

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 887 of 2020

Laxman Jayasawal @ Laxman Sao, S/o. Late Shri Vishnu Sao, Aged about 46 years, R/o. Thakurpara, Nakulnaar, P.S. Kuakonda, District Dantewada (Chhattisgarh)

---- Appellant (in jail)

Versus

State of Chhattisgarh Through National Investigation Agency, Bastar at Jagdalpur District Bastar (CG)

---- Respondent

For the Appellant :- Mr. Rahul Tamaskar, Advocate
For the respondent :- Mr. Kishore Bhaduri with
Mr. Sabyasachi Bhaduri, Advocates and
Mr. Ismail Sheikh, Special Public
Prosecutor.

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board By Manindra Mohan Shrivastava, J.

02.03.2021

1. This appeal arises out of order dated 20.10.2020, by which the appellants' application for grant of bail has been rejected by the Special Judge (N.I.A.) Jagdalpur District Bastar (CG).
2. The prosecution case is that in an incident of bomb explosion on 09.04.2019, four police personnel and Bhima Mandavi, a member of Legislative Assembly died. The NIA carried out investigation and filed charge sheet before the Special Court,

involving as many as 36 accused including the present appellant also. The allegation against the present appellant is that the appellant was also involved in the alleged conspiracy along with other co-accused under which he was assigned the role of collecting electric wire for being used for laying explosives. It is alleged that with the use of the wire procured by the present appellant underground explosive exploded resulting in death of MLA Bhima Mandavi, five police personnel and many injured.

3. Learned counsel for the appellant would argue that though the incident is said to be grievous and the alleged offences are heinous in nature, the appellant has been involved only on certain suspicion without there being clinching evidence so as to constitute a prima-facie material against him. Learned counsel for the appellant would argue that the involvement of the present applicant is based on his name disclosed in the memorandum statement of co-accused Matkaram and Linge Tati also. He would further argue that he is falsely involved in procuring electric wire in the statement of protected witness D and E. Learned counsel for the appellant would argue that mentioning of name in the memorandum statement, by itself, is not an admissible piece of evidence and it cannot be said to be a material, unless it leads to discovery of fact relevant. According to him, at the most, all that can be said that the appellant who is otherwise a shopowner and supplier of materials may have

sold electric wire to certain persons but that by itself, is not sufficient to involve him in the alleged commission of offence, unless there is some other material, independent of memorandum of co-accused, that the appellant was involved in the conspiracy also. He would submit that that mere sale of certain articles which are openly sold in the market would not involve a person in the conspiracy leading to commission of alleged offence. Learned court below has rejected the application mechanically without formation of opinion as contemplated under section 43(D) of the Unlawful Activities (Prevention) Act.

4. On the other hand, learned counsel appearing for the NIA/respondent would submit that the alleged incident of murder of a sitting MLA and Police personnel was outcome of a well hatched conspiracy of all the accused who were assigned different role to play and the present appellant was also part of the same conspiracy, assigned the role of procuring electric wires to be used in laying explosive material underground. He would submit that it is not only the memorandum of Matkaram and Linge Tati, that the appellant has been named as one of the conspirators involved in the alleged commission of offence, the statement of protected witness D and protected witness E, prima facie, shows that the appellant had procured electric wire from one of them and then it gave to other protected witness for being supplied to Linge Tati and the witness statement is

that the electric wire were supplied in the house of Linge Tati. He would further submit that in the present case, after filing of the charge sheet, the learned trial Court upon finding that a prima facie case is made out for trial, has framed charges against the present appellant therefore, there is overwhelming material in the charge sheet and the case diary to form an opinion in terms of provision contained in section 43 D (5) of the Unlawful Activities (Prevention) Act.

5. We have heard learned counsel for the parties, perused the material and the contents of charge sheet and the case diary as disclosed before us by learned counsel for the respondent/NIA.

In a case involving allegation of commission of offence under the Unlawful Activities (Prevention) Act, there exists special provision regulating exercise of discretionary jurisdiction to grant or not to grant bail, as contained in section 43 D (5)(6) and (7) which is reproduced as below.

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

XXXXXXXX	XXXXXX	XXXXXX
XXXXXXXX	XXXXXX	XXXXXX
XXXXXXXX	XXXXXX	XXXXXX

(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.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

6. The aforesaid provision and the scheme of the act as also the relevant consideration which are required to be kept in the mind by the Court while considering application for grant of bail in such category of cases came up for consideration of Hon'ble Supreme Court in the case of **National Investigation Agency vs. Zahoor Ahmad Shah watali (2019) 5 SCC 1**. While restating the settled legal position about matter to be considered for deciding an application for bail, as mentioned in para 21 of the said judgment, the special provisions contained in section 43 D we are also taken note of and was observed:-

“ 23. By virtue of the proviso to subsection (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and

the Narcotic Drugs and Psychotropic Substance Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is “prima facie” true. By its very nature, the expression “prima facie true” would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is “prima facie true”, as compared to the opinion of accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. Nevertheless, we may take guidance from the exposition in the case of *Ranjitsing Brahmajeetsing Sharma* (supra), wherein a threeJudge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paragraphs 36 to 38, the Court observed thus:(SCC pp.316-17)

“36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.

38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence..... What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea...."

And again in paragraphs 44 to 48, the Court observed: (SCC pp 318-20).

"44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to

the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

47. In *Kalyan Chandra Sarkar v. Rajesh Ranjan* 15, this Court observed: (SCC pp. 53738, para 18)

‘18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in the case *Puran v. Rambilas* 16(SCC p. 344, para 8)

“ 8).....‘Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. ... That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated.”

We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement

of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail. Therefore, we are not in agreement with the argument addressed by the learned counsel for the accused that the High Court was not expected even to indicate a prima facie finding on all points urged before it while granting bail, more so in the background of the facts of this case where on facts it is established that a large number of witnesses who were examined after the respondent was enlarged on bail had turned hostile and there are complaints made to the court as to the threats administered by the respondent or his supporters to witnesses in the case. In such circumstances, the Court was dutybound to apply its mind to the allegations put forth by the investigating agency and ought to have given at least a prima facie finding in regard to these allegations because they go to the very root of the right of the accused to seek bail. The nonconsideration of these vital facts as to the allegations of threat or inducement made to the witnesses by the respondent during the period he was on bail has vitiated the conclusions arrived at by the High Court while granting bail to the respondent. The other ground apart from the ground of incarceration (2004) 7 SCC 528 (2001) 6 SCC 338 which appealed to the High Court to grant bail was the fact that a large number of witnesses are yet to be examined and there is no likelihood of the trial coming to an end in the near future. As stated hereinabove, this ground on the facts of this case is also not sufficient either individually or coupled with the period of incarceration to release the respondent on bail because of the serious allegations of tampering with the witnesses made against the respondent.'

48. In *Jayendra Saraswathi Swamigal v. State of T.N.* 17 this Court observed : (SCC pp 21-22, para16)

' 16. The considerations which normally weigh with the court in granting bail in nonbailable offences have been explained by this Court in *State v. Jagjit Singh and Gurcharan Singh v. State (Delhi Admn.)*¹⁷ and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of

the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.’
”

24. A priori, the exercise to be undertaken by the Court at this stage - of giving reasons for grant or non-grant of bail - is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad (2005) 2 SCC 13 (1962) 3 SCR 622 (1978) 1 SCC 118 probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.

7. Further, the impact of framing of charges in such cases was also considered as one of the relevant consideration while considering bail application as below .

“ 26. Be it noted that the special provision, Section 43 D of the 1967 Act, applies right from the stage of registration of FIR for 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”.

8. Their Lordships in the Supreme Court also emphasised upon the need to have view of the totality of the material gathered by the Investigating agency and observed that even issue of admissibility of evidence could not be raised at such stage as it would be matter of consideration during trial and the Court shall be required to look into the contention of the documents and take those document into account, as it is.
9. The decision of the Supreme Court was considered by the coordinate Bench of this Court in the case of Abhay Nayak and others vs. State of Chhattisgarh passed in Criminal Appeal No. 1213 of 2019 on 20.12.2019.
10. If we apply aforesaid principle laid by the Supreme Court to the present case, we are of the view, that there exists material to form an opinion that there are reasonable ground for believing that the acquisition against the present appellant is prima facie true.

Having said so, bail application is required to be rejected as a matter rule because in the cases of this category, the normal rule of bail not jail has no application.

11. The trial Court has rejected the application holding that the available material in the case diary makes out the prima-facie case regarding involvement of the present appellant, therefore, the appeal has to be and is accordingly rejected.
12. Before parting with the order, we must make it clear that consideration as above are only limited to entitlement to grant of bail and the trial Court shall not be influenced by any of the observation made by this Court.
13. Accordingly, this appeal is rejected.

Sd/-

Manindra Mohan Shrivastava
Judge

Sd/-

Vimla Singh Kapoor
Judge