Kekhriesatuo Tep vs National Investigation Agency on 12 April, 2023

Author: B.R. Gavai

Bench: Sanjay Karol, B.R. Gavai

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 415-417 OF 2019

KEKHRIESATUO TEP ETC. ...APPELLANT(S)

VERSUS

NATIONAL INVESTIGATION AGENCY …RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 418 OF 2019

JUDGMENT

B.R. GAVAI, J.

1. The Criminal Appeal Nos.415-417 of 2019 and Criminal Appeal Nos.418 of 2019 challenge the judgments and orders dated 8th May 2018 and 3rd September 2018 respectively, passed by the learned Division Bench of the Gauhati High Court, vide which the bail granted to the appellants herein came to be cancelled.

The appellants, in Criminal Appeal Nos.415-417 of 2019, came to be arrested on 13 th October 2017, whereas the appellant, in Criminal Appeal Nos.418 of 2019, came to be arrested on 25th March 2018.

3. The appellants in Criminal Appeal Nos.415-417 of 2019 and Criminal Appeal Nos.418 of 2019, moved the learned Special Court, National Investigating Agency, Nagaland, Deemapur (hereinafter referred to as 'the NIA'), for grant of bail. Vide orders dated 17th October 2017 and 28th March 2018 respectively, the said applications came to be allowed.

4. Being aggrieved thereby, the NIA filed appeals before the Guwahati High Court. The Division Bench, vide the impugned orders, allowed the appeals and reversed the orders dated 17th October

2017 and 28th March 2018.

5. While issuing notice, vide orders dated 28 th May 2018 and 20th September 2018, this Court also stayed the judgments and orders passed by the Division Bench of the Guwahati High Court.

6. We have heard Shri R. Basant, learned Senior Counsel for the appellants and Smt. V. Mohana, learned Senior Counsel appearing for the respondent/NIA.

7. Shri Basant submits that the learned Special Judge, after finding that the act of the appellants of succumbing to the demands of the organization was not voluntary and that the investigating agency itself had admitted that the accused persons were voluntarily cooperating with the investigation, had granted bail. He submits that, in these circumstances, it was not appropriate on the part of the High Court to have interfered with the orders of the learned Special Judge and deprived the appellants herein of their liberty. He further submits that this Court in the case of Thwaha Fasal v. Union of India1, has held that even at the stage of grant of bail, the prosecution has to prima facie establish that there was mens rea for committing the crime punishable under Sections 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to the "said Act"). He further submitted that even though the appellants were arrested and subsequently released, their services are not suspended and 1 2021 SCC OnLine SC 1000 they are still continuing in their respective jobs.

8. Smt. V. Mohana submits that the learned Division Bench of the High Court has rightly reversed the orders of grant of bail. She submits that the appellants themselves have admitted that they have paid the money to the organization. She further submits that, from the documents which were submitted with the supplementary charge-sheet, it is clear that the receipts are signed in the hand writings of the appellants. She, therefore, submits that there is a prima facie material to connect the present appellants with the crime in question.

9. Smt. Mohana further relies on the provisions of sub- section (5) of Section 43D of the said Act to buttress the submission that since the prima facie case is made out, the appellants were not entitled to bail and as such, the High Court has rightly reversed the orders.

10. It will be relevant to refer to the following observation of the learned Special Judge, while granting them bail:-

> "I have considered this peculiar position which has a marked difference between the extortionist and the tax payers who are under constraint. It is also in all correctness by the learned Special PP, NIA to argue that the petitioners should take recourse to protection of the law enforcing agencies. However, in my considered view the position of the accused who are compelled to pay tax are precarious and there is no doubt that the law enforcing agencies may not always be there for their protection and penalty for violation which always looms is eminent. Under this given facts we are drawn to the cardinal principle of criminal jurisprudence which postulates that there can be no crime when there is no mens rea. It is apparent to see that the accused persons have undoubtedly committed offence but it is an offence which is

prompted by element of threat. We are drawn to the Criminal Appeal No. 4 (K) of 2017 NIA vs. Victo Swu which is relied upon by the Special PP, NIA where the submission of the learned PP NIA is recorded as "Thereafter the IA. PP NIA submitted that this document as a piece of evidence which would prove that the respondent/accused was regularly extorting money for NSCN(K) from Govt. officers and other individuals" this is explicitly clear that the present accused are victims of the extortionists, such as Victo Swu and there is the imperative duty cast upon the court to differentiate between this two individuals – those who commit extortion on their own volition and those who are compelled to pay tax by compulsion, this will serve the ends of justice. The mental exercise which is cast upon the special Judge to examine whether there is a prima facie true case in the instant case thus falls short of the requirement to tie the hands of the Court to consider bail in such cases. The prosecution has not been able to show that indeed the accused have been voluntarily contributing to the funding of the outlawed outfits to execute their nefarious activities. There is also noting emanating from the C.D. brought for the perusal of the court that the accused persons are sympathizers of the extortionist or U.G. factions, nor is there any evidence to show that the accused persons are active members of the outlawed organizations. There must be a line drawn which differentiate the likes of accused Victo Swu and the present accused persons. In the present facts the balance is more inclined to show that the accused are victims of circumstances and to hold them on equal footing with the terrorist would be grave injustice. Unless it can be shown that the accused are actually sympathizers of the outlawed outfits and they are depriving fund on their own volition to sustain the outlawed organisations it would be prejudiced to conclude that there is a prima facie true evidence. The fact that the accused/petitioners have not taken security and have not reported the matter to the authority cannot equate them as terrorists.

Hence, I derive at the conclusion that there is no prima fade true evidences against the accused persons to show that they are sympathizers and they have been voluntarily contributing to the outlawed organizations. I rule that the investigation agency have also no hindrances at all in securing any information from the accused persons as the NIA have admitted that the accused persons and voluntarily cooperating with the investigation by surrendering all relevant documents which wee needed by the investigation. The accused persons also being Govt. servants and having deep root in the society there is no chance for them to jump bail."

11. A perusal of the aforesaid would clearly reveal that even, according to the prosecution case, accused Nos.1 to 3, who were office bearers of the organization were regularly extorting money from various government servants and other individuals. The learned Special Judge has rightly observed that the Court has to differentiate between those who commit extortion on their own volition and those who are coerced to pay by compulsion. The Court has found that the prosecution has not been able to show that the accused have been voluntarily contributing to the funding of the outlawed outfits to execute their nefarious activities. The Special Judge also found that there was no material placed on record to show that the appellants were sympathizers of the extortionists or U.G. factions.

The Court further found that the investigating agency itself had admitted that the accused persons were voluntarily cooperating with the investigation.

12. The learned Judges of the Division Bench found that the learned Special Judge having itself recorded that the accused-appellants had committed the offence, albeit prompted by an element of threat having regard to the provisions under Section 43D (5) of the said Act, the prayer for bail could not have been acceded.

13. The provisions of Section 43D (5) of the said Act have been considered by this Court in the case of Thwaha Fasal (supra). The Court, after reproducing the provisions of Section 43D (5) and after considering the judgment of this Court in the cases of National Investigation Agency v. Zahoor Ahmad Shah Watali2 and Ranjitsing Brahhmajeetsing Sharma v. State of Maharashtra and Another3, held that while deciding a bail petition filed by the accused against whom offences under Chapter IV and VI of the said Act have been made, the Court has to consider as to whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. It will be worthwhile to note that this Court, in the case of Zahoor Ahmad Shah Watali (supra), has distinguished the words 2 (2019) 5 SCC 1 3 (2005) 5 SCC 294 'not guilty' as used in TADA, MCOCA and NDPS Act as against the words 'prima facie' in the present Act. The Court has held that a degree of satisfaction required in a case of 'not guilty' is much stronger than the satisfaction required in a case where the words used are 'prima facie.'

14. The additional requirement, as provided under sub- section (5) of Section 43D of the said Act is twin. The first one being that the public prosecutor has to be given an opportunity of being heard. The second one, that the Court is of the opinion that there are reasonable grounds for believing that the accusation against such a person is prima facie true.

15. Undisputedly, in the present case, the first requirement has been complied with. Insofar as the second requirement with regard to Court arriving at a satisfaction that the accusation against such persons is prima facie true is concerned, we would not like to go into the elaborate discussion of the evidence, inasmuch as that may hamper the rights of the parties at the stage of trial.

16. It would further reveal that not only the charge-sheet but supplementary charge-sheet has been filed. The Forensic Science Laboratory (for short, "FSL") report show that the receipts are in the hand writing of the appellants. Be that as it may, it is not even the case of the appellants that they did not make the payment. It is their contention that they were forced to make the payment. As such, their custodial interrogation is not warranted.

17. However, it may be noted that a perusal of Sections 39 and 40 of the said Act, as have been interpreted by this Court, would show that a prima facie satisfaction has to be arrived that the acts which are committed by the accused have been committed with intention to further the activity of a terrorist organization.

18. A perusal of Sections 39 and 40 of the said Act would itself reveal, that for an act to constitute as an offence within the meaning of that Section, it has to be done with the intention of furthering the

activities. This Court, in the case of Thwaha Fasal (supra), while considering the provisions of Section 39 of the said Act, has also taken a similar view.

19. The learned Special Judge has himself distinguished cases of the persons who have indulged into extortion for furthering the activities of the organization and the persons like the present appellants, who were government servants, and compelled to contribute the amount. We, therefore, find that it cannot be said that the prima facie opinion, as expressed by the learned Special Judge, could be said to be perverse or impossible.

20. An interference by an Appellate Court and particularly in a matter when liberty granted to a citizen was being taken away would be warranted only in the event the view taken by the Trial Court was either perverse or impossible. On this limited ground, we find that the appeals deserve to be allowed.

21. Therefore, the impugned orders are quashed and set aside and the appeals are allowed.

22. However, it is made clear that any observation made hereinabove shall not be construed an expression on the merits of the matter.

23. Pending application(s), if any, shall stand disposed of.

.....J. [B.R. GAVAI] .....J. [SANJAY KAROL] NEW DELHI;

APRIL 12, 2023