

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPLICATION (APL) NO. 1658 2022

Lokpriya Uddhav Sakhare (In Jail) Age 45 years, Occ : Doctor R/o – Mahalaxmi Palace Manewada Road, Near Police Station, Nagpur.	}	.. Applicant
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Versus

State of Maharashtra, Through Police Station Officer, Police Station, Ajni, Nagpur	}	.. Respondent
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Shri. D. V. Chavan Advocate along with Shri. C. B. Barve, Advocate for applicant.

Shri. A. R. Chutke, APP for respondent State.

CORAM : G. A. SANAP, J.

DATE : 13/04/2023.

ORAL JUDGMENT

Rule. Rule is made returnable forthwith. Heard finally by the consent of the learned counsel appearing for the parties.

(2) In this application filed under Section 482 of the Code of Criminal Procedure (Cr.P.C.), the challenge is to the part of the

order dated 06/12/2022, passed by the learned District Judge-1 and Additional Sessions Judge, Nagpur, whereby the applicant who has become an approver is ordered to be detained in custody until further orders.

(3) The facts relevant for the purpose of this application are as under :-

The applicant who was accused No.3 in the crime bearing No.578 of 2021 registered at Ajni Police Station, Nagpur for the offences punishable under Sections 420, 406, 409, 384, 506, 120-B of Indian Penal Code read with Sections 3(1)(ii), 3(2), 3(4) and 4 of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA). In this crime, there are eight accused. The accused Nos.1 and 2 have been arrested. The applicant surrendered before the learned District Judge-1 and Additional Sessions Judge, Nagpur on 12/09/2022. Before surrender, the charge-sheet was filed by the Investigating Officer against the arrested accused, namely, accused Nos.1 and 2 and all the absconding accused. In this crime, five accused are absconding. Except accused No.8 the remaining absconding accused have been declared as proclaimed offender.

(4) The applicant made an application with a prayer to become an approver. Learned Judge by his order dated 06/12/2022, allowed his application and tendered him pardon under Section 306 of the Cr.P.C. on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor in the commission of crime. The learned Judge has discharged him as an accused in the case. However, the learned Judge ordered his detention in custody until further orders.

(5) The applicant approver has come before this Court and challenged that part of the impugned order. It is his case that since he has been discharged and he has agreed to make full disclosure of the facts relating to crime, it is not necessary to detain him. The approver has stated that he is ready to abide by the conditions of the pardon. It is his case that his evidence has to be recorded without any amount of delay.

(6) In my view, the applicant accused cannot be detained in custody for indefinite period. However, at the same time, the Court has to see what is in the best interest of the approver, as well

as in the best interest of the prosecution. In order to address the issue, I have heard learned Advocate for the applicant approver and learned APP for the State.

(7) In my view keeping all the facts and circumstances in mind, it would be necessary as well as in the interest of justice to ensure the early recording of the evidence of the approver and till completion of his evidence detain him in custody. If such course of action is adopted in the trial at this stage, it would be in the interest of approver, as well as in the interest of prosecution.

(8) In this case, five accused are yet to be arrested. The Investigating Officer after completion of the investigation has filed charge-sheet against the arrested accused, as well as absconding accused. The learned Judge has taken the cognizance of the offences mentioned in the charge-sheet. The role of each and every accused has been specifically set out in the charge-sheet. It is the case of the prosecution that all the accused pursuant to the conspiracy committed the offences mentioned in the charge-sheet.

(9) It is further stated that the police officer has made

note in the charge-sheet for filing of supplementary charge-sheet after arrest of the absconding accused. It is to be noted that the filing of supplementary charge-sheet would be procedural formality, in case there is no other substantial material collected during the course of further investigation. Even if, such material is collected, it would be relevant vis-a-vis offences for which the cognizance has been taken. Therefore, in order to protect the interest of the approver, as well as the interest of the prosecution, the invocation of the provisions under Section 299 of the Cr.P.C. would be appropriate.

(10) In this case, the accused Nos. 4 to 7 have been declared as proclaimed offender. The order passed by the learned Judge, as well as the record of publication of proclamation has been placed on record. The absconding accused have therefore, been put to notice of the prosecution pending against them by publication of proclamation. They are duty bound to submit to the majesty of the Court. If they do not comply the directions in the proclamation and submit to the majesty of the Court then, it would be a mistake on their part and they would be required to face the consequences in accordance with law. In this case, according to me, the trial Court

would be required to take recourse to the provisions of Section 299 of the Cr.P.C. and to proceed further in the matter. The trial Court needs to frame the charge and record the evidence of the approver at the earliest.

(11) It is to be noted that Section 299 is an exception to Section 273 of the Cr.P.C. As per Section 273, the evidence of the prosecution witnesses has to be taken in presence of the accused. Section 299 is an exception to Section 273 and it provides for the recording of the evidence of prosecution witnesses in absence of the accused. It is to be noted in order to invoke the provisions of Section 299, the paramount condition, namely, the jurisdictional fact has to be established by the prosecution. The prosecution must prove that the accused person has absconded and that there is no immediate prospect of his arrest in near future. If this fact is established, then the prosecution can make a request to the Court or the Court on its own proceed further and record the evidence of the prosecution witnesses in absence of the accused.

(12) Sub Section (1) of Section 299 is in two parts. The first part provides for the procedure to be followed before recording

the evidence in the absence of the accused. The second part of Section 299(1) deals with the procedure to be followed for admitting the said evidence against absconding accused on his or her arrest. It provides that, any such deposition may, on arrest of the absconding accused, be given in evidence against him in the enquiry into or trial for, the offence with which he is charged, depending upon the proof of the circumstances contemplated in the Section.

(13) It is to be noted that the object behind Section 299 is to preserve the valuable evidence of the prosecution against the absconding accused. On account of the absconding of the accused for indefinite period, the valuable evidence of the prosecution cannot be allowed to be vanished. It is not, therefore, out of place to state that in such a situation, every endeavour must be made by all concerned to ensure that evidence in such a matter is recorded without wasting any time and the same is preserved.

(14) It is necessary to mention that evidence of the approver is the direct evidence being a guilty partner with his co-accused in commission of the crime in their company. The approver while extending helping hand to the prosecution, at the same time

invites risk for himself. In cases, wherever, the prosecution has benefit of the evidence of the approver, every endeavor must be made to record his evidence at the earliest.

(15) In the present case, the four accused, namely, accused Nos.4 to 7 have been declared as proclaimed offender. They have not appeared before the Court. The Investigating Officer have stated in his affidavit that despite making sincere efforts, they could not be traced out and arrested. This fact would indicate that in order to save themselves from the clutches of the law, the absconding accused are avoiding the arrest. So as on today, the four accused, namely, accused Nos. 4 to 7 have been declared as proclaimed offenders. The jurisdictional fact, as contemplated under Section 299(1) of the Cr.P.C. exists to record evidence in this case to carve out an exception to Section 273 of the Cr.P.C. to record the evidence of the prosecution witnesses in their absence.

(16) The difficulty would be faced by the learned Judge, while proceeding further in the matter, in case of accused No.8, who has not yet been declared as proclaimed offender. Learned APP would submit that the particulars provided by the prosecution were not found

sufficient by the learned Judge to issue proclamation against accused no.8. Learned APP submitted that the learned Judge, therefore, orally informed that the case was not made out for issuance of proclamation against accused no.8. Learned APP submitted that the prosecution can take steps to provide all such particulars necessary for issuance of proclamation vis-a-vis accused no.1.

(17) The learned APP further submitted that the prosecution be given eight days time to make appropriate application before the learned Judge with necessary particulars for obtaining order to declare the accused No.8 as proclaimed offender and compliance of the order, namely, the publication of the proclamation.

(18) In my view, after granting an opportunity as above, the prosecution is required to display due diligence consistent with the above statement made across the bar by the learned APP. The prosecution therefore, shall take urgent steps to obtain the order to declare the accused No.8 as proclaimed offender. Once the accused No.8 is declared as proclaimed offender, the learned Judge will have no difficulty in framing the charge against the accused who have been arrested. The main charge is of conspiracy. The absconding accused

can be described in the charge as absconders being guilty partners who are facing the trial. The learned Judge on this count can take appropriate steps and precaution in this case in order to preserve the evidence of the approver. It would, therefore, be necessary to frame charge and record his evidence. Hence, the application can be disposed with following directions :

1. The learned in-charge prosecutor of the case after publication of the proclamation qua accused No.8 shall immediately apply before the learned Judge in terms of Section 299(1) of Cr.P.C.
2. Learned Judge on proof of the jurisdictional fact shall proceed further with the trial and shall see that the evidence of the approver is recorded at the earliest.
3. It is made clear that if any application is required for separation of a trial of the absconding accused, then the learned prosecutor shall make such an application.
4. Learned Judge after recording the evidence of the approver, namely his examination-in-chief and cross-examination by the

accused, who have been arrested, shall be released by following the procedure prescribed under law.

(19) The application is disposed of in above terms. Rule accordingly.

[G. A. SANAP, J.]