



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

CRIMINAL APPLICATION [APPA] NO. 532/2024
IN CRIMINAL APPEAL NO. 303/2024.

Nishant Pradeep Agrawal

-VERSUS-

Anti Terrorist Squad, Lucknow and another.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri S. Dave, Senior Advocate with Shri C.B. Barve,
Advocate for the Applicant/Appellant.
Shri A.B. Badar, A.P.P. for Respondents.

CORAM : VINAY JOSHI AND
VRUSHALI V. JOSHI, JJ.

DATE : AUGUST 23, 2024.

Heard.

2. This is an application of the convicted accused in terms of Section 389[1] of the Code of Criminal Procedure, seeking suspension of execution of sentence and for enlargement on bail during pendency of appeal. The accused stood charged for the offences punishable under Section 66-F of the Information Technology Act, Sections 3[1][c], 5[1][a],[b],[c],[d] and 5[3] of the Official Secrets Act, in Crime No.7/2018

registered with ATS Uttar Pradesh at Lucknow. The prosecution has led evidence of in all 15 witnesses and relied on certain documents to establish the leveled charges. After full fledged trial, the Trial Court has held that the prosecution has succeeded in proving the aforesaid offences on the touchstone of requisite standard of proof under Criminal law. The trial Court sentenced the accused to undergo life imprisonment for the offence punishable under Section 66-F of the Information Technology Act; to undergo rigorous imprisonment for 14 years for the offence punishable under Section 3[1][c] of the Official Secrets Act and to undergo rigorous imprisonment for 3 years and pay fine of Rs.3000/- for the offence punishable under Section 5[1][a], [b], [c], [d] and Section 5[3] of the Official Secrets Act. All the sentences were directed to run concurrently.

3. The accused has joined BRAHMOS Aerospace Private Limited, Nagpur [BAPL] as an Executive Trainee and then held various posts in the offices of BAPL at Hyderabad and Nagpur. It is the prosecution case that the accused while working on various posts at BRAHMOS Aerospace Private Limited, Hyderabad and Nagpur, has unauthorizedly collected the secret,

restricted classified data, sensitive documents, copied it secretly on his personal device from the official computer and retained the same in his personal laptop and hard disk. The accused was in contact with various foreign agents through social media applications and facilitated to leak the secret, restricted sensitive prohibited information relating to the defence. The information was leaked to the foreign agents which is prejudicial/ harmful to the safety and security of the Nation. It is the prosecution case that the secret information and prohibited material was found in the personal laptop of the accused which came to be seized by drawing panchnama. The said information, data, files [total 19 in number], were sent for analysis and it was found that there was possibility of leakage of information which was stored by the accused in his personal laptop. It is also the prosecution case that the accused was in contact with the fictitious Facebook accounts which were operated from Islamabad, Pakistan. The accused had downloaded various applications sent by one Sejal Kapoor through her linked-in-account and facilitated foreign buyers to have access to the secret, sensitive information relating to BRAHMOS Missiles.

4. Initiation of prosecution was on receipt of secret information in the month of October, 2018 that two Facebook accounts in the name of Neha Sharma and Pooja Ranjan are being operated from Pakistan. The said foreign agents and spy are contacting via internet, through Facebook accounts with the employees holding key position in various defence establishments in India. On receipt of said information, the first information report was lodged for the aforesaid offences. On verification of the origin of those accounts, the investigating officer obtained search warrant against the accused. It was found that the accused was in the friend list of fictitious account holders Neha Sharma and Pooja Ranjan which were operated from Pakistan. The accused also communicated with one Sejal Kapoor on linked-in app. During the course of investigation, it was revealed that the accused had chat with Sejal Kapoor who has sent some links, which were downloaded by the accused. It is also the prosecution case that the accused while serving at BAPL Hyderabad has inserted the external devises into the official computer system of Brahmos Aerospace to steal the secret files. It is submitted that despite having given an undertaking, the accused has disclosed his identity and job profile to the fictitious account holder Sejal

Kapoor. It was revealed that the links which were downloaded by the accused were malware, which he installed in his personal laptop and hard disk. The same were capable of siphoning secret files which the accused has stored in his personal laptop without authorization. It was found that the classified information was found in the personal laptop of the accused which was exposed to the foreign agents.

5. The prosecution has relied on various circumstances and seizures effected during the course of investigation. The prosecution heavily relied on the evidence of P.W.3 – N.N. Kumar, who was working as an Executive Director [Production] with BAPL, Hyderabad, P.W.4 – Achyut Shankarrao Jeo, General Manager, BAPL Nagpur, P.W.9 – Vakil Ahmad, Computer Operator at ATS Head Quarter, Lucknow, P.W.10 – Seturamchandran Ayyer, Chief General Manager, HR of Brahmos and various investigating officers. Reliance is placed on the undertaking given by the accused and other related documents. During the course of investigation, the police have seized personal laptop, three mobile handsets, router, hard disk from the house search of the accused.

6. While claiming suspension, an endeavor was made to impress that the files which were found in the personal laptop of the accused were for the purpose of preparing project report. The accused who is an insider has stored certain files on his laptop and hard disk. Those documents though secret, restricted and confidential, were given to him by his superior Alan Abraham for the purpose of project preparation. The conduct of the accused was throughout meritorious, beyond suspicion. It is contended that in normal course, the accused accepted the friend request from the Facebook accounts, linked-in account and he was not aware that those were malware and he downloaded the links unknowingly. It is contended that the essential ingredients to constitute an offence punishable under Section 66-F of the Information Technology Act and Section 3[1][c] of the Security Act are totally missing. There is no material to indicate that the accused intentionally accessed the confidential information, created threat to the sovereignty, integrity, security and safety of the Nation. It is submitted that there is no material to establish that the accused has obtained/retained the secret and sensitive information, and secondly there is no material to establish that he has transmitted the information which is likely to affect the

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sovereignty, safety, security and integrity of the Country.

7. It is explained that the accused was in search of job, therefore, he had a chat with Sejal Kapoor, and for that purpose he has forwarded his bio-data, which cannot be treated as an adverse. The accused has unintentionally downloaded the links sent by Sejal Kapoor. Moreover, it is submitted that the accused is not an outsider to contend that he has secretly obtained and stored the information in his laptop. Our attention has been invited to some of the admissions, to state that there was no leakage of information and there is no record that the accused has used external device for transmitting the information from the office computer.

8. Besides that, the learned Senior Counsel would submit that the accused has undergone imprisonment for 4 years, 8 months and 5 days. In other words, he has already undergone the sentence which is imposed for Section 5[1] and 5[3] of the Official Secrets Act. Our attention has been invited that during trial, the accused was released on bail by this Court on 03.04.2023, and thus, he would be available for hearing of the

appeal. Lastly, it is submitted that the accused is young meritorious Scientist having family responsibility. His long incarceration would affect his entire carrier and, therefore, suspension and bail is justified.

9. On the other hand, the learned A.P.P. appearing for the respondent has put stiff resistance to the urge for suspension and grant of bail by inviting our attention to the portion of evidence of various witnesses who supported the prosecution case. It is strenuously argued that the accused was holding a sensitive post in BAPL. He had access to the office computer wherein secret and classified information was stored. There is no denial that the secret and classified files have been seized from the personal laptop of the accused. Moreover, it has come in the evidence that the accused had contact with the Facebook accounts which were operated from Islamabad, Pakistan. The accused himself has downloaded the malware to facilitate transmitting of secret documents. It is submitted that the documents exposed are classified documents, it contains vital information about capability of the missile, which would pose a threat to the security and safety of the Country. On obtaining such secret

information, enemy may prepare defence to counter the effect of the said missile. The learned A.P.P. also took us to Section 3[2] of the Official Secrets Act regarding the requirement to prove the guilt. Lastly it is submitted that the trial Court has properly evaluated the entire evidence while arriving to the finding of guilt, and thus, the accused does not deserve for suspension and enlargement on bail.

10. Section 389[1] of the Code of Criminal Procedure deals with suspension of execution of sentence during the pendency of the appeal and release on bail. Section 389[1] mandates the Appellate Court to record reasons in writing for ordering suspension of execution of sentence. The requirement of recording reasons in writing indicates that there has to be careful consideration of all the relevant aspects and the order directing suspension shall not be passed as a matter of routine. While dealing with the suspension application, nature of accusation, gravity of the offence, sentence imposed by the trial Court, the manner in which the crime is committed and its wider social impact needs to be considered. There is distinction in between grant of bail at pre-conviction stage and post conviction

suspension of sentence and bail. Though appeal is continuation of trial, however, the presumption of innocence has got tinkered by the order of conviction recorded after full fledged trial.

11. While dealing with the case of suspension we are guided by the decision of Supreme Court in case of **Omprakash Sahni .vrs. Jai Shankar Chaudhary and another – [2023] 6 SCC 123**, of which paragraph no.33 is relevant, which reads as under :

“33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try to pick up

few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.”

12. For the purpose of deciding the urge of suspension of sentence and grant of bail, we have considered entire relevant material on prima facie basis. Though both sides took us in extenso to the evidence led in the trial, however, we are not inclined to make exhaustive comments on the evidence, admissions and impact of evidence. At this stage the scope is restricted to the extent of forming prima facie view of the matter.

13. We are aware that during the pendency of the trial, the accused was released on bail by this Court. Certainly this cannot be a decisive factor for suspension and grant of bail, but, it is one of the bit for consideration. It is evident from the bail order dated 03.04.2023, that earlier this Court has denied bail on merits, however, liberty was granted to approach afresh, if the trial is not completed within the stipulated period. In such a background, after lapse of specified period, the accused has applied to this Court for bail and apparently the bail was granted for the reason that there is considerable delay in holding the trial.

Be that as it may, the release of the accused on bail in such background has no impact for our consideration.

14. We have gone through the entire material and considered the rival submissions for taking a prima facie view to form an opinion regarding suspension of sentence and grant of bail. We have considered the evidence led by the prosecution before the trial Court. Prima facie it emerges from the evidence that the accused during his working as a System Engineer with BAPL had access to the office computers, from where he has copied classified and secret data on his personal digital device and saved the data on his personal laptop. Notably defence has not denied that the official files have been seized from his personal laptop. The accused is B.Tech in Mechanical Branch, having sufficient understanding about the use of social media, electronic gadgets etc. He was dealing with sensitive files and was fully aware about various circulars issued by the Ministry of Defence, DRDO with regard to the confidentiality of the classified information. He has also given an undertaking to maintain secrecy, which is not in dispute. By virtue of holding a post of Scientist in BAPL, the accused was obliged to maintain very high

and strict secrecy and maintain / follow the secret protocol. These aspects also needs consideration.

15. It is prima facie evident that the accused has copied the secret information/files in his personal laptop. It has come on record, rather not disputed, that he has accepted the friend request on Facebook, which was created in Pakistan. The accused had a chat with Sejal Kapoor linked-in account without knowing her identity. Despite restrictions, he has shared his bio-data to said Sejal Kapoor and more particularly, he installed three links in his laptop wherein secret and restricted classified information was stored. It has come in the evidence, that he has installed updated new version of the links which were operated from Pakistan. It is the evidence that business record of Sejal Kapoor discloses that they are trying to contact various officials working/retired from the defence establishment throughout the Country. The FSL report indicates that the data available on the files is copied, though the accused was not authorized to copy all secret, restricted and classified data. He made it vulnerable to unknown malware links, exposing crucial information to the enemies. It is the evidence that the information was of highly

sensitive nature, which would result in causing serious threat to the defence mechanism of the Country. It was revealed during evidence that those accounts were registered at Pakistan, and the intelligence agency of Pakistan was operating those accounts from the address at Islamabad, Pakistan.

16. The forensic report indicates that the links which were already installed in the laptop of the accused remained active and were capable of sharing all the data to cloud base server. It is the evidence that during investigation, the police found total 19 files which were titled as 'secret and restricted files'. Out of them, 16 files were titled as 'Secret Files' and 3 files were titled as 'Restricted Files'. The accused was working as a Senior System Engineer with BAPL, which is under the control of Ministry of Defence. Despite various circulars, the accused has disclosed his identity and his post and place of working in defence establishment. Though the learned Senior Counsel appearing for the accused has attracted our attention to few admissions, however, the circumstantial evidence runs against the isolated admissions, which is a matter of appreciation at the time of final hearing of the appeal. Always the intention is to be gathered

from the various circumstances.

17. Taking over all view of the matter, certainly this is not a case to form a prima facie opinion that the accused has fair chances of success in appeal. The issue largely relates to security and safety of the Country, which has to be seriously viewed. The impact of crime may pose a serious threat to the National security. In our view when the question of National security and safety arises, it is quite serious than the cases of gruesome murder. In the circumstances, we are not prepared to take a risk to put the National security and safety at risk. Moreover, the trial Court after appreciation of the entire material has recorded a finding of guilt. On prima facie assessment, we do not see any perversity or glaring error committed by the trial Court while reaching to the conclusion. Considering the seriousness of the crime, nature of evidence and its social impact, we are not inclined to accede the applicant's urge for suspension of sentence and grant him bail. Having regard to above, we find that no case is made out to exercise our judicial discretion in suspending the execution of sentence. Criminal Application therefore stands rejected.

While parting with this order, we may clarify that the

above observations are made on prima facie basis, which has no impact on the merits of the appeal. Printing of paper book be expedited.

18. Criminal Application stands disposed of accordingly.

JUDGE

JUDGE