

A NARAYAN GHOSH @ NANTU ETC.

v.

STATE OF ORISSA

(Criminal Appeal No. 251 of 2008)

FEBRUARY 4, 2008

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[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

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Code of Criminal Procedure, 1973: s.439 – Bail – Charge of murder – High Court rejected the bail applications – Correctness of – Held: Appellants were politically influential and financially strong and hence capable of influencing the witnesses – Moreover, they were residents of a District on Indo-Bangladesh border and likely to flee from the judicial process – Trial being at a precarious stage, High Court rightly rejected their bail applications – Penal Code, 1860 – ss.302/34 – Arms Act – ss.25/27.

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Prosecution case was that the informant along with 250 persons, who all were members of Motor Association had come to Puri. Deceased who was a councilor of Municipality was one of them. He was a member of trade union. On the fateful day, when informant, deceased and few other persons were sitting on the sea beach, a man came on the spot and fired at deceased and ran away. It was expressed in FIR that the deceased was murdered due to the political rivalry and previous enmity. On the basis of investigation, some persons were arrested and charge sheet was filed against eight accused persons. After further investigation as per s.173(8) Cr.P.C., the ADJM, Puri took cognizance of offences under ss.302/34 IPC as also under ss.25/27 of Arms Act against accused persons and as such they were arrested.

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The accused-appellants were released by Calcutta High Court on interim bail on certain conditions and they were further directed to surrender before the SDJM, Puri.

The appellants accordingly surrendered and prayed for the bail. However, that prayer was rejected. The Sessions Judge and High Court also dismissed the bail applications. Hence these appeals.

The appellants contended that they were falsely implicated on account of their alleged political differences; that there was absolutely no evidence to support the story of conspiracy; that the three witnesses who were set up in support of the conspiracy were already examined before the Sessions Court and all of them had turned hostile; and that even otherwise there is absolutely no material implicating the appellants and, therefore, they are liable to be released on bail. It was also pleaded on behalf of the appellant 'S', that he was suffering from a serious kidney disorder and was in precarious health.

Dismissing the appeals, the Court

HELD: The appellants should not be released 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. 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 not to release the appellants when the trial is at a precarious stage. 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. This court would not, at this stage, comment upon the nature of the evidence one way or the

A other. In that view of the matter, the High Court was not in error in refusing the bail to the appellants. However, in view of the plea regarding the health of appellant 'S', the direction is passed to make available to him all the timely medical help. [Paras 9–12] [375-G-H; 376-A, D; 377-E-G]

B *Jayendra Saraswathi Swamigal v. State of Tamil Nadu* (2005) 3 SCC 13 – referred to.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 251 of 2008.

C From the final Judgment and order dated 4.9.2007 of the High Court of Orissa at Cuttack in BLAPL No. 4487/2007.

WITH

Criminal Appeal No. 252 of 2008.

D Basudev Panigarh, Uday Umesh Lalit, Deepak Kumar Jena, Minakshi Jena, Humanu Sahu, Bijan Kumar Ghosh, Dipankar Burman, S.K. Poddar and Anurag Pandey for the Appellant.

E Janaranjan Das and Swetaketu Mishra for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

F 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.

G 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

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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.

A 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
B 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
C 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
D 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
E 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
F 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
G 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
H 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

A 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.

B 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.

E 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 H 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.

D.G.

Appeals dismissed.