

Sessions Case no. 128 of 2013Order no. 98 dated 11.08.2017

Today is fixed for further submission by the ld. Spl. P.P.

Accused 1) Keshav Raj Pokhrel, 2) Arun Moktan, 3) Tenzing Khambachay (Sherpa), 4) Kamal Sinha, 5) Edwin Sanchabir Subba, 6) Goutam Tamang, 7) Puran Thami, 8) Keshar Rai, 9) Dawa Sangey Sherpa, 10) Suraj Singh, 11) Kismat Chhettri, 12) Alok Kantamoni Thulung, 13) Sanjoy Tamang, 14) Bhanu Rai, 15) Amol Lama, 16) Nagendra Pradhan, 17) Ashis Tamang, 18) Khagen Tamang, 19) Sona Sherpa, 20) Ruden Sada Lepcha, 21) Rabin Subba and 22) Dinesh Gurung @ Karate Kaila 23) Anita Lakhandri, 24) Sandhya Gurung, 25) Kabita Dahal and 26) Miss. Urmila Rumba are present by filing haziras.

Accused 1) Jiten Tamang, 2) Bimal Gurung @ Daju, 3) Smt. Asha Gurung, 4) Pemba Tshering Ola, 5) Roshan Giri, 6) Binay Tamang, 7) Sushma Rai, 8) Dinesh Theeng, 9) Devendra Sharma, 10) Dipen Malay, 11) Tilak Rai, 12) Babita Ganguly, 13) Naresh Rai, 14) Prabin Subba, 15) Harka Bahadur Chettri 16) Sunil Rai, 17) Ranjit Rai, 18) Subhash Tamang, 19) Pradeep @ Bhupendra Pradhan and 20) Prasant Chhettri @ Yogen, 21) Sudesh Rai Majhi and 22) Col. Ramesh Allay are absent.

Ld. Advocates for the above named accused persons filed four petitions along with annexures under section 317 Cr.P.C., praying for permission to represent the accused persons, by them, after serving the copy to the ld. Spl. P.P.

In view of the observation made in the earlier order dated 25.07.2017 and in view of the directions passed by the Hon'ble court in CRM no. 5221 of 2015 since the prosecution could not ensure the appearance of the accused persons the prayer u/s. 317 of Cr.P.C., stands allowed.

Hazira filed on behalf of Bharati Tamang (widow of the deceased) through her advocate.

Ld. Spl. P.P. resumed his argument by submitting that vide order dated 25.7.2017, this court had opined that this court's power had been seized by the Hon'ble High Court, when the Hon'ble High Court had granted liberty to the CBI, to pray for cancellation of the anticipatory bail, on violation of any conditions imposed by the Hon'ble court, upon the petitioners of CRM no. 5221 of 2015. But in the same CRM no. 5221 of 2015, the Hon'ble court had directed the Chief Judge of the City Sessions Court, Calcutta to release the petitioners on executing a bond of Rs. 10,000/- each of two sureties of Rs. 5000/- each, one of whom would be local, by December 21, 2016. Therefore, the ld. Spl. P.P's. contention was that, as the petitioners mentioned above had been granted regular bail by this court therefore, the CBI was not bound to ensure the production of the petitioners, as directed by this court vide order dated 25.7.17 and the subsequent orders thereafter. Moreover, he has also submitted that this court was empowered under the provision of section 437(5) of the Cr.P.C. to ensure the production of the petitioners. That apart he has led this court, through the directions in para 42(II) of the Hon'ble Supreme Court in Writ Petition (CRM) no. 159 of 2012, wherein it has been laid down that the Sessions Judge should forthwith commence the proceedings by ensuring the presence of all concerned, both accused as well as the prosecuting agency. Therefore, from the above findings

the CBI should not have been instructed to ensure the appearance of the accused persons, as it was the duty of this court to ensure the appearance of the accused persons. Furthermore, he has submitted that instead of this court being in CATCH- 22 position, the prosecution was more in CATCH-22 position, as the Hon'ble court had criticized the prosecution's inability to ensure appearance of the accused persons before this court, but when a prayer of NBW was made before this court, this court had refused the same and therefore, the prosecution was unable to ensure the production of the accused persons in this case.

In this regard he has relied on the following judgements :-

- 1) AIR 1990 SC – 121 – Radhey Shyam vs. Kunj Behari & Ors.
- 2) AIR 2001 SC- 40 – State of Delhi vs. Gyan Devi and Ors.
- 3) AIR 1981 SC – 1548 – Mohd. Akbar Dar & Ors. Vs. State of Jammu & Kashmir & Ors.
- 4) AIR 2001 SC – 1507 – Smt. Om Wati & anr. vs. State, Through Delhi Admn. & Ors.
- 5) Appeal (Crl.) 744 of 2008 – Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra.

He therefore, prays for framing of charge against all the accused persons in view of the submissions made above as well as on the basis of the ruling cited above.

At this stage, one application supported by affidavit, filed on behalf of Bharati Tamang (widow of the deceased), through her advocate after necessary supply of the copies to all the sides, including the ld. Spl. P.P.

The ld. Lawyer for the widow, Bharati Tamang submits that this affidavit has been filed, on the basis of the order passed by this court and Crl. M.P. 1738 of 2017 had been filed in the Writ Petition (Crl.) no. 159 of 2012 praying for-

- (a) appointment of special investigating team for denovo investigation,
- (b) directing respondent nos. 8 & 9 (CBI) for fresh investigation into the aspects mentioned in the above petition,
- (c) monitor the investigation,
- (d) appoint of a Special Public Prosecutor for conducting the trial before the court of the Chief Judge, City Court, Calcutta,
- (e) for direction upon the respondent no. 2 who had intercepted the telephone calls of the accused persons during and after the murder of Madan Tamang and had obtained the voice data record and to produce the original hard disc containing the voice data record of the intercepted telephone calls obtained by the Intelligence Bureau, West Bengal and the same was still pending before the Hon'ble Supreme Court.

He has further submitted, that another petition being Crl. M.P. no. 4129 of 2017 in Crl. M.P. 1738 of 2017 in Writ Petition (Crl.) no. 159 of 2012 had been filed seeking for stay of all the further proceedings, in Sessions Case no. 128 of 2013, before the court of the Chief Judge, City Sessions, Calcutta and the same was also pending.

He has also submitted, that yet another batch of petitions being Crl. M.P. nos. 1603 – 1608 of 2017, challenging the anticipatory bail order granted to 23 accused persons on 14.12.2016, in Criminal Misc. case nos. 5221, 5222, 5223, 5224, 5294 and 5295 all of 2015, passed by the Hon'ble Calcutta High Court and all the above mentioned petitions had been

pending before the Hon'ble Supreme Court for which reason the instant order on the discharge petitions as well as the consideration of charge should not be passed by this court.

To 16.08.2017 for necessary order.

D/C. by me.

Sd/-

Chief Judge
City Sessions Court, Calcutta.

Sd/-

Chief Judge
City Sessions Court, Calcutta.