KABC010106012017

IN THE COURT OF THE XLIX ADDL. CITY CIVIL & SESSIONS JUDGE, [SPECIAL COURT FOR THE TRIAL OF NIA CASES], (CCH-50) AT BENGALURU

DATED : 24th day of February, 2024

PRESENT:

Sri Gangadhara C.M.
B.Com., LL.B.,
XLIX Addl. City Civil & Sessions Judge,
[Special Judge for the trial of NIA Cases],
(CCH-50) Bengaluru.

Spl.C.No.181/2017

COMPLAINANT : The National Investigation Agency, Bengaluru.

(By : Learned Special Public Prosecutor)

V/s

ACCUSED : Irfan Pasha and others

ACCUSED NO.6/ APPROVER : Mr. Mohammed Ghouse Nayazi @ Ghouse Bhai, S/o Nayaz Ahmed, Aged about 42 years, R/o House No.304, 17th Cross, 2nd Block, R.T. Nagar, Bengaluru.

(By : Sri Muzaffar Ahmed, Advocate)

ORDERS

Accused No. 6/Approver, Mr. Mohammed Ghouse Nayazi @ Ghouse Bhai, has filed an application seeking his release from custody on bail.

2. Accused No. 6/Approver has pleaded in his application that a case was registered under Crime No. 126/2016 at the

Commercial Street Police Station on 16.10.2016 for offences under Section 302 read with Section 34 of the IPC, for the killing of Sri Rudresh. During the investigation, accused Nos. 1 to 5 were arrested. Subsequently, the case was transferred to the National Investigation Agency (NIA) for investigation by the Central Government. The NIA concluded the investigation and submitted a charge sheet to the Court on 21.04.2017, for offences under Sections 120B, 302 read with Section 34 of the IPC, and Sections 16, 18, and 20 of the Unlawful Activities (Prevention) Act, 1967 (U.A.(P) Act).

3. He further pleaded that he was one of the accused in the charge sheet submitted by the NIA. On 02.03.2024, the NIA arrested him and produced before this Court. He submitted a letter to this Court on 16.05.2024, seeking permission to give a statement. This Court considered his request, and his statement was recorded by the learned XVII ACMM, Bengaluru, on 25.05.2024. On 30.05.2024, he requested this Court to grant a pardon. Accordingly, this Court tendered the pardon with certain conditions on 06.07.2024. He was later examined as a prosecution witness (PW.76). He is no longer an accused. The prosecution never declared him hostile, and the learned Special Public Prosecutor did not certify that he has willfully concealed any essential facts or given false evidence, thereby violating the conditions of the pardon. Furthermore, the learned Special Public Prosecutor did not file any application under Section 308 of the Cr.P.C., claiming that he has violated the conditions of the pardon. He has fulfilled the conditions and supported the prosecution’s

case. Even after the completion of four months, the learned counsel for the accused has not completed the cross-examination. On the contrary, they are attempting to prolong the proceedings and abuse the process of law. His prolonged detention in judicial custody is in violation of his right to life and personal liberty, guaranteed under Article 21 of the Constitution of India. Therefore, he has prayed for his release from custody.

4. After the filing of the application and the conclusion of the cross-examination of the approver/accused No. 6, the Investigating Officer submitted a report through the learned Special Public Prosecutor. The report states that accused No. 6/approver was arrested on 02.03.2024, and a supplementary charge sheet was filed against him on 28.06.2024. On 16.05.2024, accused No. 6/approver filed an application seeking pardon and requesting to be considered as an approver. On 06.07.2024, this Court granted pardon to accused No. 6 and removed him from the list of accused. He was examined as PW.76 and subjected to cross-examination on various dates. He made full and true disclosure of all circumstances within his knowledge relating to the offence, including his role and the role of the other accused persons in the commission of the offence in this case. He also deposed in support of the prosecution's case during cross-examination.

5. This Court has heard the arguments of the learned counsel appearing for accused No. 6/approver and the learned counsel representing the learned Special Public Prosecutor.

6. The points that arise for the Court's consideration are as follows:

1. **Whether this court can release accused No. 6/approver from custody on bail without the termination of the trial?**

2. **What order?**

7. The findings of this Court to the above said points are as follows:

Point No.1 : In the affirmative;

Point No.2 : As per final order, for the following:

R E A S O N S

8. **Point No. 1**: It appears from the records that a case was registered under Crime No. 124/2016 at the Commercial Street Police Station for the murder of Sri Rudresh, under Section 302 read with Section 34 of the IPC. The Investigating Officer took up the case for investigation and began collecting evidence against the accused. Meanwhile, the case was transferred to the NIA by the Central Government, and the NIA continued the investigation, collecting additional evidence. The NIA then submitted a charge-sheet to this Court, accusing accused Nos. 1 to 5 of offenses under Sections 120B, 302 read with Section 34 of the IPC, and Sections 13, 18, and 20 of the U.A.(P) Act, listing accused No. 6 as absconding. This Court took cognizance of the offences, heard both sides, and framed charges against accused Nos. 1 to 5, as there was enough evidence to proceed against them. The trial proceeded for accused Nos. 1 to 5, while accused No. 6 remained at large.

9. On 02.03.2024, accused No. 6 was arrested and produced before this Court. He was initially remanded to police custody for custodial interrogation and was later remanded to judicial custody.

10. It further appears from the records that on 16.05.2024, accused No. 6 submitted a letter to this Court requesting permission to give a statement. This resulted in his physical presence before the Court from the Central Prison, Bengaluru. After confirming that accused No. 6 voluntarily came forward to give statement, this Court asked the learned Chief Metropolitan Magistrate, Bengaluru, to record his statement. Accordingly, the learned XVII ACMM, Bengaluru, recorded his statement under Section 164 of the Cr.P.C. Later, on 04.06.2024, accused No. 6 requested this Court to grant him pardon. This Court granted him pardon on 06.07.2024, subject to certain conditions, and removed him from the list of accused.

11. The prosecution later examined accused No. 6 as a prosecution witness (PW.76). His examination has been completed. The Investigating Officer, through the learned Special Public Prosecutor, has reported that PW.76 made a full and truthful disclosure of the circumstances surrounding the offense, detailing his own role as well as that of the other accused. He also supported the prosecution's case during cross-examination.

12. It is important to note that the learned Special Public Prosecutor has not filed an application under Section 308 of the Cr.P.C., alleging that PW.76 violated the conditions of the pardon,

and this Court has not issued any such order under Section 308. Therefore, accused No. 6, now an approver, has filed the present application seeking his release from custody.

13. The counsel for accused No. 6 / approver has relied on the decision of the Hon'ble High Court of Karnataka in **Lakshmamma vs. State of Karnataka, Criminal Petition No.384/1980.** In this decision, the Hon'ble High Court held in paragraph 4 as follows:

> 4. I see considerable force in the said contention of Mr. Raja Iyengar. It is not disputed the petitioner has been tendered pardon under Section 307 of Cr.P.C. by the Sessions Court. According to Section 307, the Sessions Court can tender pardon to the accused committed to it for trial on the same condition i.e., the condition stated in Section 306 of Cr.P.C. The only condition stated in Section 306 Cr.P.C is that the person to whom the pardon is tendered shall make 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 thereof. The prohibition contained in Section 306(4)(b) applies only to Magistrate and not to the Sessions Court. It does not constitute the condition on which the pardon may be tendered to the accused person. The provisions of law contained in Section 306(4)(b) cannot be made applicable to the case of a person to whom pardon has seen tendered under Section 307 of Cr.P.C. by the Sessions Judge analogy. As there is no prohibition in Section 307 of Cr.P.C. the petitioner can be released on bail. The petitioner being a lady is entitled to be released on bail. The learned High Court Government Pleader also very fairly conceded that he has no objections to release the petitioner on bail.
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> **(emphasis supplied)**

14. The learned counsel for accused No. 6/approver has also relied on the decision of the Hon'ble High Court of Kerala in **Shammi Firoz v. National Investigation Agency, Ministry of Home Affairs, Govt. of India, New Delhi, 2011 Cri.L.J.1529**. In this decision, the Hon'ble High Court held in paragraph 15 as follows:

"15. If pardon was granted to the petitioner under Sec. 307 Cr.P.C. by the Special Court itself which is a Sessions Court competent to take cognizance of the offence without a committal, then the bar under Section 306 (4) (b) does not apply. The said provision will be attracted only in the case of a person who has accepted a tender of pardon made under sub-section (1) of Sec. 306 Cr.P.C. by a Magistrate. Here, the pardon was tendered by the Special Judge who is a Sessions Judge and that too under Sec. 307 Cr.P.C. and, therefore, Sec. 306 (4)(b) is not attracted. I am fortified in this conclusion by the decision of the Karnataka High Court in Lakshmamma v. State of Karnataka - 1980 (2) Kar.L.J. 178. Hence, in the absence of any statutory prohibition against the release of the petitioner on bail, I am inclined to grant bail to the petitioner who has been in custody since 19-3-2010 onwards. Accordingly, the petitioner is directed to be released on bail in each of the above crimes on his executing a bond for Rs. 25,000/- (Rupees twenty five thousand only) with two solvent sureties each for the like amount to the satisfaction of the Special Court for trial of N.I.A. Cases, Ernakulam in each of the above crimes and subject to the following conditions:- ……"

(emphasis supplied)

15. Both decisions from the Hon'ble High Court of Karnataka and the Hon'ble High Court of Kerala confirm that when a Sessions Court (or Special Court) grants a pardon under Section 307 Cr.P.C., the prohibition under Section 306(4)(b) does not apply. This Court also has the powers of a Sessions Court under Section 16 of the NIA Act and shall try the offence in accordance with the procedure prescribed in the Code for trials before a Court of Session. Although Accused No. 6/Approver submitted a letter before the investigation was completed, this Court granted him pardon after the supplementary charge sheet was submitted. In fact, this court granted pardon to accused No. 6/Approver under Section 307 of the Cr.P.C. Therefore, the bar under Section 306(4)(b) does not apply, as confirmed by both decisions.

16. Assuming that this Court granted pardon to Accused No. 6/approver under Section 306 of the Cr.P.C., the question

remains whether the Court can release him on bail during the pendency of the trial. To answer this, it is important to review Section 306 of the Cr.P.C., which reads as follows:

> "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.
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> (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);
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> (b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.
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> (3) Every Magistrate who tenders a pardon under sub-section (1) shall record— (a) his reasons for so doing;
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> (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.
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> (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;
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> (b) shall, unless he is already on bail, be detained in custody until the termination of the trial.
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> (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-
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> (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;
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> (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;
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> (b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself."

17. According to sub-Section 4(b) of Section 306, a person accepting a pardon must be detained in custody unless already on bail until the trial concludes. In this case, Accused No. 6/approver was not on bail when granted pardon. As per this provision, Accused No. 6 must remain in custody until the trial is over.

18. In this regard, the learned counsel for accused No. 6/approver has relied on the decision of the Hon'ble High Court of Bombay, in **Danish Ali Jamaluddin Ahmed vs. State of Maharashtra, 2023 SCC OnLine Bom 2471**. In this decision, the Hon'ble High Court of Bombay held in paragraph 29 as follows:

> "29. I am, therefore, of the view that with the Witness Protection Act in place, when the applicant himself is a prosecution witness and an important one at that, it is the responsibility of the State to ensure that the applicant is fully protected in accordance with the Witness Protection Act. It is in this view of the matter, that sub-section 4 of section 306 can be harmoniously construed by achieving the balance of personal liberty of the applicant enshrined in Article 21 of the Constitution of India without in any manner tinkering with the object of sub-section 4 of section 306. In my humble opinion, detaining the applicant for an indefinite period when there is nothing on record to indicate when the trial will be terminated is not only be unfair to the applicant but will be deterrent to those witnesses seeking tender of pardon in future. This cannot be the object of sub-section 4 of section 306, more so when legislation like the Witness Protection Act is now in place. Learned counsel for the Urmila Ingale emphasized that the applicant does not want any protection, nonetheless in the facts of the present case, the decision can be best left to the prosecution and the concerned agencies to take an informed decision of providing protection to the applicant or otherwise in consonance with the procedure prescribed.
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> **(emphasis supplied)**

19. The High Court, after considering Section 306(4)(b) and relevant Hon'ble Apex Court decisions, stated that sub-section 4 of Section 306 could be interpreted to balance the applicant's personal liberty with the objective of Section 306. Therefore, the approver could be released before the trial ends.

20. The learned counsel for accused No. 6/approver has also relied on the decision of the Hon'ble High Court of Judicature at Patna, in **Mandeep Yadav @ Manjeet Yadav @ Matla vs. The National Investigation Agency, in Criminal Appeal (DB) No.1048/2024, decided on 12.09.2024**. In this decision, the Hon'ble High Court of Judicature at Patna, held in paragraph 17 as follows:

> 17. Therefore, our answer to the aforesaid question is as under:-
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> "Though there is a bar under Section 306(4)(b) of the Code to release the approver on bail, if he is already in custody, till termination of the trial, High Court can release such person on bail by exercising inherent powers. However, such powers can be exercised where such an approver, to whom the concerned Court has tendered the pardon and the said accused has been examined as a prosecution witness during which he has fully supported the case of the prosecution, and in such a case, the approver can be released on bail.
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> **(emphasis supplied)**

21. In this decision, the Hon'ble High Court has clearly held that when a court grants pardon to the approver and such approver has been examined as a prosecution witness, during which he has fully supported the case of the prosecution, the court, in such a case, can release the approver on bail. In this case, as noted above, the investigating officer submitted a report through the learned Special Public Prosecutor stating that PW.76 made a full and truthful disclosure of the circumstances surrounding the offense, detailing his own role as well as that of the other accused. He also supported the prosecution's case during cross-examination. Since his continued detention is no longer necessary, the approver/PW.76 is entitled to be released on bail as laid down in the aforementioned decisions. In light of

the above discussion, **this court answers point No. 1 in the affirmative.**

22. **Point No. 2**: In view of the discussions above, this Court proceeds to pass the following:

ORDER

The application filed by the approver, Mr. Mohammed Ghouse Nayazi @ Ghouse Bhai, is hereby allowed, and he is enlarged on bail subject to the following conditions:

CONDITIONS

1. **Accused No. 6/Approver shall execute a personal bond for Rs.1,00,000/- with a surety for the like sum.**
2. **Accused No. 6/Approver shall not threaten prosecution witnesses or tamper with the prosecution evidence in any manner.**
3. **Accused No. 6/Approver shall submit his contact number(s) and address to this Court in a closed envelope.**
4. **Accused No. 6/Approver shall not indulge in any criminal activities in the future.**
5. **Accused No. 6/Approver shall not leave the country without prior permission of this Court.**

(Dictated to the Senior Sheristedar, transcript thereof computerized by him, corrected and then pronounced by me in open Court on **24th day of February, 2025**).

(GANGADHARA C.M.),
XLIX Additional City Civil & Sessions Judge,
[Special Judge for trial of NIA Cases],
(CCH-50), Bengaluru.

**HRN/-*