to the knowledge that the Police Station Darbha has also registered Cr.No.7/2017 and seized pamphlets and literatures containing propagation of naxal movement. The Investigating Officer found e-mail ID

and mobile number written over the seized articles, which were further investigated on which one person named 'Abhay Nayak, R/o Bangalore' was suspected as a person who has committed the offence.

5. When the police team went to Bangalore (Karnataka) it got information that the appellant is not available in the country, but is travelling abroad with unknown location. Thereafter, Bastar Police issued Look Out Circular. The Immigration Bureau, New Delhi, informed the Superintendent of Police, Bastar that the appellant has been taken into custody. He was enquired by Bastar Police at Delhi and thereafter, upon his consent, Laptop, Mobile, Hard Disk, Pen Drive, etc. were recovered and brought to Bastar for further investigation. In his confessional statement the appellant admitted that for propagating naxal activities he acts as a Blogger and Spokesman via its Blog and Social Media sites i.e. Twitter, Google+, Yahoo, etc. to increase urban naxal cadre and influence urban youths. The appellant was arrested on 1-6-2018 and his residence was searched. The appellant was thereafter searched for two other offences.
6. Dr. Yug Mohit Choudhary, learned senior counsel appearing with Ms Payoshi & Shri Kishore Narayan, learned counsel for

the appellant, would argue that no diary statement implicates the appellant nor any recovery has been made from him nor there is any allegation of involvement of any terrorist act. Referring to disclaimer in blog post dated 30-6-2007 it is argued by Dr. Choudhary, learned senior counsel, that the appellant is not involved in propagating naxal movement. He withdrew from the blog post naxal revolution in August, 2006, but took charge again in August, 2010. The CPI (Maoist) was banned on 27-8-2009, therefore, anything done prior to the said date is not an offence. It is also argued by Dr. Choudhary, learned senior counsel that any blog post or social media post made in the State of Karnataka would not constitute an offence under the provisions of the Chhattisgarh Special Public Security Act, 2005. Dr. Choudhary would read few relevant e-mails authored by the appellant. In substance, learned senior counsel would submit that no charge, as alleged against the appellant, is made out, therefore, the appellant is entitled to be released on bail.

7. Ms Fouzia Mirza, learned Addl. Advocate General appearing with Shri K.K. Singh, learned Govt. Advocate for the State, *per contra*, would submit that the appellant is a member of over ground cadre of CPI (Maoist) not only before 22-6-2009,

but thereafter also. The appellant was found using the e-mail ID to propagate naxal movement and ideology. The appellant opened the blog Abhay Naxal Revolution in the year 2011. He has deleted certain incriminating articles, which were later on recovered during data analysis. The appellant runs the blog, receives e-mails and disseminate to others and hence the appellant is actively working as member of over ground cadre of CPI (Maoist). He is also involved in on-line recruitment of naxal cadres.

8. Ms Fouzia Mirza, learned Addl. Advocate General, would further submit that during data analysis the appellant was found to be using proxy server to hide his identity. Referring to the diaries written by the appellant, which have been seized and deposited as articles in the trial Court, it is argued that the diaries contain incriminating material against the appellant, therefore, he is not entitled for bail.
9. We have heard learned counsel appearing for the parties at length and perused the case diaries of the respective police station, as also the diaries and other materials placed by the State before this Court.

10. A perusal of the material available in the case diaries would reveal that the hand written diary seized from the residence of the appellant containing objectionable and anti national contents about the Indian Police and Para Military Force was sent to the State Examiner of Questioned Document, Government of Chhattisgarh (Hand Writing Expert) on 23-6-2018. The Hand Writing Expert's report received by the police on 30-6-2018 mentions that all the writings have been written by one and the same person. Diary also reveals that when the appellant's blog was data analysed by the Cyber Police Team of Bastar, the appellant was found to have officially created 'CPI Maoist Naxalite' blog and continued blogging on the site. Thereafter, he wrote his blogs as 'abhaynaxalrevolution', to hide his overtly and expressly Maoist connection. The appellant was also found to use fake ID number, proxy server and TOR to run his blog, which he did to hide his identity from the Government surveillance. The blog posts and proxies have been annexed with the return filed by the State.
11. Record also contains material that on thorough examination of appellant's e-mail ID, after seeking permission from the Special Court, Jagdalpur, various folders with naxal contents

and anti national contents including press release, propaganda and audio video attachments having anti national and provocative contents were found. Mail from superior naxal cadres like Vikalp and Gudsa Usendi and connection with RDF (Revolutionary Democratic Front) and other anti national organization was also found. The scrutiny also revealed that the appellant is working with Rona Wilson, G.N. Saibaba, etc.

12. The data analysis also found that the appellant tried to contact other naxal sympathizers including foreigners and journalists for arranging interview with superior naxal cadres either directly or through virtual media. He has been visiting foreign countries for last one year to promote the naxal ideology and improve naxal movement in India. The investigating police have also found that appellant's blog post 'naxalrevolution.blogpost.com' is a mirror website of 'naxalrevolution-lal salam', which is totally a Maoist social networking platform.
13. While considering prayer for release of an accused on bail, who is charged with offence under the Unlawful Activities (Prevention) Act, 1967, it is important to notice the provisions contained under Section 43D (5) & (6) of the said Act, which are quoted below :

43D Modified application of certain provisions of the Code. —

XXX XXX XXX
 XXX XXX XXX
 XXX XXX XXX

(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.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

14. In a recent decision rendered by the Supreme Court in *National Investigation Agency v Zahoor Ahmad Shah Watali*¹ the Supreme Court has considered the scope and application of the proviso to hold thus in paras 25 to 27 :

25. From the analysis of the impugned judgment, it appears to us that the High Court has ventured into an area of examining the merits and demerits of the evidence. For, it noted that the evidence in the form of statements of witnesses under Section 161 are not admissible. Further, the documents pressed into service by the Investigating Agency were not admissible in evidence. It also noted that it was unlikely that the document had been

¹ (2019) 5 SCC 1

recovered from the residence of Ghulam Mohammad Bhatt till 16-8-2017 (para 61 of the impugned judgment). Similarly, the approach of the High Court in completely discarding the statements of the protected witnesses recorded under Section 164 of Cr.P.C., on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is, in our opinion, in complete disregard of the duty of the Court to record its opinion that the accusation made against the accused concerned is *prima facie* true or otherwise. That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 Cr.P.C.) and other material gathered by the Investigating Agency during investigation.

26. Be it noted that the special provision, Section 43D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. To wit, soon after the arrest of the accused on the basis of the FIR registered against him, but before filing of the charge-sheet by the Investigating Agency; after filing of the first charge-sheet and before the filing of the supplementary or final charge-sheet consequent to further investigation under Section 173(8) Cr.P.C., until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses, etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the court that despite the

framing of charge, the materials presented along with the charge-sheet (report under Section 173 of Cr.P.C.), do not make out reasonable grounds for believing that the accusation against him is *prima facie* true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.

27. For that, the totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is.

15. The law is, thus, settled that while considering the prayer for grant of bail the material collected by the prosecution thus far need not be discarded nor its admissibility or otherwise is to be considered at this stage. If the case diary and other materials disclosed that the accusation against the accused is, *prima facie*, true, the bar under the proviso to sub-section (5) of Section 43D of the Unlawful Activities (Prevention) Act, 1967 would be attracted.
16. In the case at hand, there is material collected by the Investigating Officer which furnishes reasonable ground for believing that the accusation against the appellant is,

prima facie, true. Thus, no case for inferring with the trial Court's order is made out.

17. As a sequel, all the criminal appeals, *sans substratum*, are liable to be and are hereby dismissed.

Sd/-
(Prashant Kumar Mishra)
Judge

Sd/-
(Gautam Chourdiya)
Judge