

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 31.08.2024
Pronounced on: 13.09.2024

CRM(M) No.656/2023

BILAL AHMAD LONE ... PETITIONER(S)

Through: - Mr. Zahid Hussain Dar, Advocate, with
Mr. Bhat Shafi, Advocate.

Vs.

UT OF J&K & OTHERS ...RESPONDENT(S)

Through: - Mr. Satinder Singh Kala, AAG, with Ms. Raheela Khan,
Assisting Counsel-for R1
Ms. Yasmeema, Advocate, vice Mr. T. M. Shamsi, DSGI-
for R2 & R3.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, through the medium of present petition, has invoked jurisdiction of this Court under Section 482 of the Cr. P. C for challenging vires of Section 306(4)(b) of the Code of Criminal Procedure and for grant of bail in a case arising out of FIR No. 42/2020 for offences under Section 302, 364, 201, 436, 182 of IPC and Section 7/25 Indian Arms Act registered with Police Station, Herpora Shopian, which is stated to be pending trial before the Court of Principal Sessions Judge, Shopian.

2) During the course of hearing, learned counsel for the petitioner submitted that he would confine this petition to the prayer relating to grant of bail and that he would give up

the challenge to the vires of the provisions contained in Section 306(4)(b) of the Cr. P. C.

3) The facts leading to the filing of this petition are that on 18.07.2020, a complaint was received by Police Station, Herpora, Shopian, from Major Kush, Adjutant-62 RR, to the effect that he had received information with regard to hiding of unknown terrorists in Village Amshipora, as a consequence whereof, on 17.07.2020, a cordon and search operation was launched during which three unidentified hardcore terrorists got neutralized. It was also informed that two pistol with two magazines, four empty pistol cartridges, 15 live cartridges and 15 empty cartridges of AK series weapon and other objectionable items were recovered from the site of encounter. On the basis of this information, police registered FIR No.42/2020 for offences under Section 307 IPC, 7/27 Indian Arms Act and 16 ULA(P) Act and started investigation of the case.

4) During investigation of the case, three unidentified dead bodies were taken into possession by the police for conducting their medical examination and DNA profiling. As per the postmortem report, the cause of death of these three unidentified persons was shown to be multiple firearm injuries leading to hemorrhagic shock and cardio respiratory

arrest. Since the deceased persons could not be identified, as such, a wireless message was flashed to all SHOs of the Country so as to inform the family members of the missing persons in their respective jurisdictions.

5) On 10.08.2020, a signal was received from I/C PP Peeri Rajouri, whereby an information was received that three persons, namely, Abrar Ahmad S/o Bagha Khan, Abrar Ahmad S/o Haji Mohammad Yousuf and Imtiyaz S/o Sabir Hussain, had gone to Kashmir to work as labourers but their whereabouts are not known to their family members. The Investigating Agency collected the DNA samples of the family members of the missing persons of District Rajouri and along with the said samples, DNA samples of three deceased persons were sent to CFSL, Chandigarh, for analysis. Upon receipt of the report of the CFSL, Chandigarh, the deceased persons were identified as the above named three missing persons of District Rajouri.

6) During the course of investigation, it was found that the above named three persons were killed by the main accused, namely, Captain Bopinder Singh @Major Bashir Khan, of 62-RR, and involvement of two more persons, namely, Tabish Nazir and Bilal Ahmad Lone (petitioner herein) was also established. It was also found that the above

named three deceased persons did not have any links with any terrorist organization. Accordingly, after investigation of the case, offences under Section 302, 364, 201, 436, 120-B, 182 IPC and Section 7/25 Indian Arms Act were found established against the aforesigned three accused persons including the petitioner herein.

7) It appears that during investigation of the case, accused Tabish Nazir as well as the petitioner herein were arrested on 28.09.2020. Accused Captain Bopinder Singh @Major Bashir Khan was detained by the Army Authorities for facing trial in Court of Enquiry. The said accused was being tried by the General Court Martial.

8) It appears that the petitioner herein consented to become an approver and, as such, in terms of order dated 14.12.2020 passed by the learned Chief Judicial Magistrate, Shopian, he has been tendered pardon on the condition of his making a full and true disclosure of whole of the circumstances relating to the occurrence.

9) It seems that the petitioner had approached the Court of learned Principal Sessions Judge, Shopian, for grant of bail in his favour but his application came to be dismissed by the said Court in terms of order dated 20.07.2023, primarily, on the ground that in terms of clause (b) of sub-section (4) of Section 306 of the Cr. P. C, a person accepting

a tender of pardon has to be detained in custody until termination of the trial.

10) The petitioner has, while urging this Court to grant him bail, contended that he has testified against the accused persons twice, firstly before the civil court where the co-accused, Tabish Nazir, is facing trial and second time before the Court Martial where the main accused Captain Bopinder Singh @Major Bashir Khan was facing trial. It has been contended that Captain Bopinder Singh @Major Bashir Khan has been convicted by the Court Martial and the trial of the co-accused, Tabish Nazir, is about to complete. According to the petitioner, he has made true and complete disclosure of all the facts and circumstances before both the courts and, as such, his further incarceration in custody is not warranted at all. It has been further contended that Section 306(4)(b) of the Cr. P. C has to be interpreted in a manner that would not defeat the mandate contained in Article 21 of the Constitution. It is being contended that once an approver has fulfilled the stipulated conditions by making true and full disclosure of the circumstances during the trial of the case, his further incarceration in custody would be violative of Article 21 of the Constitution of India.

11) Respondent No.1 has filed its reply to the petition in which it has narrated the facts relating to the prosecution

story. It has been contended that unless and until trial of the case is complete, the petitioner cannot be enlarged on bail in view of the mandate contained in Section 306(4)(b) of the Code of Criminal Procedure.

12) Respondent No.2-Union of India, in its reply to the petition, has submitted that Summary General Court Martial against Captain Bopinder Singh commenced on 10.01.2022 and it concluded on 17.01.2023, whereafter the aforesigned Army Officer has been sentenced to be “cashiered and to suffer imprisonment for life”. It has been further submitted that the sentence has been confirmed on 18.07.2023, whereafter the said sentence has been suspended by the Armed Forces Tribunal, New Delhi, in terms of order dated 9th November, 2023 and the said Army Officer has been released on bail.

13) I have heard learned counsel for the parties and perused record of the case.

14) The question that is required to be determined in this case is as to whether, in view of the provisions contained in Section 306(4)(b) of the Cr. P. C, an approver can be granted bail at a stage when the trial of the case is yet to conclude. In order to understand the legal position on the subject, it would be apt to notice the provisions contained in Section 306(4)(b) of the Cr. P. C, which read as under:

“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 134 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.

(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);
- (b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record—

- (a) his reasons for so doing;
- (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.

(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;
- (b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(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—
 - (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;
 - (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;
- (b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.”

15) From a perusal of the aforesaid provision, it is clear that when a person accepts a tender of pardon made under sub-section (1) and if such person is not already on bail, he has to be detained in custody until the termination of the trial.

16) The Supreme Court has, in the case of **Suresh Chandra Bahri vs. State of Bihar**, 1995 Supp (1) SCC 80, while discussing the object of requiring an approver to be detained in custody until termination of the trial, observed that the same is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from the possible indignation, rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from temptation of saving his onetime friends and companions after he is granted pardon and released from custody.

17) The question whether bail can be granted to an approver during trial of a case came up for consideration before this Court in the case of **Mohammad Lateef Deedar vs. State**, 2010 Supreme (J&K) 308. This Court while interpreting the provisions contained in sub-section (3) of Section 337 of the J&K Cr. P. C, which is in *pari-materia*, with the provisions contained in Section 306(4)(b) of the

Code of Criminal Procedure, 1973, has held that High Court is vested with jurisdiction to enlarge an approver on bail even before conclusion of trial in appropriate cases. In this regard, paras 11, 14, 15 and 16 of the said judgment are relevant to the context and the same are reproduced as under:

“11. Sub section 3 of section 337 SVT 1989 cannot be interpreted in a manner which would defeat the mandate contained in article 21 of the Constitution of India. What purpose is to be achieved by keeping an approver in custody during the trial after he satisfactorily complies with the terms and conditions of the order of pardon. The custody of an approver is co-terminus with fulfillment of terms and conditions of the order of tender of pardon. The moment he complies with the terms and conditions of tender of pardon, he gets right to be released. Keeping such a person detained until termination of the trial would not only be violating the constitutional guarantees as contained in article 21 of the Constitution of India but would also tantamount to inflicting punishment on him.

14. The expression 'unless he is already on bail' occurring in sub section 3 of section 337 SVT 1989, apparently, makes it writ large on the face of the statute that the trial Court, in the facts and circumstances of the case, has the power to grant bail to an accused person under sections 497/498 Cr. P.C. It appears the said power of admitting the accused person to bail is, thus, retained by sub section 3 of section 337 SVT 1989 and has not been taken away. Otherwise also sections 497/498 Cr. P.C. confer discretionary power on the Court to admit an accused to bail in accordance with the settled principles and norms of law. If the Court of competent jurisdiction is having jurisdiction to admit and enlarge an accused person to bail, the said power of admitting an approver to bail, if denied to the trial Court/Court of competent jurisdiction, will inflict an irreparable damage on the rights of the person who turns approver and is granted pardon and satisfies the terms and conditions of the tender of pardon. Such a person would land in worst position vis-a-vis the perpetrators of crime. Assume a situation that trial Court admits the accused person to bail on some valid legal grounds, which would include lack of material supporting the prosecution case, on the

interpretation of sub section 3 of section 337 SVT 1989, as put by learned counsel for the respondents, the approver who has been tendered pardon has to remain in custody until termination of trial. This will not only create an absurd situation but will be against the basic fundamentals of the Constitution. The provision of law cannot be given such an interpretation which will create an absurd situation and will render it unjust as well. The power to grant or refuse bail is a power conferred by statute on a Court of law. This power cannot be taken away by any judicial interpretation as any such interpretation will tantamount to legislating the law which does not fall within the domain of Courts. The expression 'unless he is already on bail' occurring in sub section 3 of section 337 SVT 1989 preserves the power of grant of bail, which power is correlated to the right to personal liberty guaranteed under article 21 of the Constitution of India. Sub section 3 of section 337 SVT 1989, thus, may not restrict the jurisdiction of the trial Court to consider the grant of bail to an approver in terms of sections 497/498 of SVT 1989. Otherwise the sub section 3 of section 337 SVT 1989 would fall foul of articles 14 and 21 of the Constitution of India. This issue of competence of the trial Court to grant bail to an approver has not been raised and debated, as such is left open to be decided in an appropriate case.

15. *The approver who is tendered pardon, on satisfaction of conditions contained therein, ceases to be an accused and has to get benefit of pardon, which would mean that he is not to be punished. In such eventuality, he may not even be required to be asked to furnish bail and surety bonds. He can be released on furnishing Undertaking/Personal bond to faithfully continue to abide by the terms and conditions of tender of pardon. The Hon'ble Supreme Court in case titled State (Delhi Administration) Appellant v. Jagjit Singh-Respondent, reported in 1989 Supp (2) SCC 770: AIR 1989 SC 598, has held that once an accused is granted pardon under Code of Criminal Procedure (Cr.PC), he ceases to be an accused and becomes witness for the prosecution. It is further ruled that so long as the prosecution does not certify that he has failed to comply with the conditions of grant of pardon, he continues to be a witness.*

16. *In view of the discussion made hereinabove, can it still be said that an approver, who satisfies the terms and conditions of the tender of pardon, cannot be ordered to be released from prison. In order to meet*

such like eventualities, the legislators have enacted section 561-A, Cr. P.C., SVT 1989 which provides Saving of inherent power of High Court'. Section 337 SVT 1989 falls under chapter XXIV and section 561-A falls under chapter XLVI. Section 561-A is reproduced hereunder:

*"561-A. Saving of inherent power of High Court
Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*

18) This Court again in the case of **Mohammad Sultan Mir vs. State of J&K**, 2012 SCC Online J&K 78, has held that the High Court in exercise of its powers under Section 482 of Cr. P. C is vested with jurisdiction to enlarge an approver on bail in exceptional and reasonable cases. Similar view has been taken by this Court in the case of **Tariq Ahmad Dar vs. National Investigating Agency**, 2023 SCC Online J&K 236.

19) The High Court of Rajasthan in the case of **Noor Taki @Mamu vs. The State of Rajasthan**, 1986 SCC Online Raj. 11 and the High Court of Jharkhand in the case of **Sudhanshu Ranjan vs. Union of India**, 2022 SCC Online Jhar 290, have also taken a similar view.

20) From the foregoing analysis of the law on the subject, it is clear that this Court in exercise of its power under Section 482 of the Cr. P. C is vested with jurisdiction to enlarge an approver on bail even before culmination of the

trial provided there are exceptional and reasonable circumstances involved in a particular case.

21) The inherent powers vested in the High Court in terms of Section 482 of the Cr. P. C manifestly confirms the aforesaid position of law. As per the aforesaid provision, nothing in the Code of Criminal Procedure can limit or effect the inherent powers of the High Court to make such orders, as may be necessary to give effect to any order under the Code or to prevent the abuse of process of Court or otherwise to secure the ends of justice. Thus, any fetter or restriction contained in the Criminal Procedure Code, 1973, which includes clause (4)(b) of Section 306 of the Cr. P. C, cannot take away the powers of the High Court to grant bail to an approver if it finds that the same is required to be done to secure the ends of justice. It is obligatory for this Court to interpret the provisions contained in Section 306(4)(b) read with Section 482 of the Cr. P. C in a manner that would advance the cause of justice, otherwise we may find cases of hardship where an approver can approach the High Court for release on bail but because of the provisions contained in Section 306(4)(b) of the Cr. P. C, he may not be able to secure bail. This would certainly be violative of Article 21 of the Constitution of India, thereby posing a serious challenge to the vires of Section 306(4)(b) of the Cr. P. C. It is, therefore,

imperative for the Court to interpret the said provisions in a manner that would leave scope for the High Court to exercise its inherent powers for releasing an approver on bail in appropriate cases.

22) With the aforesaid legal position in view, let us now advert to the facts of the present case. It is not in dispute that the petitioner has been tendered pardon by the Court of Chief Judicial Magistrate, Shopian, and he has accepted the same. The record of the trial court shows that the petitioner has, during the trial of the case which is pending against accused Tabish Nazir, made his statement, a perusal whereof reveals that he has disclosed full details of the alleged crime and the same is in line with his statement recorded by the Chief Judicial Magistrate, Shopian, at the time of granting pardon in his favour. It is also not in dispute that on the basis of the statement made by the petitioner before the Summary General Court Martial, the main accused, Captain Bopinder Singh @Major Bashir Khan has been convicted and sentenced to undergo life imprisonment. The trial court record shows that most of the prosecution witnesses have already been examined and the trial is nearing its completion.

23) So far as the allegations made in the chargesheet against the petitioner are concerned, his role in the alleged

crime appears to be of a peripheral nature, inasmuch as he is stated to have accompanied the main accused to the site of encounter and has stayed in his vehicle while the alleged fake encounter took place. It is also noted by the trial court in its order dated 20.07.2023, whereby application of the petitioner for grant of bail was rejected , that the petitioner is suffering from old burst fracture on L4 vertebra body with retropulsion of the posterior fractured fragments with acquired canal stenosis and has defused disc bulges with L3-L4, L4-L5 and L5-S1 levels with neuro compression.

24) In the face of aforesaid facts, it is clear that there are exceptional circumstances obtaining in the case at hand, which deserve to be taken note of while considering prayer for grant of bail to the petitioner, who has been in custody for last about four years. The main accused is already on bail and the trial against the co-accused is nearing its completion. The petitioner has complied with the conditions of pardon by making statement before the Court Martial as well as before the trial court in line with his statement recorded by the Chief Judicial Magistrate, Shopian, at the time of tendering pardon to him. Apart from this, the petitioner is also suffering from ailment. Therefore, this is a fit case where the petitioner deserves to be enlarged on bail.

25) For the foregoing reasons, the petitioner is admitted to bail subject to the following conditions:

- (I) That he shall furnish bail bond with one surety in the amount of Rs.1.00 lac (rupees one lac) each to the satisfaction of the trial court.
- (II) That he shall not leave the limits of the Union of Territory of Jammu and Kashmir without prior permission of the trial court.
- (III) That he shall not influence the prosecution witnesses whose statements are yet to be recorded by the trial court.

26) A copy of this order be sent to the learned trial court for information.

(Sanjay Dhar)
Judge

Srinagar,
13.09.2024
“Bhat Altaf-Secy”

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No