

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 754 of 2020**

- State (Through National Investigation Agency, New Delhi, Branch Office- Raipur, Moulshri Vihar, Purena, District Raipur, Chhattisgarh)

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1. Hidma S/o Handa Kawasi Aged About 25 Years Resident Of Sarpanchpara, Aranpur, Ps Aranpur, Dist South Bastar, Dantewada, Chhattisgarh
2. Madka Ram Tati S/o Hidiya Tati @ Idia Tati Aged About 36 Years Resident Of Patelpara, Tikanpal, Ps Kirandul, Dist- South Bastar, Dantewada, Chhattisgarh
3. Bhima Ram Tati @ Bhima Tati S/o Joga Tati Aged About 27 Years Resident Of Village Patelpara, Tikanpal, Ps Kirandul, District South Bastar, Dantewada, Chhattisgarh
4. Linge Tati @ Kumari Linge Tati D/o Late Joga Tati Aged About 25 Years Resident Of Village Mundrapara, Tikanpal, Ps- Kirandul, District- South Bastar, Dantewada, Chhattisgarh
5. Laxman Jaiswal @ Laxman Sao S/o Late Vishnu Sao Aged About 46 Years Resident Of Village- Thakurpara, Nakulnar, Ps- Kuakonda, District- South Bastar, Dantewada, Chhattisgarh
6. Ramesh Kumar Kashyap @ Ramesh Hemla S/o Apu Ram Kashyap Aged About 35 Years Resident Of Village- Kakadi, Ps- Aranpur, District- South Bastar, Dantewada, Chhattisgarh
7. Haripal Singh Chauhan @ Haripal Chauhan S/o Late Shiv Nayak Chauhan Aged About 44 Years Resident Of Village- Thakurpara, Nakulnar, Ward No. 03, Ps- Kuankonda, Distt- Dantewada, Chhattisgarh
8. Giri Reddy @ Shyam @ Chaitu @ Pawanda Reddy @ Arjun @ Nandu @ Pankaj S/o Damodar Reddy Aged About 57 Years Resident Of Village- Quilashapura, Mandal- Raghunathapally, District- Warangal, Telangana
9. Bada Deva @ Barse Sukka @ Deva @ Devanna @ Barsa Deva @ Sainath S/o Kakad Deva Aged About 45 Years Resident Of Village Hoipara, Puvarti, Ps Jagargunda, District Sukma, Chhattisgarh
10. Jaylal Mandavi @ Jailal @ Ganga @ Ganga Ram @ Jaylal Dirdo Aged About 40-45 Years, S/o Hunga, Resident Of Bodhgubal, Ps Erabora, District Sukma, Chhattisgarh
11. Masa Madvi @ Madvi Masa S/o Madvi Sukda Aged About 32 Years Resident Of Village Gachchanpalli, Ps Bhejji, District Sukma, Chhattisgarh
12. Linge Madkam @ Madkam Linge S/o Not Known Aged About 30 Years Resident Of Village Entapad, Ps Chintagufa, District Sukma, Chhattisgarh

13. Madvi Deve W/o Late Gundadhur Aged About 26 Years Resident Of Village- Jagampal, Ps Kukanar, District- Sukma, Chhattisgarh
14. Madvi Linga S/o Jagra Madvi Aged About 25 Years Resident Of Village- Tetam, Ps Katekalyan, District- South Bastar, Dantewada, Chhattisgarh
15. Kushram Sunita @ Shushila @ Hungi @ Sunita Kohrami D/o Sukka Kuhrami Aged About 33 Years Resident Of Village Rewali, Patelpara, Ps Aranpur, District- South Bastar, Dantewada, Chhattisgarh
16. Barse Joga S/o Mangdu Aged About 31 Years Resident Of Village Gufadi, Ps Gadiras, District Sukma, Chhattisgarh
17. Madvi Kosa S/o Madvi Bami Aged About 22 Years Resident Of Village Maad, Gadam, Ps- Katekalyan, District- South Bastar, Dantewada, Chhattisgarh
18. Guddi Mandavi S/o Jagra Aged About 29 Years Resident Of Village Maad, Gadam, Ps Katekalyan, District- South Bastar, Dantewada, Chhattisgarh
19. Midiyam Suresh @ Midiyam Sukram @ Yogesh @ Suresh Son of Ayata Aged About 25 Years Resident Of Village Govindpal, Ps Tongpal, District- Sukma, Chhattisgarh
20. Baman Mandavi Son of Late Handa Mandavi Aged About 26 Years Resident Of Village Karka, Ps Kuakonda, District- South Bastar, Dantewada, Chhattisgarh
21. Deleted (Dirdo Made @ Dirdo Mahadev) As Per Honble Court Order Dated 25-02-2021 And A. R. (J) Note Dated 01-03-2021.
22. Umesh Hemla @ Umesh Kumar Kashyap S/o Apu Kashyap Aged About 33 Years Resident Of Village Kakadi, Ps- Aranpur District- South Bastar, Dantewada, Chhattisgarh
23. Baga Kartami @ Kartami Baga @ Badal @ Basant S/o Kartami Joga Aged About 25 Years Resident Of Village Mundum, Ps Kukanar, District Sukma, Chhattisgarh
24. Deleted (Sodhi Kesa @ Gundadhur (Deceased)) As Per Honble Court Order Dated 25-02-2021 And A. R. (J) Note Dated 01-03-2021.
25. Deleted (Mangli @ Bandi @ Hemla Mangli (Deceased)) Aged About 29 Years As Per Honble Court Order Dated 25-02-2021 And A. R. (J) Note Dated 01-03-2021.
26. Deleted (Chhota Deva @ Deva Kawasi @ Hemla Shankar @ Deva (Deceased)) As Per Honble Court Order Dated 25-02-2021 And A. R. (J) Note Dated 01-03-2021.
27. Hemla Hunga @ Vinod Hemla @ Chappe Hunga @ Vinodanna @ Emla Sappa @ Dokra S/o Emla Sappa Aged About 55 Years Resident Of Vill- Puvarti, Ps- Jagargunda, Dist. Sukma, Chhattisgarh
28. Jagdish Kudam @ Budhra S/o Not Known Aged About 35 Years Resident Of Vill- Surpanguda, Ps- Jagargunda, Dist. Sukma, Chhattisgarh

29. Nanda Kunjam S/o Late Bheema Kunjam Aged About 30 Years Resident Of Schoolpara,kalepal, Ps- Kirandul, Dist. Dantewada, Chhattisgarh
30. Nambala Keshav Rao @ Gaganna @ Basavraj @ Prakash @ Krishna @ Vijay @ Keshav @ Raju @ Umesh S/o Late Vasudev Rao Aged About 65 Years Resident Of Jiyanpenta, Mondal- Kotambali, Dist. Shrikakulam, Telangana
31. Kattam Sudarshan @ Anand @ Mohan @ Birendra @ Mohan Tekam @ Sudharshan @ Mahesh @ Ramesh S/o Mallesh Aged About 63 Years Resident Of Village Bellampalli, Dist. Adilabad, Telangana
32. Mallojulla Venugopal @ Bhupati @ Sonu @ Vivek @ Lachchna S/o Venkatayya Aged About 58 Years Resident Of Peddapalli, Dist. Karimnagar, Telangana
33. Mallojulla Venugopal @ Bhupati @ Sonu @ Vivek @ Lachchna S/o Venkatayya Aged About 58 Years Resident Of Peddapalli, Dist. Karimnagar, Telangana
34. Deleted (Roula Srinivas @ Ramanna @ Srinu @ Narendra) As Per Honble Court Order Dated 25-02-2021 And A. R. (J) Note Dated 01-03-2021.
35. Hidma @ Hidmanna @ Madvi Hidma @ Hidmalu @ Santosh S/o Podiyam Soma @ Duggavade Aged About 51 Years Resident Of Village Puvarti, Ps Jagargunda, Dist. Sukma, Cg
36. Ganesh Uike @ Pakka Hanumantu @ Ganesh @ Chamru Dada @ Rajesh Tiwari S/o Chandreyya Aged About 59 Years Resident Of Pullemala, Tehsil Chandur, Dist. Nalgudda, Telangana

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Present:-

Shri Kishore Bhaduri, along with Shri Sabyasachi Bhaduri and Shri Ismail Sheikh, Advocates for appellant.

Shri P.K. Tulsyan, Advocate for respondent No.7.

Shri Vaibhav Singh and Shri Dev Ashish Biswas, Advocates for respondents No.23 & 29.

Division Bench: Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Shri Justice Narendra Kumar Vyas
CAV Order

05/10/2021

1. This appeal is directed against order dated 25-09-2020 passed by the learned Special Judge (N.I.A. Act) Bastar at Jagdalpur, by which, the application preferred by the appellant-National Investigation Agency, New Delhi, under Section 306 sub section(1) of the Cr.P.C. to tender pardon to the accused-Baga Kartami and Nanda Kunjam has been rejected.

2. A ghastly incident of attack on the convoy of a sitting Member of Chhattisgarh Legislative Assembly Shri Bhima Mandavi took place on 09-04-2019 by the naxalites. In this attack, Shri Bhima Mandavi and five police personnel died. A crime under FIR No.11/2019 was registered at Police Station Kuakonda, District Dantewada on 10-04-2019 registering offence under Section 147, 148, 149, 302, 396, 397 and 120-B of the IPC; Section 25, 27 of the Indian Arms Act; Section 3 & 5 of the Explosive Substances Act and Section 13(1)(a), 38 & 39 of the UA(P)Act, 1967.

3. Considering the nature and gravity of the case, Government of India, in exercise of power under Section 6(4)(5) read with Section 8 of the NIA Act entrusted the investigation to National Investigation Agency. While investigation was underway, two persons mainly Baga Kartami and Nanda Kunjam came forward, surrendered voluntarily before the authorities on 13-03-2020 and 26-08-2020 respectively and they were produced before the Magistrate to record their statement under Section 164 of Cr.P.C. In their respective statements, these persons, stating to be involved in the aforesaid incident of attack and murder of the M.L.A. Shri Bhima Mandavi, revealed their involvement in the crime. They volunteered to be approver. The investigation agency having found and satisfied of their integrity and truthfulness, preferred an application under Section 306(1) of the Cr.P.C. before the N.I.A Court praying that the aforesaid two persons, who appeared to be accused having been involved in the aforesaid crime be tendered pardon. However, the NIA Court, by the impugned order, rejected the application of the appellant, giving rise to this appeal.

4. Learned counsel appearing for the appellant-National Investigation Agency, relying upon several authorities, argued in extenso and submitted that the learned NIA Court, rejected the application on extraneous and irrelevant considerations, contrary to the statutory mandate and scheme of Section 306 of

the Cr.P.C. and ignored that two persons clearly stated in their 164 Cr.P.C. statements before the Magistrate that they are involved in the aforesaid crime and gave details, which are prima facie truthful and voluntary as also fulfill the legal requirement of they being persons supposed to have been directly concerned and privy to the offence alleged. The learned NIA Court, it is contended, instead of, minutely considering the contents of the statements given by the aforesaid two accused, misdirected itself by taking into consideration that such surrendered persons are entitled to beneficiary scheme of rehabilitation. It has been further argued that the learned NIA Court exceeded its jurisdiction at the stage of considering application, by entering into the arena of appreciation of evidence, which was wholly impermissible under the law.

5. However, learned counsel appearing for the respondent No.7 argued that the application has been rightly rejected as they are not the accused and as they already surrendered and desirous of getting benefit of rehabilitary scheme, they are not likely to speak truth.

6. We have heard learned counsel for the parties and perused the records.

7. In order to appreciate the submission of learned counsel for the parties, it is relevant to refer to the provisions contained under Section 306 of the Cr.P.C., which reads as under:-

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.”

Section 307 Cr.P.C. confers power on the Court to which commitment is made to tender pardon 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.

Section 308 of the Cr.P.C. provides that where, Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion, such person has, either by wilfully 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.

8. The scope and ambit as also the object behind the scheme of grant of pardon to an accomplice was explained by the Hon'ble Supreme Court in the case of **Suresh Chandra Bahri vs. State of Bihar, 1995 (Suppl.Volume-1) SCC 80, as below:-**

42. “We have already reproduced above Section 306 of the Code the provisions of which apply to any offence triable exclusively by the Court of

Special Judge to any offence punishable with imprisonment extending to seven years or with a more serious sentence. Section 306 of the Code lays down a clear exception to the principle that no inducement shall be offered to a person to disclose what he knows about the procedure (sic). Since many a times the crime is committed in a manner for which no clue or any trace is available for its detection and, therefore, pardon is granted for apprehension of the other offenders for the recovery of the incriminating objects and the production of the evidence which otherwise is unobtainable. The dominant object is that the offenders of the heinous and grave offences do not go unpunished, the Legislature in its wisdom considered it necessary to introduce this section and confine its operation to cases mentioned in Section 306 of the Code. The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.”

9. In later decisions of the Supreme Court, the aforesaid principle has been succinctly followed in the case of ***Chandran vs. State of Kerala (2011) 5 SCC 161, Prithipal Singh vs. State of Punjab, (2012) 1 SCC 10, Yakub Abdul Razak Memon vs. State of Maharashtra, (2013) 13 SCC 1 and Somasundaram vs. State, (2020) 7 SCC 722.***

10. In the present case, as the order passed by the learned NIA Court reads the operative reason for rejection of the application, as below:-

- (a) Naxalites, who have surrendered, are granted some benefit and legal action is avoided against them, no cognizance of the offence is taken.
- (b) The two applicants cannot be treated as accomplice in the present case as they are not likely to be prosecuted.
- (c) The evidence of such persons may not be reliable, because they believe that they would not be prosecuted.

(d) Statements of the aforesaid persons does not show that they were fully involved in the incident of murder.

10. At the first place, the learned NIA Court was swayed by an irrelevant consideration that naxalites, who surrender, are provided certain facilities. The learned NIA Court was clearly swayed by such irrelevant consideration. Whether or not any benefits/facilities are granted, once the legal requirement under Section 306(1) of the Cr.P.C. of the person appearing to be accomplice and falling in the category of person supposed to have been directly or indirectly concerned in or privy to an offence, is fulfilled, the power under Section 306 of the Cr.P.C. for tender of pardon to accomplice could be exercised.

11. The surmise, which guided, the learned NIA Court to reject the application, is that such persons are not prosecuted, is again contrary to the statutory scheme of Section 306 of the Cr.P.C. The power to tender pardon upon fulfillment of certain conditions has its own consequences to flow. Merely because, grant of pardon would result in certain legal consequences to flow, as has been provided under Section 306 of the Cr.P.C., the application for grant of pardon could not have been rejected.

12. In the case of **Chandran** (supra), the Supreme Court had an occasion to appreciate the evidence of a person, who had not been put on trial, but could have been tried jointly with the accused and found his evidence reliable in view of the law laid down by that Court in **Laxmipat Choraria vs. State of Maharashtra, AIR 1968 SC 938**.

Considering the legal position as discussed in the case of **Chandran and Laxmipat Choraria** (supra), the Supreme Court in the case of **Prithipal Singh** (supra) summarized the law, on the point, as below:-

“43. In view of the above, the law on the issue can be summarised to the effect that the deposition of an accomplice in a crime who has not been made an accused/put to trial, can be relied upon, however, the evidence is required to be considered with care and caution. An accomplice who

has not been put on trial is a competent witness as he deposes in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration.”

13. In view of the aforesaid clear enunciation of law, the reason assigned by the learned NIA Court is palpably illegal and erroneous in law. The other reason assigned by the learned NIA Court to reject the application is based on unwarranted assumption that the accused may not speak truth, apart from being perverse, is against the principle that the evidentiary value could not be assessed at the stage of considering application for grant of pardon.

14. In the case of ***Lt. Commander Pascal Fernandes vs. State of Maharashtra & Others, (1968) 1 SCR 695***, Their Lordships in the Supreme Court held as below:-

15. “In this case the Special Judge made no effort to find out what Jagasia had to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to 'offer no evidence and permit his acquittal, or (d) to enter a nolle prosequi. In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. [Section 8\(2\)](#) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several may be tendered pardon. But even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecuting joins tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favourably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon *silo motu* at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed.”

15. The appellant has placed before us the relevant records including the statement of the two persons for whom, applications under Section 306 sub section (1) of the Cr.P.C. was preferred.

16. The statements are in great detail and reveal the manner, in which, the incident happened. However, we find that the learned NIA Court, swayed by irrelevant and extraneous considerations, has completely abdicated function assigned to it under the law to minutely scrutinize those statements and arrive at his own satisfaction whether those persons supposed to have been directly or indirectly concerned in or privy to an offence, in respect of which, application for pardon was made. The order of the learned NIA Court, if we may say so, is completely non-speaking.

17. The aforesaid discussion, therefore, leads to irresistible conclusion that without scrutinizing the statements and material placed before it, the learned NIA Court, swayed by irrelevant and extraneous considerations, mechanically rejected the application. The impugned order, therefore, cannot be sustained in law and therefore, set aside.

18. The matter is remanded to the NIA Court for re-consideration of the appellant's application, in the light of the observations made by this Court and in accordance with law.

19. In the result, the appeal is allowed.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Narendra Kumar Vyas)
Judge