

**IN THE SPECIAL COURT FOR TRIAL OF NIA CASES, KERALA,
ERNAKULAM**

Present:-

Shri. Kamanees K., Judge, Special Court for NIA Cases.

Monday, the 17th day of January, 2022 / 27th Pousha, 1943

CrI.M.P No. 252/2021

in

RC No. 01/2021/NIA/KOC

(Vizhinjam P.S. Crime No. 498/2021)

Petitioner / Complainant:-

Union of India, represented by National Investigation Agency, Kochi

By Smt.Sindhu Ravisankar, Public Prosecutor, NIA.

Respondents / Accused No. 3, 8, 14 :-

- 1) A.H.S. Mendis Gunasekara, Aged 32 years,
S/o. Agampodi Hemal Sathyajit, R/o. 108,
Algiriyagewaththa, Katudampe,
Rathgama, Sri Lanka.
- 2) Soundarajan @ Soundar,
aged 24 years, No. 72, Agni Fairy Land,
Vanagaram, Maduravayil, Chennai.
- 3) Ahammed Fasly, aged 47,
S/o. Abdul Hassan, H.No. 35,
Central College Road, Passara Village,
Badulla District, Uva province, Sri Lanka.
Now residing at 38/18, Ibrahim Sahib Street 2nd Lane,
Mannadi, Chennai – 600001.

By Adv. Sri. Renjith Krishna, Legal Aid Counsel.

This petition having been heard on 14/01/2022 and the Court on this day passed the following:-

ORDER

1) This is an application filed by the Union of India represented by National Investigation Agency, Kochi to tender pardon to the accused Nos. 3, 8 and 14.

2) The brief facts of the case is as follows :- The Indian Coast Guard intercepted and traced out a Sri Lankan fishing boat by name 'Ravihansi' at Arabian Sea, found in possession of huge quantities of contraband articles including narcotic drugs along with five AK-47 rifles and 1000 numbers of 9mm ammunitions with six Sri Lankan nationals onboard. The boat along with ammunition were seized by the Narcotics Control Bureau (NCB) Sub-Zone, Kochi on 25.03.2021 and 26.03.2021 on their arrival at Vizhinjam port at Thiruvananthapuram. The case was registered by the NCB against six Sri Lankan nationals namely, L.Y.Nandana(A1), H.K.G.B. Janaka Dassppriya(A2), A.H.S.Mendis Gunasekara(A3), S.A.Nameesh Chullaka Senarath (A4), Thilanka Madushan Ranasingha(A5) and Dadallage Nisanka A(A6). The seized articles and arrested six accused persons were produced at JFCM Court, Neyyattinkara by NCB and the case was transferred to the Sessions Court, Vanchiyoor,

Thiruvananthapuram. On the basis of the report submitted by NCB, a case was registered on 05.04.2021 at Vizhinjam police station as Crime No.498/2021 dated 05.04.2021 under section 27 of Arms Act and section 34 of IPC for the illegal possession of arms and ammunitions before JFCM, Neyyattinkara. As per the notification of Government of India, Ministry of Home Affairs dated 27.04.2021, the National Investigation Agency took over the investigation and re-registered the case as RC 1/2021/NIA/KOC under section 7 r/w 25(1AA) of Arms Act and the FIR was submitted before this court. The investigation was taken over from Kerala police on 12.05.2021. The accused were formally arrested by the NIA on 11.06.2021 at Central Jail, Poojappura. They were produced before this court on 21.06.2021 on a production warrant issued by the court in CrI.MP No.99/2021. The accused persons were taken into NIA custody from 21.06.2021 to 28.06.2021 and further extended custody were given to the NIA. They were produced before the court on 02.07.2021 and were remanded back. The custodial interrogation revealed the role of the owner of the intercepted fishing boat. It also revealed the role of one Suresh Raj at Chennai and one Soundarajan @ Sounder of Chennai. They were part of larger conspiracy. They were arrayed as accused No. 7 and 8 and produced before this court on 29.07.2021. They were formally arrested on 02.08.2021.

3) During investigation the incriminating role played by the accused Suresh Raj @ Suresh and Soundarjan @ Soundar for committing the offence had been revealed. They were arraigned as accused No. 7 and 8 and a report has been submitted. They were revealed to be the members of banned organisation LTTE and rendering support for furthering the activities of LTTE. The investigation revealed the role of the proscribed terrorist organisation LTTE in this case. The relevant sections 38, 39 and 40 of the Unlawful Activities (Prevention) Act has been invoked. The custodial interrogation and investigation conducted so far revealed that the accused Nos. 7, 8, 10 and 15 are members of banned terrorist organisation and were working secretly for furthering the activities of LTTE under the supervision of leaders of LTTE at Tamil Nadu, Sri Lanka and other foreign countries. Accused Nos. 8, 3 and 14 expressed their willingness to give statements under section 164 Cr.PC regarding the role played by them as well as others in this case. The statement recorded under section 164 Cr.PC will be advantageous for the successful prosecution of the accused arrested in this case. They have made true and complete disclosure of the facts known to them regarding their role and association with other accused. They have also revealed the role of each accused which corroborates the evidence collected against them. It is therefore necessary

that these accused may be tendered pardon and examined as prosecution witnesses. The petition has been filed under section 306 and 307 Cr.PC in the interest of justice.

4) When the matter was posted for hearing, the accused No. 7 put up a written objection to the same. It shows that as per the order dated 31.12.2021, summons / production warrant were ordered after taking the case in the file. The application to tender pardon to the accused was received by this court during the investigation stage and before the final report was filed. The court can only forward such a request for compliance by the Chief Judicial Magistrate concerned who alone has the power to tender pardon to the accused. The Chief Judicial Magistrate will have to forward the case to the appropriate Magistrate. The Committal Magistrate will have to examine as a witness under section 306(4)(a) Cr.PC. The Magistrate will have to commit the case to Special Court for trial. Even if there is power under section 16(1) of NIA Act to take cognizance of the offence without a committal order, the powers to tender pardon shall have to be exercised in the manner cited supra. This court is bound by the statutory stipulations of section 4(2) Cr.PC, section 193 Cr.PC and section 209 Cr.PC. This court has not taken cognizance as against the said 3 accused and has not issued summons/production warrant upon them. The pardon

can be tendered only by Special Court and it will be one tendered under section 307 Cr.PC. In such case, the stage of examination of accused under section 306(4)(a) Cr.PC does not arise. Only after the investigation is completed and a final report is filed, pardon can be tendered against them. Court cannot go back to the pre-committal stage and forward the CrI.MP during the investigation stage to the competent Chief Judicial Magistrate. The charge sheet was filed only against 9 of the accused persons. There has been error in procedure by omitting out to take cognizance upon A3, A8 and A14. Reference has to be made to the Hon'ble High Court to set aside the order dated 31.12.2021.

5) Heard both sides.

6) In cases where the Special Courts grant pardon, compliance of section 306(4)(a) is not required and the position is clear in **Deivendran vs. State of Tamil Nadu (AIR 1998 SC 2821)** wherein it has been held as follows.

“It is no doubt true, as contended by Mr. Muralidhar the learned Counsel appearing for the appellants, that the procedure indicated in Sub-section (4)(a) of Section 306 is intended to provide a safeguard to an accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and thereby the accused becomes

aware of the evidence against him and further such evidence of an approver can be ultimately shown as untrustworthy during the trial when the said approver makes any contradictions or improvements to his earlier version. But still when the legislature in Section 307 have made specific reference to only on "such conditions" and not to the other procedures in Section 306 it would not be a rule of interpretation to hold that even Sub-section (4)(a) of Section 306 would also be applicable in such a case.”

7) It may be true that the petition had been filed before the final report was laid. Even if the final report has been laid, there has not been any finding that these persons who are sought to be made approvers are not found culpable. The prosecution has reserved his right to file a supplementary charge sheet in case the same is called for. Therefore, the procedure available under section 307 Cr.PC shall also be applicable.

8) Power under section 306 can be exercised by the Special Judge as it is expressly declared under section 16 of the NIA Act. Therefore, even if section 307 contains a provision that the same is to be exercised at any time after commitment, the same does not affect the power of the Special Judge for NIA cases. Thadiyantevida Nazeer and Ors. vs. State of Kerala reported in (MANU/KE/2062/2011) is speaking on the point.

9) In Thadiyantevida Nazeer and Ors. vs. State of Kerala, yet another aspect is spoken to. The objections are seen raised by another accused who actually does not have any say in this regard. Actually, it is the prosecution who has to be heard in this regard. The sections 306, 307 and 308 Crpc do not entitle the accused to complain against granting pardon to the approver or make any other order as to approver. In the words of Hon'ble High Court of Kerala in Thadiyantevida Nazeer and Ors. vs. State of Kerala -

“The Public Prosecutor has no grievance that Shammy Firoz examined as P.W.1 has resiled from the condition of pardon or that he has failed to make a full and true disclosure of the entire circumstances of the case within his knowledge. Hence, Annexure IV petition filed by the petitioners under Sec. 306, 307 and 308 Cr.P.C. was misconceived since those Sections do not entitle the accused to seek a cancellation of the order granting pardon to the approver or to re-transpose the approver back to the array of accused. The result of the foregoing discussion is that this was an ill-advised expedition by the petitioners/accused who were actuated by the sinister motive of aborting the trial assiduously conducted by the Special Judge”.

10) The learned counsel for 7th accused relies on **Gangula Ashok vs State of Andhra Pradesh (2000 (2) SCC 504)** which covers a specific category of cases under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1987. The same is not the case herein. She also relied on **CBI Chennai vs. Arul Kumar (AIR 2016 SC 2551)**. That had been a case under

the Prevention of Corruption Act, 1988 which speaks about a committal. The case on record is different, obviously. **Commander Pascal Fernandes vs State of Maharashtra (AIR 1968 SC 594)** was also relied on. That also does not cover the specific instance canvassed here. **Ashokan vs. State of Kerala (2005 (3) KLT 770)** principally speaks about the lack of right of the accused while the approver is examined before the Magistrate.

11) Therefore, there is no merit in the objections raised. The objections are hereby overruled. The accused persons shall be produced in the next posting. Ordered accordingly.

Dictated to the Confidential Asst., transcribed and typewritten by her, corrected and pronounced by me in open court on this the 17th day of January, 2022.

Sd/-
Kamanees.K.
Judge

Appendix : NIL

Id/-
Judge

// True copy //

(By Order)

Sheristadar

Order in
CrI.M.P No. 252/2021
in
RC No. 01/2021/NIA/KOC
Dated 17/01/2022