

Saif Ateeque Nachan vs National Investigation Agency on 20 December, 2024

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.M.C. 5213/2024

SAIF ATEEQUE NACHAN
Through:

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NATIONAL INVESTIGATION AGENCY
Through: Mr. Gautam Narayan
Advocate with Ms.
PP, Ms. Asmita Sin
Anand, Mr. Punishk
Tushar Nair and Mr
Bansode, Additiona

+ CRL.M.C. 5216/2024
REHAN ASHFAQUE SUSE
Through:

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NATIONAL INVESTIGATION AGENCY
Through: Mr. Gautam Narayan
Advocate with Ms.
PP, Ms. Asmita Sin
Anand, Mr. Punishk

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CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
ORDER

% 20.12.2024

1. By way of present petitions, the petitioners seek their release in RC- 29/2023/NIA/DLI dated 06.11.2023 registered under Sections 120B IPC, sections 18/20 Unlawful Activities Prevention Act, 1967 (hereinafter, referred to as 'UAP' Act) and section 4/5 of Explosive Substance Act, 1908 at PS-NIA, Delhi.

2. Initially, the case was registered by Special Cell, Delhi Police as FIR No. 243/2023 under Section 120B IPC and Sections 18/20 UAP Act upon receiving information that one Shehnawaz Alam, wanted in another FIR involving the UAP Act, alongwith one Rizwan are planning to carry out terrorist activities in Delhi and some Delhi based contacts are also part of the said conspiracy. The Special Cell arrested the abovementioned accused, along with one Mohammad Arshad Warsi in the said case.

Central Government, upon receiving intimation of the registration of said FIR, was of the opinion that a scheduled offence under National Investigation Agency Act, 2008 (hereinafter, referred to as 'NIA' Act) had been committed. Directions were issued by Ministry of Home Affairs, Govt. of India, Counter Terrorism and Counter Radicalization Division (C.T.C.R), North Block, New Delhi, vide its order F. No. 11011/84/2023/NIA dated 19.10.2023. Consequent to said directions, PS- NIA, New Delhi re-

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3. Pursuant to investigation, the petitioners were arrested in relation to the above case on 09.12.2023. In the Chargesheet filed on 21.03.2024, the petitioner/Saif was arrayed as A7 and petitioner/Rehan was arrayed as A10. On 25.12.2023, the petitioners filed handwritten applications to AIO, NIA, requesting therein to give their voluntary confessions. The applications were filed by the respondent agency in the Court of Judicial Magistrate, Patiala House Courts. The Judicial Magistrate remanded the petitioners to judicial custody to give them some time to reflect on their pleas of voluntary confessions. On 27.12.2023, the voluntary confessions of the petitioners came to be recorded under Section 164 Cr.P.C.

4. Thereafter, the petitioners moved applications under Section 306 Cr.P.C. before ASJ, Patiala House Courts praying for grant of pardon and allowing them to become approvers. In view of the no objection given by the respondent agency to the said request, the said applications came to be allowed vide common order dated 01.06.2024. However, due to the bar imposed by Section 306(4)(b) Cr.P.C., the petitioners have remained incarcerated.

5. Mr. Sidharth Luthra, learned Senior Counsel for the petitioner/saif, submits that the original intent of Section 306(4)(b) Cr.P.C was to protect a approver in custody so that he was not threatened by his fellow co-accused. He further submits that when the section was introduced, the trials used to take place in a short span of time however, today that position has changed. He submits that in the present case, there are around 154 non-formal witnesses and 438 witnesses in total. It is submitted that two chargesheets This is a digitally signed order.

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6. Mr. Ashim Sood, learned counsel for the petitioner/Rehan adopts the submissions put forth by Mr. Luthra and further submits that the consistent position taken by High Courts over the Country is that the bar under Section 306(4)(b) Cr.P.C. would be ordinarily be violative of Article 21 and thus the High Courts have read down the provision to say that the High Court may considering the facts and circumstances of each case, release the approver on bail.

7. Mr. Gautam Narayan, learned Senior Counsel appearing on behalf of the respondent agency submits that the petitioners have revealed relevant facts and circumstances and co-operated with the investigation, due to which respondent agency was able to gather sufficient and crucial evidence and that is the reason that the respondent agency gave a no objection to the petitioner's application for pardon. He submits that the respondent agency has filed a chargesheet and supplementary chargesheet dated 21.03.2024 and 03.06.2024 respectively and is in the process of filing the second supplementary chargesheet. He, on instructions, reiterates that the respondent has no objection to the petitioners' prayer for release.

8. I have heard learned counsel for the parties and gone through the records.

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9. Section 306 Cr.P.C. makes provision for tender of pardon to an accomplice subject to them giving full and fair disclosure and information in relation to any offence they are privy to. Section

306(4)(b) Cr.P.C. provides that every person accepting a tender of pardon, shall, unless he is already on bail, be detained in custody until the termination of trial. The object of this sub-section is to shield the approver from both the susceptibilities and influences of his confederates, as well as from their wrath. Since the word used is 'shall', if the statute is read literally, it would mean that the approver, if not already released on bail would, in every case, continue to remain incarcerated until the termination of trial. Such a rigid interpretation would lead to situations where the approver would continue to remain incarcerated even when, considering the facts and circumstances of that case, there would be no tangible risk in enlarging him before the termination of the trial. An inflexible interpretation would also lead to an anomaly in as much as if there are two similarly placed co-accused who apply for pardon, and one of them is already enlarged on bail, the one who is out would continue to be free but the one imprisoned would continue to be behind bars, despite both of them helping in the investigation. Determining the necessity of detention of the approver on basis of the facts and circumstances in each case would ensure that the objectives of the provision are met.

10. Once an accused person is granted pardon, he is no longer an accused person. The provisions of Section 437 and 439 Cr.P.C. are no longer available to him. However, the inherent power to release such an approver is still available to this Court under Section 482 Cr.P.C. This Court may release such an approver, if after considering the facts and circumstances of This is a digitally signed order.

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11. A Full Bench of this Court in Prem Chand v. State, reported as 1984 SCC OnLine Del 311 has elaborately dealt with the issue at hand and its findings would be beneficial for adjudication of the present case and are reproduced as under :-

17. The power available under this provision is notwithstanding anything else contained in the Code. In case the High Court is satisfied that an order needs to be made to prevent abuse of the process of any court, or otherwise to secure the ends of justice the inherent powers are available, and they are not limited or affected by anything else contained in the Code. We are not oblivious that these powers have not to be ordinarily invoked where specific provisions are contained in the Code or specific prohibitions enacted. However, in cases where the circumstances unmittigatingly bring out that a grave injustice is being done and an abuse of process of court is taking place either as a result of the acts of the accused or the unavoidable procedural delays in the courts, we are of the firm opinion that the inherent powers should and need to be exercised. The approver's evidence in the present case has already been recorded, and no useful purpose is being served in his detention. The administration of justice is not in any manner likely to be affected by his release. There is no reason to suppose that the machinery of law would not be able to give protection to the petitioner in case any adventurism is sought to be displayed by his

confederates, or their supporters. The conduct of the petitioner in seeking his release itself shows that he carries no apprehensions. It would not be, therefore, correct for the court to still create such fears and profess to provide him unsolicited protection by detaining him for indefinite period. Thus in the case of A.L. Mehra (supra) the Punjab High Court released the approver from confinement in exercise of inherent powers to prevent the abuse of the process of court, finding that he had been in confinement for several months. Similarly the Madras High Court in the case Karuppa Servai (supra) laid emphasis on the detention of an approver till he has deposed at the trial in the Sessions court truly and fully to matters within his knowledge.

18. We are further of the opinion that there is no rational basis for inflexible classification of approvers who are in detention, and those who because of fortuitous circumstances happen to be on bail at the time of grant of pardon. A person being granted bail and still not in detention are not considered in law as incompatible. So far as allurements of release if allowed pardon, it is inherently there in any pardon. As such too much of This is a digitally signed order.

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12. Recently, a Co-ordinate Bench of this Court in the case of Amit Chakraborty v. State (NCT of Delhi), reported as 2024 SCC OnLine Del 3336 after analysing the decisions of various High Courts, held as follows :-

18. Therefore, what can be discerned from the aforesaid discussion is that the High Court, while exercising its inherent powers under Section 482 of Cr. P.C., can direct the release of an approver who has been granted pardon under Section 306 of Cr. P.C. where in view of facts and circumstances, such direction is deemed necessary to prevent abuse of process of law or to secure ends of justice.

13. This issue has also been dealt with on similar lines by various High Courts. Reference in this regard is made to the decisions in Tariq Ahmed Dar v. National Investigation Agency, reported as 2023 SCC OnLine J&K 236, Sudhanshu Ranjan v. Union of India through NIA, reported as 2022

SCC OnLine Jhar 290, Noor Taki v. State of Rajasthan, reported as 1986 SCC OnLine Raj 11, and Rajkumar Sahu v. State of Chhattisgarh, reported as 2020 SCC OnLine Chh 109.

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14. In the present case, the petitioners have, concededly, co-operated with the investigation. Respondent agency has also stated that they have no- objection to them being granted a pardon. Moreover, there are 438 total witnesses in the case, around 154 of whom are non-formal. Two chargesheets spanning over 14000 pages already stand filed and a third one is said to be in the works. The trial is at the stage of Section 207 Cr.P.C and is not expected to terminate in the near future. In such a scenario, the continued incarceration of the petitioners would serve no purpose and in fact, would defeat the ends of justice.

15. Considering the facts and circumstances of the case and the import of the decisions discussed hereinabove, the present petitions are allowed and it is directed that the petitioners be released on them furnishing a personal bond in the sum of Rs. 25,000/- with one surety of the like amount, subject to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty Judicial Magistrate and subject to the following further conditions :-

- i) The petitioners shall comply with all the conditions on which pardon was tendered to them;
- ii) The petitioners shall appear before the concerned Court as and when directed;
- iii) The petitioners shall not leave the country without the prior permission of the concerned Court.

16. Accordingly, the present petition stands disposed of in above terms.

17. Copy of the order be communicated to the concerned Jail Superintendent for information and necessary compliance.

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18. Needless to state that the observations made hereinabove are only for the purpose of disposal of present petition and which shall not have a bearing on the trial of the case.

MANOJ KUMAR OHRI, J DECEMBER 20, 2024/rd This is a digitally signed order.

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