

Ryan John Michael Thorpe vs The State Of Maharashtra on 7 August, 2021

Author: A.S. Gadkari

Bench: A. S. Gadkari

ssm

1

cri.wp-2611.21.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2611 OF 2021

Ryan John Michael Thorpe,
Age 43 years, Occu. : Service,
Residing at A 901, Meridian CHS Ltd.,
Sector No.-6, Plot No-25 & 26,
Nerul West, Navi Mumbai - 400706. ...Petitioner.

Vs.

The State of Maharashtra,
Crime Branch, CID, Property Cell,
Byculla, Through the Public
Prosecutor, High Court,
Mumbai. ...Respondent

WITH

CRIMINAL WRIT PETITION NO. 2612 OF 2021

Ripu Sudan Balkishan Kundra
Alias Raj Kundra,
Age 45 years, Occ.: Business,
Residing at of 1st Floor, Kinara Building,
Dr. R.S. Jain Marg, Juhu,
Mumbai-400049. ...Petitioner.

Vs.

The State of Maharashtra,
Crime Branch, CID, Property Cell,
Byculla, Through the Public
Prosecutor, High Court,
Mumbai. ...Respondent

Mr. Abhinav Chandrachud a/w. Mr. Hitesh Jain, Mr. Subhash Jadhav, Mr.
Chandansingh Shekhawat, Mr. Yashovardhan Deshmukh and Ms. Farishta

Menon i/b. Parinam Law Associates for the Petitioner in Writ Petition No.2611 of 2021.

1/21

ssm

2

cri.wp-2611.21.doc

Mr. Aabad Ponda, Senior Counsel a/w. Mr. Hitesh Jain, Mr. Subhash Jadhav, Mr. Chandansingh Shekhawat, Mr. Yashovardhan Deshmukh and Ms. Farishta Menon i/b. Parinam Law Associates for the Petitioner in Writ Petition No.2612 of 2021.

Mrs. Aruna Pai, Public Prosecutor for the Respondent-State in both Petitions.

Mr. Kiran Bidve, Investigating Officer present.

CORAM : A. S. GADKARI, J.

RESERVED ON : 2nd AUGUST, 2021 PRONOUNCED ON : 7th AUGUST, 2021.

P.C.:-

By the present Petitions under Article 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."), the Petitioners Accused No.11 and 10 respectively, have impugned the common Order dated 20 th July, 2021 passed by the learned Additional Chief Metropolitan Magistrate, 37 th Court, Esplanade, Mumbai in R.A. No.640 of 2021 in C.R. No.26/2021 of DCB, CID (Property Cell), Mumbai thereby, remanding the Petitioners to police custody and all Orders of subsequent remands by the Trial Court, which extend the custody of the Petitioners and for their release from custody.

2 Heard Mr. Ponda, learned senior counsel appearing for the Petitioner in Writ Petition No.2612 of 2021, Mr. Abhinav Chandrachud, learned counsel appearing for the Petitioner in Writ Petition No.2611 of 2021 and Mrs. Pai, learned Public Prosecutor for the Respondent-State in both the Petitions. Perused record.

ssm

3

cri.wp-2611.21.doc

3

The record reveals that, a crime bearing No.103 of 2021 dated

5th February, 2021 was originally registered with Malvani Police Station, Mumbai. The said crime was transferred to Detection of Crime Branch, CID (Property Cell), Byculla, Mumbai on the same day which was renumbered as CR No.26 of 2021 under Sections 354(c), 292, 293, 420 read with Section 34 of the Indian Penal Code, Sections 66(E), 67, 67(A) of the Information Technology Act, 2000 and Sections 3,4,6 and 7 of the Indecent Representation of Women (Prohibition) Act, 1986. During the course of investigation, initially complicity of 9 accused persons was disclosed and after

completion of investigation against them, a charge sheet has been filed on 3rd April, 2021 in the Court of the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai. The said charge sheet is numbered as CC No.251/PW/2021. During the course of investigation Umesh Ganpat Kamat (Accused No.7) revealed participation of Petitioners in the present crime. Apart from it, from the statement of other witnesses, the role of Petitioners and their complicity in the crime was also revealed. The investigating agency, thereafter obtained permission from the Trial Court for further investigation as contemplated under Section 173(8) of Cr.P.C..

4 The investigation revealed that, the Petitioner Ripu Sudan Kundra @ Raj Kundra has active participation in the present crime and he along with Petitioner Ryan Thorpe and other accused used to maintain ssm 4 cri.wp-2611.21.doc Hotshots App through his company Viaan Industries, was circulating/publishing it on social media and used to earn money from it. The Petitioner Ripu Sudan Kundra @ Raj Kundra had established Armsprime Media Pvt. Ltd. Company for the same. The investigating agency accordingly made an application for taking search of the office of Viaan Industries, which was granted by the learned Magistrate. In furtherance of search warrant issued by the learned Magistrate, the investigating agency took search of the office premises of Viaan Industries situated at J.L. Stream, 1501/1502, Lotus Grandeur, V.R. Desai Road, Andheri (West), Mumbai. The police seized certain electronic gadgets including, personal laptop of Petitioner Ripu Sudan Kundra @ Raj Kundra, Hard-Disk and Storage Area Network/Storage Attached Network (SAN). A search panchanam dated 19th July, 2021 has been drawn in presence of panch witnesses by the investigating agency.

5 It is the prosecution case that, notice as contemplated under Section 41A (1) of Cr.P.C. was served upon the Petitioners and they were called upon to attend the office of the investigating agency. That, the Petitioner Ripu Sudan Kundra @ Raj Kundra refused to accept the said notice. The Petitioner Ryan Thorpe accepted the said notice and acknowledged it. The Petitioners were thereafter taken to the office of the investigating agency and were subsequently arrested by effecting Search and Arrest Panchanama dated 19 th July, 2021. At the time of their search, ssm 5 cri.wp-2611.21.doc one mobile phone each was found on the person of the Petitioners, which have been seized by the police by the said panchanama.

The Petitioners were produced before the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai on 20th July, 2021 along with a Remand Application No.640 of 2021. The learned Magistrate, after perusing case diary, remand report and taking into consideration the allegations against the Petitioners, remanded them to police custody till 23rd July, 2021 by its impugned Order dated 20th July, 2021.

6 Mr. Ponda, learned senior counsel appearing for the Petitioner Ripu Sudan Kundra @ Raj Kundra submitted that, in pursuance of the decision in the case of Joginder Kumar Vs. State of U.P. & Ors. reported in (1994) 4 SCC 260, of the Hon'ble Supreme Court, the legislature amended Section 41 of Cr.P.C. and brought on the statute book Section 41A with effect from 1st November, 2010. That, Section 41A applies where the arrest of a person is not required under the provisions of sub-section (1) of Section 41 or the said provisions are not resorted to by the police. He submitted that, notice under Section 41A was never served upon the Petitioner Ripu Sudan Kundra @ Raj Kundra and

therefore Section 41A (4) comes into effect and therefore, the police ought to have taken Order of the Magistrate before arresting his client. He submitted that, the purpose of issuance of notice to an accused under Section 41A is to allow him to ssm 6 cri.wp-2611.21.doc appear before the police with dignity and not to permit the police to whisk him away to the police station. He submitted that, assuming for the sake of arguments, the Petitioner has failed to comply with Section 41A (1), then the police officer was obliged to follow Section 41A (4) of Cr.P.C.. That, the police did not give him an opportunity to appear before it on a particular date and time.

He submitted that, in the case of Arnesh Kumar Vs. State of Bihar & Anr. reported in (2014) 8 SCC 273, the Supreme Court after considering the mandate of Sections 41 and 41A, has issued certain directions. That, as per direction No.11.6, the police were obliged to give notice of two weeks for appearance in terms of Section 41A of Cr.P.C. for appearing before it for the purpose of the investigation. That, in the case of his client, the said period of two weeks was not given and therefore the investigating agency has committed mockery of the directions issued by the Supreme Court. He submitted that, Section 41A of Cr.P.C. has not been followed by the police in its letter and spirit. He submitted that, the police never gave notice under Section 41A of Cr.P.c. to the Petitioner Ripu Sudan Kundra @ Raj Kundra and it is an afterthought to state the said fact in its remand report dated 20th July, 2021 that, the Petitioner refused to accept the said notice.

He submitted that, in Suo-Motu Writ Petition(C) No.1/2020, In Re- Contagion of Covid 19 Virus in Prisons, the Supreme Court in its Order ssm 7 cri.wp-2611.21.doc dated 7th May, 2021 has reiterated the directions issued by it in para No.11 in the case of Arnesh Kumar Vs. State of Bihar & Anr. (Supra) . That, in the case of Munawar Vs. The State of Madhya Pradesh & Ors. [Writ Petition(s) (Criminal) No(s).62 of 2021], the Supreme Court released the accused on ad-interim bail for non-compliance of the procedure contained in Section 41 of Cr.P.C. as adumbrated in the case of Arnesh Kumar Vs. State of Bihar & Anr. (Supra) and therefore, this Court may also release the Petitioner.

By pointing out first remand report dated 20 th July, 2021, he submitted that, no case for destruction of evidence on 19 th July, 2021 in presence of police was stated therein. However for the first time in Affidavit dated 28th July, 2021, the investigating officer in para No.5 has come up with a case of deletion of data thereby causing disappearance of evidence has putforth. He further submitted that, in the remand report dated 23rd July, 2021, in para No.6, it is stated that, the relevant data in the present crime has been deleted by the co-petitioner Ryan Thorpe in the month of February, 2021 and in that report also, there is no mention of deletion of data or causing disappearance of evidence on 19 th July, 2021.

He submitted that, the learned Magistrate did not take into consideration the settled position of law and violation of Section 41A, while passing the impugned Order dated 20th July, 2021. He therefore prayed that, the impugned Order dated 20 th July, 2021 may be quashed and set aside and the Petitioner Ripu Sudan Kundra @ Raj Kundra may be released ssm 8 cri.wp-2611.21.doc from custody.

In rejoinder to the arguments advanced by the learned Public Prosecutor he submitted that, the decision of the Supreme Court in the case of State of Maharashtra & Ors. Vs. Tasneem Rizwan Siddiquee reported in (2018) 9 SCC 745, is not applicable to the facts of the present case, as the Petitioners herein are not seeking writ of habeas corpus, but have impugned Order dated 20th July, 2021 passed by the learned Magistrate thereby remanding the Petitioners to police custody and therefore, the present Petitions are maintainable. He submitted that, though in the Affidavit of the investigating officer it is stated that, the Petitioners started deleting material from the WhatsApp group and chats, thereby causing disappearance of evidence, the same is not possible in presence of 22 police officers who were present at the time of effecting search of the office premises of Petitioner Ripu Sudan Kundra @ Raj Kundra. He submitted that, nobody would try to delete the data and escape from the eyes of police. He submitted that, no such ground is taken in remand reports dated 20th July, 2021 and 23rd July, 2021. A specious plea that, data is deleted as stated in Affidavit cannot be accepted as there is no corresponding record to that effect. He submitted that, the Affidavit filed by the Police is silent on these aspects. He further submitted that, Section 201 of the Indian Penal Code is added by the police on 23 rd July, 2021 for deletion of the relevant data from the electronic gadgets of the Petitioner Ripu Sudan Kundra @ Raj ssm 9 cri.wp-2611.21.doc Kundra and/or his company in the month of February, 2021 and not for an alleged act committed by the Petitioners on 19 th July, 2021 i.e. deletion of incriminating material/data on that day. He submitted that, the search panchanama does not reflect about seizure of mobile phones of the Petitioners and therefore it is presumed that, the mobile phones of the Petitioners were not seized and no data was deleted.

While concluding his arguments, at the cost of repetition and while reiterating his earlier arguments noted hereinabove, he submitted that, there is no mention of deletion of data by the Petitioners on 19 th July, 2021, even in remand report dated 23 rd July, 2021. That, no contemporaneous record is produced by the prosecution and even the said fact is not mentioned in the arrest panchanama dated 19 th July, 2021. That, statement made in the Affidavit by the investigating officer about deletion of data on 19th July, 2021 is an afterthought and none else. He therefore, submitted that, the present Petitions may be allowed. 7 Mr. Chandrachud, learned counsel appearing for the Petitioner Ryan Thorpe submitted that, his client had accepted notice issued by the police under Section 41A of Cr.P.C. and therefore Section 41A (3) of Cr.P.C. would come in operation. He submitted that, Section 41A (3) of Cr.P.C. requires that such a person cannot be arrested in respect of the offence referred to in the notice, unless for the reasons to be recorded that he ought to be arrested. That, no case for non-compliance of Section 41A or ssm 10 cri.wp-2611.21.doc destruction of evidence after receipt of the said notice by his client is made out by the prosecution. That, without granting an opportunity to the Petitioner Ryan Thorpe to comply with the said notice, he has been directly arrested and therefore, his arrest is bad in law. He submitted that, even as per second remand report dated 23 rd July, 2021 and in particular para No.6 thereof, as per the prosecution, the Petitioner destroyed evidence in the month of February, 2021 itself and not after receipt of notice under Section 41A of Cr.P.C. on 19th July, 2021. That, there is a discrepancy in the second remand report dated 23rd July, 2021 and the averments made in the Affidavit by the concerned officer about destruction of evidence. He therefore prayed that, the present Petitions may be allowed by setting aside impugned Order dated 20th July, 2021 and the Petitioner Ryan Thorpe may be released from custody.

In rejoinder to the arguments advanced by the learned Public Prosecutor, by adopting the arguments of Mr. Ponda, he further submitted that, the police did not give an opportunity to his client to appear at a particular designated place and time and without complying with the provisions of Section 41A (3) of Cr.P.C. arrested his client and therefore, the arrest of Petitioner Ryan Thorpe is bad in law. He reiterated that, in the first remand report dated 20 th July, 2021, there is no mention of deletion of data or destruction of evidence by the Petitioner on 19 th July, 2021. That, for the first time in the remand report dated 23 rd July, 2021, Section 201 of ssm 11 cri.wp-2611.21.doc the Indian Penal Code has been added by the police. That, even in the second report dated 23rd July, 2021, there is no mention of deletion of data or destruction of evidence on 19 th July, 2021 and for the first time in the Affidavit filed before this Court, a statement is made about destruction of evidence on 19th July, 2021. There is discrepancy in the version of the prosecution in the said two documents and therefore, some doubt is cast on the version of the police. He therefore submitted that, the Petition filed by the Petitioner Ryan Thorpe may be allowed.

8 Mrs. Pai, learned Public Prosecutor, while opposing the Petitions submitted that, in the present crime i.e. CR No.26 of 2021, which is being investigated by DCB CID (Property Cell), initially a charge sheet against 9 accused persons was filed on 3 rd April, 2021. That, permission for further investigation as contemplated under Section 173(8) of Cr.P.C. was sought from the learned Magistrate. During the course of investigation, Umesh Ganpat Kamat (Accused No.7) had revealed the complicity of Ripu Sudan Kundra @ Raj Kundra (Accused No.10) and Ryan Thorpe (Accused No.11). That, Accused No.7 and Accused No.11 were working with the Accused No.10 since the year 2014. She submitted that, during the course of investigation lot of incriminating material is seized from the personal laptop and CDR of the Petitioner Ripu Sudan Kundra @ Raj Kundra. That, from his mobile phone and SAN devise, 51 pornographic films/movies with logo of Hotshots and Bollyfame have been seized. At the time of office ssm 12 cri.wp-2611.21.doc search of Ripu Sudan Kundra @ Raj Kundra (Accused No.10), Ryan Thorpe (Accused No.11) and other employees were also present. The police found email messages on Hotshots App between the Petitioner Ripu Sudan Kundra @ Raj Kundra with Pradeep Bakshi (wanted accused) who is his brother-in- law. That, the said accused Pradeep Bakshi owns a company in London by name Kenrin Pvt. Ltd.. During the search of office of Ripu Sudan Kundra @ Raj Kundra, the police found exchange of emails from Hotshots App and Pradeep Bakshi of Kenrin Pvt. Ltd. That, the data of customers about their subscription and account details etc. was also found. That, obscene pornographic videos were also found on Hotshots App. She submitted that, Section 41A notice was thereafter served upon both the Petitioners. The Petitioner Ripu Sudan Kundra @ Raj Kundra refused to accept the said notice. The Petitioner Ryan Thorpe accepted it. The Petitioners were called for investigation. She submitted that, the refusal to accept notice by Petitioner Ripu Sudan Kundra @ Raj Kundra has been clearly mentioned in the Case Diary No.62 of 2021 dated 19 th July, 2021 by the investigating officer. The Petitioner Ripu Sudan Kundra @ Raj Kundra also refused to sign/acknowledge the Search Panchanama dated 19th July, 2021. That, instead of co-operating with the police, the Petitioners started deleting from their mobile WhatsApp group, chats, thereby destructing evidence/incriminating material which is important for investigation. She submitted that, therefore the investigating agency, to prevent them from ssm 13 cri.wp-2611.21.doc causing destruction of material evidence, left with no option but to arrest them. She submitted that, the investigating agency cannot be expected to be mute spectator while the accused persons destroy evidence against

them. The investigating agency therefore arrested Petitioners to avoid further destruction of evidence. She submitted that, the police are trying to retrieve deleted data by the Petitioners. She on instructions submitted that, as a matter of fact some of the deleted data by the Petitioners has been retrieved by the police. That, the Petitioner Ripu Sudan Kundra @ Raj Kundra is the Administrator of Apps namely Hotshots and Bollyfame. In the Hard-Disk of the laptop of the Petitioner Ripu Sudan Kundra @ Raj Kundra, 68 porn films have been found. A Power Point Presentation (PPP) with details of Hotshots App is also found. She submitted that, on 19 th July, 2021, Ripu Sudan Kundra @ Raj Kundra(Acused No.10) deleted his iCloud Account from his mobile, thereby causing destruction of evidence. That, some of the emails are now retrieved from the said iCloud Account. She submitted that, from the personal mobile of the Petitioner Ripu Sudan Kundra @ Raj Kundra, it is found that, he had chats with wanted accused Pradeep Bakshi, Petitioner-Ryan Thorpe and his Accountant. That, statement of his Accountant under Section 164 of Cr.P.C. has been recorded by the police. She submitted that, the Petitioner Ryan Thorpe (Accused No.11) also destroyed evidence from his mobile phone on 19 th July, 2021 and the police are now trying to retrieve it. She submitted that, the ssm 14 cri.wp-2611.21.doc investigating agency cannot be expected to be a mute spectator till the accused persons destroy entire evidence against them in two weeks, after receipt of notice under Section 41A of Cr.P.C. It is certainly not the purpose in enacting the said Section and the situation depends upon facts of each case, which necessitates the arrest of the accused. She further submitted that, the internet sites namely 'YouTube' and 'googleplay' have deleted the App of Petitioner Ripu Sudan Kundra @ Raj Kundra namely Hotshots from their sites, as those were having sexual content and in violation of policies of the said Apps/companies. By relying on para No.5 of the decision in the case of State of Maharashtra & Ors. Vs. Tasneem Rizwan Siddiquee (Supra) , she submitted that, the arrest of the Petitioner Ryan Thorpe is legal. That, the prosecuting agency has applied Section 201 of the Indian Penal Code to the present crime and the said fact is brought to the notice of the learned Magistrate in remand report dated 23 rd July, 2021. She submitted that, the investigating officer has filed Affidavit dated 28 th July, 2021 and in para No.5 of the said Affidavit, the reasons for immediate arrest of the Petitioners have been mentioned. She submitted that, the fact that the Petitioner Ripu Sudan Kundra @ Raj Kundra refused to accept notice implies that, he refused to co-operate in the process of investigation. That, at the time of arrest of the Petitioners, a Search and Arrest Panchanama dated 19th July, 2021 has been effected. As per the said panchanama, the mobile phones of the Petitioners were with them and the incriminating ssm 15 cri.wp-2611.21.doc material/data has been deleted from the said phones. That, the deleted data is being retrieved. That, deletion of data from the WhatsApp group and chats by the Petitioners, causing disappearance of evidence prompted the investigating officer to arrest the Petitioners to prevent them from further tampering with the evidence. She submitted that, the arrest of the Petitioners is legal and the learned Magistrate after perusing case diary and remand report, has passed the impugned Order dated 20 th July, 2021. She submitted that, the impugned Order does not suffer from any error thereby warranting this Court to interfere with it, in its jurisdiction under Article 227 of the Constitution of India. She therefore, prayed that, both the Petitions may be dismissed.

9 As noted earlier, the record reveals that, in the present crime during the course of investigation, initially complicity of 9 accused persons was disclosed and after completion of investigation against them, a charge sheet has been filed on 3 rd April, 2021 in the Court of competent jurisdiction. The

role played by the Petitioners and their complicity in the present crime was revealed from the statements of witnesses and from Umesh Ganpat Kamat (Accused No.7). The investigating agency sought permission from the learned Magistrate for further investigation as contemplated under Section 173(8) of Cr.P.C. The further investigation revealed that, the Petitioners herein have active participation in the present crime. The Petitioner Ripu Sudan Kundra @ Raj Kundra used to maintain ssm 16 cri.wp-2611.21.doc Hotshots App through his company Viaan Industries and was circulating/publishing pornographic contents on social media and used to earn money from it. The Petitioner Ryan Thorpe and other accused used to maintain Hotshots App for the Petitioner Ripu Sudan Kundra @ Raj Kundra. The Petitioner Ripu Sudan Kundra @ Raj Kundra had also established Armsprime Media Pvt. Ltd. Company for the same.

10 The investigating agency therefore, made an application for taking search of the office of Viaan Industries situated at J.L. Stream, 1501/1502, Lotus Grandeur, V.R. Desai Road, Andheri (West), Mumbai. Petitioner Ryan Thorpe was also present there. The police took search of the said premises and seized electronic gadgets including, the personal laptop of Petitioner Ripu Sudan Kundra @ Raj Kundra. A search Panchanama dated 19th July, 2021 is accordingly drawn in presence of panch witnesses. The Petitioner Ripu Sudan Kundra @ Raj Kundra was directed to sign the said panchanama however, he refused to sign it. The investigating officer thereafter, served a notice under Section 41A (1) of Cr.P.C. upon the Petitioners. The Petitioner Ripu Sudan Kundra @ Raj Kundra after reading the said notice, refused to accept it by saying 'am I an accused, I will not sign on this letter' . Petitioner Ryan Thorpe accepted the said notice under Section 41A (3) and acknowledged it. Petitioners thereafter were asked to attend the office of the investigating agency. As the Petitioner Ripu Sudan Kundra @ Raj Kundra refused to accept the said ssm 17 cri.wp-2611.21.doc notice under Section 41A, it clearly implied that, he did not want to co- operate in the process of investigation in the present crime. The fact of refusal of acceptance of notice under Section 41A by Ripu Sudan Kundra @ Raj Kundra is evident from record. The said fact is recorded in the case diary by the investigating officer and the said two remand reports dated 20th July, 2021 and 23 rd July, 2021. Therefore, the contention raised by Ripu Sudan Kundra @ Raj Kundra that notice under Section 41A was never served upon him is a palpably false plea adopted by him.

As per the categorical statement made by investigating officer in para No.5 of his Affidavit, the Petitioners started deleting data from the WhatsApp group and chats, thereby causing evidence of the offence to disappear and tamper. The investigating officer, therefore to prevent the Petitioners from further destruction of evidence, brought them to their office and thereafter they were arrested.

The fact that, the Petitioner Ripu Sudan Kundra @ Raj Kundra refused to sign search panchanama and notice under Section 41A of Cr.P.C. and acknowledged it, has been clearly mentioned by the investigating officer in case diary No.62 of 2021 of the present crime. Police have effected arrest panchanama dated 19th July, 2021 at their office. During the search of the Petitioners, one mobile phone each were found on their person. It is the prosecution case that, the Petitioners started deleting data from their WhatsApp group and chats from these mobile phones, thereby ssm 18 cri.wp-2611.21.doc causing disappearance of evidence and tampering with it. The learned Public Prosecutor on instructions had made a statement before this Court that, some of the deleted data from the said phones has now been retrieved and the other data is being retrieved. It is thus clear

that, at the time of their arrest, the mobile phones of the Petitioners were with them and as per the prosecution case, they deleted data from it thereby causing disappearance of evidence on 19 th July, 2021. Therefore, the contention of the Petitioners that, they could not have deleted data necessary for investigation thereby causing disappearance of evidence in presence of 22 police officers at the time of effecting search, has no substance in it. 11 It is to be noted here that, after service of notice under Section 41A of Cr.P.C., what is expected under the law from the accused is to co- operate in the process of investigation and not to indulge into destruction of incriminating material/evidence against him/her, which the investigating agency intends to seize or to take it into its custody for the purpose of investigation of a crime.

The period of two weeks as has been directed by the Hon'ble Supreme Court in para No.11.6 in the case of Arnesh Kumar Vs. State of Bihar & Anr. (Supra) would be effective and/or comes into effect, provided the accused accepts the said notice under Section 41A of Cr.P.C.. In the present case, the Petitioner Ripu Sudan Kundra @ Raj Kundra has refused to accept the said notice and the said fact can be clearly discerned from the ssm 19 cri.wp-2611.21.doc case diary and said remand reports.

12 It is the settled position of law that, a statement made on oath in Affidavit and submitted in the Court in a proceeding, has its own significance in the eyes of law. The investigating officer in his Affidavit dated 28th July, 2021 has made a categorical statement that, the Petitioner Ripu Sudan Kundra @ Raj Kundra refused to accept the said notice under Section 41A and the Petitioner Ryan Thorpe accepted it. Refusal to accept notice by Ripu Sudan Kundra @ Raj Kundra clearly implies and indicates that, he did not want to participate and co-operate in the process of investigation of the present crime. As per the allegation of the prosecution in Affidavit, it appears that, the situation was aggravated by the Petitioners when they started deleting incriminating material against them from their mobile phones thereby causing disappearance of evidence. As noted earlier, till their arrest by effecting Search and Arrest Panchanama dated 19 th July, 2021, the said mobile phones were with the Petitioners. 13 It may be noted here that, there cannot be any difference of opinion about the principles of law enunciated and directions issued by the Hon'ble Supreme Court in the case of Arnesh Kumar Vs. State of Bihar & Anr. (Supra) in para No.11 of the said decision. In the present case, directions No.11.3 and 11.4 are relevant and are reproduced hereinbelow for the sake of convenience:-

"11.

ssm

20

cri.wp-2611.21.doc

11.1.

11.2.

11.3. The police officer shall forward the check list duty filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention; 11.4 The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention; Perusal of case diary would clearly indicate that, the investigating officer

has recorded his satisfaction which necessitated the arrest of the Petitioners, as contemplated under Section 41(1)(b),. The learned Magistrate while remanding the Petitioners to police custody i.e. while authorizing their detention, has perused the case diary and remand report and has recorded his satisfaction about arrest and custodial interrogation of the Petitioners while authorizing their detention by its impugned Order. The satisfaction recorded by the Magistrate in the impugned Order, may not be elaborate as per the expectation of the Petitioners but according to this Court, it complies with the direction No.11.4 in the case of Arnesh Kumar (Supra). The fact that, the learned Magistrate has perused case diary and other record can be discerned from the fact that, he has signed the case diary after its perusal.

ssm

21

cri.

14

As far as the Petitioner Ryan Thorpe is concerned, as

earlier, it is the specific allegation against him that, after receipt of notice under Section 41A of Cr.P.C, he started deleting data from the WhatsApp group and chats thereby causing evidence of the present crime to disappear and tamper with it. The investigating officer therefore, in order to prevent him from causing disappearance of further evidence, decided to arrest him. As noted earlier, the investigating officer has filed Affidavit dated 28 th July, 2021 to that effect.

15 The aforesaid deliberation would lead to draw a safe conclusion that, the arrest of the Petitioners by the investigating officer and their remand to police custody by the impugned Order dated 20 th July, 2021 by the learned Magistrate is within the conformity of the provisions of law. The impugned Order dated 20th July, 2021 passed by the learned Magistrate does not suffer from any error, which requires this Court to interfere with it under its jurisdiction under Article 227 of the Constitution of India.

Both the Petitions are accordingly dismissed.

SANJIV

SANJIV

SHARNAPPA

MASHALKAR

MASHALKAR

Date: 2021.08.07

15:20:57 +0530

(A.S. GADKAR