

CASE NO.:
Appeal (crl.) 251 of 2008

PETITIONER:
Narayan Ghosh @ Nantu

RESPONDENT:
State of Orissa

DATE OF JUDGMENT: 04/02/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO 251 OF 2008
(Arising out of SLP (Criminal) No.6875 of 2007)
WITH
CRIMINAL APPEAL NO 252 OF 2008
(Arising out of SLP (Criminal) No.5941 of 2007)
Sankar Adeya
Versus
State of Orissa

\005. Appellant

\005. Respondent

V.S. SIRPURKAR, J.

1. Leave granted.

2. Being aggrieved by the refusal of bail by the High Court both the accused persons have come up before us by filing separate appeals.

3. The accused before us along with six other accused persons are facing the prosecution for the offences of criminal conspiracy under Section 120B IPC, murder under Section 302/34 IPC as also the offences under Section 25 and 27 of the Indian Arms Act. The case of the prosecution appears to be that the 8 accused persons conspired and in pursuance of that conspiracy one Tapas Mitra was murdered on the Puri Sea Beach. Immediate report with regard to the murder was lodged at the Puri Sea Beach Police Station by one Prashanta Bala to the effect that the informant along with some others, all of whom were the members of Baragaon Motor Association, about 250 members, had come to Puri and stayed in the hotels and deceased Tapas Mitra who was a Councilor of Baragaon Municipality was one of them. It was alleged that he was a member of the Trade Union and was an invited guest and was staying at Hotel Mayur and on 22.6.2006 at about 9.20 p.m. when the informant along with deceased Pallav Das, Tapas Ghosh and Swapan Seth were sitting on the sea beach in front of Hotel R.L., a man suddenly came on the spot and fired at Tapas Mitra, as a result of which Tapas Mitra sustained bleeding injuries. It was further averred that the persons present there tried to catch the assailant but he was able to escape. It was expressed specifically in the FIR that it was due to the political rivalry and previous enmity that Tapas Mitra was murdered. On the basis of the investigation some persons were arrested and a charge-sheet came to be filed against eight accused persons. However, after further investigation as per Section 173(8) Cr.P.C., the SDJM, Puri by his orders dated 2.1.2007 took cognizance of the offences under Section 302/34 IPC as also under Sections 25/27 of the Arms Act against the accused persons and as such they were arrested on 30th March, 2007 by Banagaon Police Station on the requisition of Puri Sea Beach Police Station.

4. To begin with, the appellants were released by Calcutta High Court

on interim bail by order dated 5.4.2007 on certain conditions and they were further directed to surrender before the appropriate court, i.e., SDJM, Puri within two weeks from the date of their release. The appellants accordingly surrendered on 20.4.2007 and prayed for the bail. However, that prayer was rejected. The appellants, therefore, moved the Sessions Judge, Puri. Even the Sessions Judge dismissed their bail applications. They thereafter moved the High Court of Orissa. However, even the High Court seems to have dismissed their bail applications. The appellants have now come up before us.

5. We have heard Shri Uday Umesh Lalit and Shri Panigrahi, learned Senior Counsels appearing on behalf of both the appellants. It was urged that both the appellants have been falsely implicated on account of their alleged political differences. It is further stated that the theory of conspiracy has no legs to stand as there is absolutely no evidence to support the same. It is also pointed out that the three witnesses who were set up in support of the conspiracy were already examined before the Sessions Court and all of them did not support the theory, in the sense that they turned hostile. Learned counsel further urged that the only possible material against them would be the confessions of the co-accused and even assuming that such confessions are admissible under Section 10 of the Indian Evidence Act, they would be of no consequences since such confessions cannot be used as substantive evidence. It is then pointed out that otherwise there is absolutely no material implicating the appellants and, therefore, they are liable to be released on bail.

6. Shri Janaranjan Das, learned counsel for the prosecution vehemently opposed the appeals. It is pointed out that the trial has already commenced and has substantially proceeded inasmuch as a large number of witnesses have already been examined. It is also expressed that at this stage of the trial it would not be proper to release the accused on bail as such release was likely to affect adversely the evidence of the proposed witnesses in the sense that there was every likelihood of the witnesses being intimidated because of the release of the appellants on bail.

7. Shri Lalit also supported his arguments by suggesting that the appellant Sanker Adeya was suffering from a serious kidney disorder and was in precarious health and pressed the ground of health in support of plea of bail. Learned counsel also further pointed out that there are some inherent defects in the prosecution story inasmuch as though Sanker Adeya was in Bangladesh from 19.5.2006 to 30.5.2006 yet it was suggested by prosecution witness Swapan Mondal that he had met Sankar Adeya and Naryana Ghosh at Tarapith temple and had a feast where the conspiracy for the murder was hatched. Learned counsel also pointed out that the statement of witnesses like Nirmal Biswas and Ashok Das @ Putke were recorded late and after the arrest of the appellant Sankar Adeya. All this, according to the learned counsel, went on to suggest that the appellants were actually innocent and were unnecessarily implicated.

8. Shri Janaranjan Das, learned counsel appearing for the prosecution pointed out that the prosecution has the material to show that as many as six accused persons, namely, Satyajit Lohar, Tarun Kumar Bhowmik @ Raja, Samir Durlav, Bapi Roy, Rajen Biswas and Samir Das had boarded a vehicle Tata Sumo from Chakdaha in the evening of 18.6.2006 and came to the Siromani Mondal at Gaganpur where they halted and next morning all these six persons along with three others, namely, Buro @ Akas, Kalo, etc. left for Puri and arrived there on 19.6.2006 and stayed in Hotel Kingfisher. Next day they were joined by Kaka and Munna who had arrived by Puri Express. All these persons, helped by two other persons to identify Tapash Mitra @ Tofan Mitra, firstly attempted to murder him in the afternoon but failed. However, in the evening on information that Tapas Mitra had gone to Puri Sea Beach, the accused persons located Tapas Mitra who was sitting there. Accused Raju, Bapi Roy and Akas @ Buro went and sat behind Tapas Mitra and one of them fired at Tapas Mitra, resulting in his death. The accused thereafter fled from the scene of occurrence. It was then contended that Bapi Roy had confessed about the conspiracy. It has also come out that both the appellants were friends and they had common grudge against Tapas Mitra.

9. Considering everything, we are of the clear opinion that it will not be possible to release the accused on bail at this stage. It is an admitted position that the Sessions trial had almost come to an end, and there are only few more witnesses to be examined. The prosecution has expressed that the appellants are politically influential and financially strong and are capable of influencing the witnesses. It has also been expressed that the appellants are residents of Banagaon District which is on the Bangladesh border and, therefore, there is every likelihood of their fleeing from the judicial process.

10. It is an admitted position that the appellants Sankar Adeya and Narayan Ghosh are the residents of Banagaon District which is a border District. Therefore, it cannot be said that the apprehension expressed by the learned counsel for the Prosecution is totally unfounded. Learned counsel, however, insisted that we should consider the material and more particularly the evidence regarding the conspiracy. We do not think that it would be proper for us to discuss the evidence threadbare as any expression of ours would undoubtedly affect the trial. It was admitted during the debate that some witnesses who were the witnesses for conspiracy were examined and had to be declared hostile. If that is so, that is all the more reason for us not to release the appellants when the trial is at a precarious stage.

11. Much debate was devoted about the non admissibility of the confessions of the co-accused which were likely to be relied upon by the prosecution. Reference was made to the reported judgments more particularly of Jayendra Saraswathi Swamigal v. State of Tamil Nadu [(2005) 3 SCC 13]. It was urged, relying on that decision, that there was no reasonable ground to believe that two or more persons in this case had conspired together to commit an offence and if there was no prima facie evidence of the existence of conspiracy, then there was no question of any evidence of the acts and statements made by any of the accused in furtherance of the common object being admissible at all. Learned counsel strenuously argued that there was no prima facie evidence to show that the two appellants were party to the conspiracy and had conspired together between themselves or with any other accused persons. It was pointed out from the reported decision that it was only when the conspiracy was being hatched, whatever was said could become admissible. Our attention was invited to the following observations:

"The words of Section 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words 'common intention' signify a common intention existing at the time when the thing was said, one or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention to the conspirators to which the statement can have reference."

There is no dispute about the principles stated in the ruling, however, we do not think that it would be proper for us to discuss at this juncture about prima facie finding. In our opinion it would be for the trial court to consider and appreciate the evidence which comes before it in support of the plea of conspiracy and to arrive at the correct finding. We will not, at this stage, comment upon the nature of the evidence one way or the other. In that view of the matter we do not think that the High Court was in error in refusing the bail to the appellants.

12. However, in view of the plea regarding the health of Sankar Adeya, we direct that all the timely medical help shall be made available to him. We also further direct that the trial shall be completed without any

unnecessary delay and as far as possible within four months from today.
With these observations, we dismiss both the appeals.

JUDIS