

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.173 OF 2019

AREEB EJAZ MAJEED)
Age 26 years, Residing at : C Wing,)
206, Sarvodaya Residency, Patripool,)
Kalyan (W), Thane.)
Presently at : Judicial Custody,)
Arthur Road Jail, Mumbai.)...APPELLANT

V/s.

1) NATIONAL INVESTIGATION AGENCY)
)
2) THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Areeb Ejaz Majeed – Appellant appearing in person.

Ms.Aruna Pai, Special Public Prosecutor a/w. Ms.Geeta Godbole,
Public Prosecutor, for the Respondent - National Investigation
Agency.

**CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.**

**DATE : RESERVED ON 15th MARCH 2019
PRONOUNCED ON 27th MARCH 2019**

JUDGMENT :

1 By this appeal, the appellant – under trial accused is challenging the order dated 10th January 2019 passed on an application below Exhibit 280 by the learned Special Judge under the National Investigation Agency Act, 2008, for Greater Mumbai, thereby rejecting his application for issuance of summons in exercise of powers under Section 91 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C. for the sake of brevity) to Nodal Officers of Telecom Companies namely Airtel, Tata Docomo, Vodafone, Reliance and BSNL to produce Call Detail Records (CDRs) of cell phones bearing no.7498720440 being used by his father Dr.Ejaz Majeed, cell phone nos.9820111409 and 9029888448 being used by Sameer Wankhede, Additional Superintendent of Police of the National Investigating Agency (hereinafter referred to as NIA for the sake of brevity), cell phone nos.9869621234 and 9004340727 being used by Rupinsh Sharma, who is allegedly working as a Senior Officer of the NIA and that of cell phone no.9870133681 being

used by Azam Patel, Police Inspector of the NIA.

2 Brief facts leading to filing of the instant appeal can be summarized thus :

- (a) The appellant/accused is facing trial for alleged commission of offences punishable under Sections 16 and 18 of the Unlawful Activities Prevention Act, 1967, (hereinafter referred to as U.A.(P) Act for the sake of brevity) as well as under Section 125 of the Indian Penal Code (IPC) in pursuant to the First Information Report (FIR) dated 28th November 2014 which resulted in registration of NIA Crime No.RC-01/2014/NIA/MUM for offences punishable under Sections 16, 18 and 20 of U.A.(P) Act as well as under Section 125 of the IPC. It is alleged by the prosecution that he along with co-accused conspired and indulged in Jihadi activities in Syria, Iraq and India by joining ISIL. They have conspired to commit terrorist acts and as such, committed offence under Section 18 of the U.A.(P) Act. He, along with absconding accused, was part of unlawful association formed with intent to promote terrorism in Syria, Iraq and

India. They participated in terrorist acts in Syria and Iraq and were likely to commit terrorist acts in India. It is further alleged against them that they had waged the war against Asiatic Powers in peace with the Government of India.

- (b) According to the appellant/accused, though he was shown as arrested at 1.30 a.m. of on 29th November 2014 from Anti-Terrorist Squad Kala Chowki Police Station, Mumbai, infact, he was arrested at 5.30 a.m. of 28th November 2014 from Aircraft TK-720 at the Chhatrapati Shivaji Maharaj International Airport, Mumbai, on his return from Turkey. He was interrogated there by officers of the NIA namely Sameer Wankhede, Azam Patel, Suhas Warke, Vishwas Kumar Singh and others and thereafter, he was taken to some farm house for further interrogation. He was kept at the lock-up at Bhoiwada in the night of 28th November 2014 by the officers of the NIA and ultimately, he was shown to be arrested on 29th November 2014 at 1.30 a.m. from Anti-Terrorist Squad Kala Chowki Police Station, Mumbai.

- (c) According to the appellant/accused, his father Dr.Ejaz Majeed had lodged Missing Report on 26th May 2014. Thereafter, on 23rd November 2014, his father Dr.Ejaz Majeed met officers of the NIA namely Sameer Wankhede, Azam Patel, Suhas Warke and Rupinsh Sharma at Hotel Turf Club, Mahalaxmi, Mumbai, and his father was provided with contact information of Sidharth Zutshi, 1st Secretary of Indian Embassy in Ankara, Turkey. The officers of the NIA assured his father to provide all the help for return of the appellant/accused to India. Accordingly, the NIA arranged for return of the appellant/accused to India. Said Sidharth Zutshi, on instructions of the NIA, issued Emergency Certificate in favour of the appellant/accused, so also provided him one way air ticket from Sector Istanbul to Mumbai. The cost of the air ticket was also paid by the consulate. Thereafter, on arrival at the Chhatrapati Shivaji Maharaj International Airport, Mumbai, he was, infact, arrested by the NIA on 28th November 2014 itself but

subsequently was shown to have been arrested on 29th November 2014 from Anti-Terrorist Squad Kala Chowki Police Station, Mumbai.

- (d) The appellant/accused, during pendency of the trial, preferred an application Exhibit 280 for issuing summons to the Telecom Companies for calling CDRs of the cell phone numbers of officers of the NIA as well as that of his father in order to demonstrate the fact that entire arrangement of arrival of the appellant/accused to Mumbai on 28th November 2014 was made by the NIA and then he came to be arrested. The appellant/accused contended that his father was in regular contact with the officers of the NIA and had even met them on 23rd November 2014.
- (e) The application moved by the appellant/accused came to be opposed by the prosecuting agency i.e. NIA by filing reply to it, particularly on the ground that the relevant CDRs have already been placed as documentary evidence by the

prosecution. The concerned Nodal Officers are also cited as prosecution witnesses and they shall be called upon by the prosecution at appropriate time to support the prosecution case. It is further contended by the prosecution in its reply that Rupinsh Sharma is not holding the post of Inspector General in the NIA. The application is filed only to delay the proceeding. The claim made by the appellant/accused is incorrect.

- (f) After hearing the parties, by the impugned order dated 10th January 2019, the learned Special Judge under the N.I.A. Act was pleased to reject the application under Section 91 of the Cr.P.C. filed by the appellant/accused with a reasoning that the documents necessary or desirable for defence of the appellant/accused can be called by him by resorting to the provisions of Section 91 of the Cr.P.C. at such stage when the appellant/accused puts his defence. It is further observed by the learned Special Judge that CDRs of mobile number 9324209295 which belongs to the father of the

appellant/accused are already with the charge-sheet and there is no document to show that cell phone no.7498720440 is that of Dr.Ejaz Majeed. The reasoning given by the learned Special Judge in paragraph 10 of the order need reproduction and it reads thus :

“10 The applicant-accused is seeking the CDR of mobile number of NIA officers, Dr.Ejaz Majeed, Sameer Wankhede, Rupinsh Sharma, Azam Patel. He has brought to the notice the CDR of the mobile no.9324209295, of father of the applicant-accused. From this mobile number he has referred the calls of Azam Patel, Shameer Wankhede, Rupinsh Sharma. The said call data is for the period of 1.12.2013 to 11.12.2014. Thus, the said period include the period of 20.11.2014 to 29.11.2014 for which he is seeking CDR. There is no documents to show that 7498720440 is of Dr.Ejaz Majeed. Therefore, in case the call record of mobile no.9324209295 which is according to the prosecution is also of Dr.Ejaz Majeed, the father of the

applicant-accused there is no necessity to again call the CDR of the Sameer Wankhede, Rupesh Sharma and Azam Patel as it will reflect whether they were in contact with the father of the applicant-accused.”

The learned Special Judge further referred to Section 48 of the Cr.P.C. and observed that mere presence of the NIA officers in the Airport would not sustain the case of the appellant/accused. This order is impugned in the instant appeal.

3 We have heard the appellant/accused who is appearing in person. By relying on judgment of the learned Single Judge of this court in the matter of Kamal Ahmed Mohammed Vakil and Others vs. State of Maharashtra¹, he argued that scope of Section 91 of the Cr.P.C. is wide and for fair trial, the appellant/accused is entitled for CDRs of officers of the NIA. He reiterated that his return to India was arranged by the officers of the NIA in consultation with his father, and therefore, for effective cross-examination of those officers of the NIA, he is entitled for

1 2013 Cri.L.J. 858

the CDRs of the cell phones.

4 The learned counsel appearing for the NIA vehemently opposed the appeal by contending that, at this stage, the appellant/accused is not entitled for the CDRs, as called for, by him. The appellant/accused is moving several applications and is protracting the trial. There is no officer by name Rupinsh Sharma. It is further argued that when the appellant/accused was arrested and produced before the competent court, he had not made such request nor had he complained that he was arrested on 28th November 2014. On earlier occasion, such applications were moved by the appellant/accused and those were rejected.

5 We have carefully considered the submissions so advanced and we have also perused the record and proceedings made available. Undisputedly, the appellant/accused is being tried for offences punishable under U.A.P.Act with an accusation that he along with co-accused formed unlawful association with an intent to promote terrorism in Syria, Iraq and India. It is

further averred that the appellant/accused participated in terrorist acts in Syria and Iraq and he along with co-accused was likely to commit terrorist act in India. The prosecution is also alleging that the appellant/accused along with co-accused had waged war against Asiatic Powers at peace with the Government of India. This is clear from reply of the prosecuting agency to the application under Section 19 of the Cr.P.C. (Exhibit 280) filed by the appellant/accused.

6 The defence of the appellant/accused, as seen from the averments made in his application, is to the effect that his return from Turkey to India was arranged by the officers of the NIA in consultation with his father Dr.Ejaz Majeed, and accordingly, all necessary arrangements were made by the prosecuting agency. Our attention is drawn to the communication dated 24th October 2018 issued by Consul & CPIO which in turn mentions that Emergency Certificate bearing no.952108 and one way air ticket for the sector Istanbul-Mumbai as well as hotel accommodation for one night for the appellant/accused was

provided by the Consulate of India at Istanbul. The said communication further shows that cash of Rs.65,460/- on account of air ticket of the appellant/accused for the sector Istanbul-Mumbai was also borne by the Consulate of India at Istanbul. This official document, prima facie, justifies contention of the appellant/accused made in the application at Exhibit 280 for issuing of summons to the Telecom Companies for providing CDRs of cell phones of the officers of the NIA as well as another cell phone number of his father bearing no.9324209295. Ultimately, the appellant/accused is alleged to have participated in terrorist acts in other countries and he is stated to have come to India for committing terrorist acts. On this backdrop, it is the defence of the appellant/accused that he returned to India with the help of the NIA on the basis of missing report of his father Dr.Ejaz Majeed.

7 Article 21 of the Constitution of India encompasses concept of fair trial. It provides that no person shall be deprived of his life or personal liberty except according to procedure

established by law which necessarily must be just, fair and reasonable. Sub-section (1) of Section 91 of the Cr.P.C. reads thus :

“91(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.”

Bare perusal of this Section makes it clear that, when the same is invoked by the accused, the necessity and desirability would have to be seen by the court in the context of the purpose of investigation, inquiry, trial or other proceeding under the Code. When the appellant/accused has raised a defence that he was, infact, brought back to India with all necessary help by the officers

of the NIA in consultation with his father, and that, those officers were in contact with his father at the relevant time and were also present at the Airport at the time of arrival of the appellant/accused, requirement of fair trial necessitates calling of CDRs of the officers of the NIA as well as those of another cell phone number of father of the appellant/accused. In his submission, his father was possessing other cell phone bearing number 7498720440. However, the learned trial court, in this regard, has observed that there is no documentary evidence to show that this cell phone number belongs to Dr.Ejaz Majeed – father of the appellant/accused. For possessing a particular cell phone number, no documentary evidence is required.

8 We have already stated what is the defence of the appellant/accused. He can establish his defence by relying on the material available in the prosecution evidence. In addition to that, the appellant/accused can elicit answers from prosecution witnesses through cross-examination to establish his defence by preponderance of probabilities. In addition to this, he may also

adduced other evidence by entering on his defence after recording of his statement under Section 313 of the Cr.P.C. In the case in hand, the appellant/accused wants to cross-examine official witnesses in order to substantiate his contention that his return to India is arranged by the NIA by consultation with his father Dr.Ejaz Majeed and for that purpose, he wants CDRs of the official witnesses. In this view of the matter, the learned trial court ought not to have rejected the application under Section 91 of the Cr.P.C. with a reasoning that the appellant/accused can call for the documents when he enters in his defence. Similarly, we are unable to endorse the reasoning of the learned trial court that for want of documentary evidence to show that cell phone no. 7498720440 is of Dr.Ejaz Majeed, the CDRs cannot be called. Similarly, the ground for rejection of the application under Section 91 of the Cr.P.C. that CDRs of another cell phone of father of the appellant/accused are already on record, is also unjustified because official witnesses cannot be sufficiently cross-examined with the aid of those CDRs of one cell phone only. Ultimately, identity of persons to whom calls were made and received on that

number will have to be ascertained for crystallizing the facts.

9 In this view of the matter, we are of the considered opinion that in the interest of fair trial the appellant/accused is entitled for CDRs of the cell phone numbers mentioned in his application Exhibit 280 for effective cross-examination of prosecution witnesses and he needs to be supplied with those CDRs only for cross-examination of official witnesses summoned by the prosecution, whose CDRs are sought by the appellant/accused. He need not be provided with other call details except the calls, if any, exchanged between Dr.Ejaz Majeed and the persons named as officers in the application at Exhibit 280 on record of the trial court. In the result, the following order :

ORDER

- i) The impugned order dated 10th January 2019 passed below Exhibit 280 in NIA MCOC Special Case No.1 of 2015 between the parties is quashed and set aside.

- ii) The application at Exhibit 280 in the said MCOC case between the parties is allowed to the extent of issuance of

summons to the Nodal Officers of Telecom Companies namely Airtel, Tata Docomo, Vodafone, Reliance and BSNL for production of CDRs of the cell phone numbers given in the said application.

- iii) The summons should be issued only for production of CDRs of calls exchanged in between cell phone numbers 9820111409, 9869621234, 9029888448, 9004340727, 9870133681 and cell phone number 7498720440 which is allegedly possessed by Dr.Ejaz Majeed for the period from 20th November 2014 to 29th November 2014.
- iv) The CDRs so summoned be supplied to the appellant/accused only if officers of the NIA named in the application at Exhibit 280 are summoned for adducing evidence on behalf of the prosecution.
- v) The appeal is accordingly disposed off.

(A. M. BADAR, J.)

(INDRAJIT MAHANTY, J.)