

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU

CRM(M) No. 554/2022

Reserved on: 15.03.2023

Pronounced on: 11.04.2023

Tariq Ahmed Dar age 39 years

....Petitioner(s)

Through:-Mr. Gagan Kohli, Advocate.

**Versus**

National Investigation Agency  
Th. (NIA P/S) New Delhi

....Respondent(s)

Through:- Mr. Vishal Sharma, DSGI

**CORAM: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

**J U D G M E N T**

1. Petitioner/applicant has invoked the inherent jurisdiction of this court in terms of Section 482 of the Code of Criminal Procedure (hereinafter referred as 'Code') for quashing/setting aside Section 306(4)(b) Cr.PC on being unconstitutional/unreasonable putting restrictions upon the powers of the trial Court to release the approver on bail, with further direction to release the petitioner on bail. It is averred, that the petitioner is facing trial before the Court of 3<sup>rd</sup> Addl. Sessions Judge (with powers under NIA Act) at Jammu in Nagrota Terrorists attack case RC No. 16/2016/NIA/DLI dated 07.12.2016 arising out of Police Station Nagrota (J&K) case Crime No. 221/2016 dated 29-11-2016 titled State (NIA) **Versus** Syed Munir-Ul Hassan Qadri and Ors., wherein the petitioner is neither criminal nor a terrorist, but an innocent businessman who stands implicated in the case by the other accused persons; petitioner has nothing to do with the acts of the terrorists as he has no knowledge of the plan hatched by the other co-accused persons; A-1 Syed Munir-Ul Hassan Qadri who was an employee of petitioner misrepresented him in order to secure the vehicle of the petitioner; petitioner had neither any knowledge of such plan nor any intention to

indulge in anti national activities as the petitioner is nationalist to the core; that the petitioner was neither in touch with PAK nationals nor had such knowledge of conspiracy on the part of A-1 to commit attack on army establishment in Nagrota Jammu, wherein, vehicle of the petitioner was secured by A-1 misrepresenting him. It is moreso averred, that during the pendency of trial, petitioner has been made approver in the said case, wherein, he has accepted to be such witness with the promise extended by the trial court, in pursuant thereto, petitioner has already deposed correctly and truthfully as such a witness before the Ld. Trial Court, as prosecution witness, and therefore, at this stage petitioner is entitled to grant of bail; that the release of petitioner would advance the case of justice, whereas, the denial thereto will defeat the same and result into the grave miscarriage of justice to the petitioner apart from infringing the constitutional rights; that in case petitioner/approver is detained in custody till final conclusion of trial, the same will discourage the persons to be as such approver/witness which will hamper the interest of prosecution; the provisions contained in Section 306(4)(b) Cr.pc mandate that unless the accused is already on bail he shall be detained in custody until the termination of trial operates as complete bar on the powers of Criminal Court to release approver on bail, however, the High Court has the inherent powers u/s 482 Cr.pc to pass any order including release of petitioner/approver on bail to meet the ends of justice and to prevent the abuse of process of court, therefore, the petitioner who is behind bar since 02.06.2018 (04 years and 10 months) and even his statement/evidence stands recorded as prosecution witness on 25.04.2022 & 26.04.2022 if he is not released on bail no useful purpose would be served by keeping him in detention, prayer has been made for release of petitioner accused on bail.

2. Respondent/UT has opposed the bail on the grounds, that the present petition filed by the petitioner u/s 482 Cr.pc seeking quashment of Section 306(4)(b) Cr.pc as unconstitutional is misconceived under law and deserves to be dismissed with heavy cost; Section 306(4)(b) requires an approver to be kept in judicial custody until the termination of trial if he is not already released on bail, and the object thereof is not to punish the approver, but to protect him from being exposed to harm from other

accused/accomplishes, as the accused to whom pardon is tendered being an infamous person is susceptible to easy accessibility and may be tampered with or the co-accused if on bail or persons interested in them who would necessarily be infuriated by his treachery may attempt to do away with approver. It is contended, that Police Station Nagrota on source information registered case No. 221/2016 dated 29.11.2016 U/S 7/27 of Arms Act 1959 r/w Sections 120-B/121/307 RPC against slain terrorists and unknown person on the basis of complaint lodged by Sh. Jatinder Singh Rakwal Sub-Inspector JKP Police Station Nagrota alleging therein in that complaint, that few unknown terrorists on the directions of Pakistan based ISI Agency entered into the state in order to create hue and cry, duly equipped with arms and ammunition sneaked into the army camp and attacked on army camp Nagrota near Baleeni with intention to kill the army personnel and committed a deadly attack and started indiscriminate firing and during the said attack 10 army personnel got injured out of which 2 officers and 5 jawans succumbed to their injuries and got martyred. It is contended, that considering the gravity of offence and its interstate linkages and implication on national security, central Government in exercise the powers conferred by Section 6(5) r/w 8 of NIA Act 2008 Suo moto issued order No. 11011/37/2016-IS. IV dated 06.12.2016 directed the NIA to take up the investigation of the case, accordingly, a case was registered at Police Station NIA New Delhi vide RC-No. 16/2016/NIA/DLI dated 07.12.2016 for the purpose of investigation. It is moreso contended, that after completion of investigation, the charge sheet was filed before this Trial Court on 20.11.2018 against accused persons including the appellant for commission of offences punishable u/ss 307/302/201/120-B/121 RPC r/w Sections 7/25/27 of Arms Act r/w Sections 3/4/5 Explosives Substances Act r/w Section 14 Foreigners Act r/w Sections 17/18/19/20/38/39 of UA(P) Act 1967; seven (07) accused persons are still absconding and General Warrants of arrest u/s 512 Cr.pc against them have already been issued by NIA Court Jammu; appellant/petitioner was arrested on 02.06.2018 vide order dated 07.10.2021, he was granted pardon by the NIA Court, Section 306(4)(b) casts duty on the court to keep approver in detention till termination of trial, appellant/petitioner

filed bail application on 30.04.2022 before the trial court and on 27.06.2022 the bail application was withdrawn in view of Section 306(4)(b) Cr.pc, inherent jurisdiction cannot be exercised as there is no abuse of process of court, no cause of action has accrued to petitioner, who is not entitled to any relief, therefore, the appeal deserves to be dismissed.

3. Ld. Counsel for petitioner/applicant without disputing the statutory restriction in regard to direction of approver till termination of trial, has submitted arguments that in appropriate cases approvers have been released on bails in exercise of inherent powers of the High Court under section 482 CrPC, petitioner at no stage was involved in commission of any offence much less in the incident involving terrorist attack in army camp Nagrota Jammu, petitioner has voluntarily offered to assist the investigation/prosecution by providing important information and has stood to his ground after being made approver and has make statement before the trial court as prosecution witness making full/complete disclosure of the facts of the case in his statement before the trial Court. It is argued, that the dominant object of requiring an approver to be detained is not intended to punish the approver but to protect him from possible indignation, rage and resentment of his associates in the crime to whom he has chosen to expose, the release of an approver on bail may be illegal but such release cannot have any effect on the virility of pardon, moreso, petitioner/accused has already been examined as witness and to keep him in further custody would amount to infringement of his right to life and personal liberty. To support his arguments, Ld. Counsel for appellant/petitioner has relied upon the judgments reported in (i) **2010 Supreme (J&K) 308** [Mohd Lateef Deedar—Appellant Versus State & Ors.—Respondents], (ii) **2010 Legal Eagle (J&K) 149** [Mohammad Sultan Mir Versus State of J&K], (iii) **2007 Supreme(J&K) 467** [Kumad Kumar Mandal—Appellant Vs. State of J&K and Others—Respondents],(iv) **1994 Legal Eagle (SC) 582** [Suresh Chandra Bahri and others Versus State of Bihar] &(v)**2022 Supreme(Jhk) 910** [Sudhanshu Ranjan @ Chhotu Singh—Petitioner Versus The Union of India, through National Investigation Agency, New Delhi-Opposite Party].

4. Per-contra Ld. DSGI for respondents while recapitulating his contentions in the written objections has opposed the grant of bail on the ground that the court has no power to admit approver on bail in view of statutory inhibition put on it's power in terms of Section 306(4)(b) Crpc, which are mandatory in nature, the dominant object of the said provision is to keep the approver in custody till the termination of the trial so as to protect him from rage and resentment of his associates.
5. I have heard Ld. Counsel for petitioner & Ld. DSGI for respondent. I have gone through the contents of the petition, the objections of the respondent, case laws cited by Ld. Counsel for petitioner and the relevant law on the subject matter.

**Section 306(4)(b) of Cr.pc** which deals with the provisions of tendering pardon to an accomplice and grant of bail, for the sake of convenience is reproduced hereunder:-

**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 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.**

Section 306 appears to be an exception to the general principles of criminal law. This provision has been incorporated in the statute book to ensure that the preparators of crime are punished and do not get scot free. If a person who has committed crime volunteers to make a clean

breast of all the true facts about the circumstances relating to the offence and all other persons involved in the commission of the crime, the state, by enacting aforementioned provision has extended promise to such person that after fulfilling the terms and conditions therein, he will get benefit of the pardon which has been tendered to him meaning thereby, that he would not be punished, but would be set at liberty. The intention of the legislature in enacting such a provision has to be seen in the backdrop of securing a crime free society. The person who volunteers to make full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and other persons connected therewith, when satisfies the terms and conditions of the pardon tendered to him by making a statement during the trial of the case, which pardon entitles him to be set at liberty, then what is the purpose of keeping such a person in detention thereafter. Everyone is bound by statutory promise. Article 21 of the Constitution of India reproduced hereinunder provides that no person shall be deprived of his life and personal liberty except in accordance with procedure established by law.

“21. Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law.

**In 2010 Supreme (J&K) 308** [Mohd Lateef Deedar—Appellant Versus State & Ors.—Respondents] relied by Ld. Counsel for petitioner, this Court while granting bail to an approver in case FIR No. 130/2008 of Police Station Kupwara registered for commission of offences under sections 364,302,34,420 RPC, in paragraphs 11,14,15&16 of the judgment held 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.PC. 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.PC 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 can not 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 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.PC, 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."

**In 2010 Legal Eagle (J&K) 149** [Mohammad Sultan Mir Versus State of J&K] relied by Ld. Counsel for petitioner, while granting bail to an approver/accused for commission of offences punishable under sections 302, 364,120-B,201 RPC, this Court in paras 13 &14 of the judgment observed as under:-

13. Learned counsel for the petitioner contends that the approver, no doubt, has to remain in custody until termination of trial **but in exceptional circumstances grant of bail is permissible**. In support thereof, relied on the judgment rendered by the Hon'ble Apex Court in Suresh Chandra Bahri v. State of Bihar (AIR 1994 SC 2420).

14. In the reported judgment the approver was enlarged on bail. It was contended that clause (b) of Section 306(4) Cr. P. C (corresponding to Section 337 (3) of the State Cod) provides that the approver shall be detained in custody until termination of trial unless he is already on bail but contrary to that the approver was enlarged on bail after he was granted pardon and as such the trial was vitiated. Hon'ble Apex Court in para 34 of the judgment has observed as under:-

"It is no doubt true that clause (b) of 5.306(4) directs that the approver shall not be set at liberty till the termination of the trial against the accused persons and the detention of the approver in custody must end with the trial. The



dominant object of requiring an approver to be detained in custody until termination of the trial 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 resentment of his associates in a crime to whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon and released from the custody." In the said para it has been further observed:

"one thing is clear that the release of an approver on bail may be illegal which can be set aside by a superior Court, but such a release would not have any effect on the validity of the pardon once validly granted to an approver. In these circumstances even though the approver was not granted any bail by the committal Magistrate or by the trial judge, yet his release by the High Court would not in any way affect the validity of the pardon granted."

**In 2007 Supreme(J&K) 467** [Kumad Kumar Mandal—Appellant Vs. State of J&K and Others—Respondents] relied by Ld. Counsel for petitioner, while granting bail to an approver/petitioner indicted for commission of offences in FIR No. 138/2014 of Police Station Leh punishable u/ss 366-A,302,376,202,212,342,176 & 201 RPC, this Court while granting bail to approver in paragraphs 7&9 of the judgment observed as under:-

7. Legal position is clear too and no more res integra. There is complete Bar to the release of the approver until the termination of the trial, if the approver had not been released on bail prior to the tender of pardon to him. **However, in appropriate cases, having regard to the facts and circumstances of the case, an approver can be released on bail by the High court in exercise of inherent powers under section 561-A Cr. P.C. (section 482 Central Code).**

9. There cannot be any quarrel with the legal position that in terms of section 337 (3) Cr.P.C. bail to the approver, who is in custody, cannot be granted. However, in an appropriate case, this Court can release him on bail in exercise of inherent power under section 561-A Cr.P.C. Having regard to the nature of the involvement of the petitioner in the incident and the role said to have been played by him, his having supported the prosecution case at trial of the case and the fact that he is now in custody from last more than two years, the interest of justice demands that he is released on bail instead of keeping him in custody.

**In 1994 Legal Eagle (SC) 582** [Suresh Chandra Bahri and another Versus State of Bihar] relied by Ld. Counsel for petitioner, Hon'ble the Supreme Court while granting bail to an approver indicted in a murder

case for commission of offence punishable u/s 302 IPC in para 34 observed as under:-

34. As regards the contention that the trial was vitiated by reason of the approver Ram Sagar being released on bail contrary to the provisions contained in clause (b) of sub-section (4) of Section 306 of the Code, it may be pointed out that Ram Sagar after he was granted pardon by the learned Magistrate by his order dated 9.1.1985, he was not granted bail either by the committing Magistrate or by the learned Additional Judicial Commissioner to whose Court the case was committed for trial. The approver Vishwakarma was however, granted bail by an order passed by the High Court of Patna, Ranchi Bench in Criminal Misc. Case No. 4735186 in pursuance of which he was released on bail on 21.1.1987 while he was already examined as a witness by the committing Magistrate on 30.1.1986 and 31.1.1986 and his statement in Sessions trial was recorded from 6.9.1986 to 19.11.1986. It is no doubt true that clause (b) of Section 306 (4) directs that the approver shall not be set at liberty till the termination of the trial against the accused persons and the detention of the approver in custody must end with the trial. The dominant object of requiring an approver to be detained in custody until the direction of the trial 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 to whom he was chosen to expose as/well as with a view to prevent him from the temptation of saving his one time friends and companions after he is granted pardon and released from the custody. It is for these reasons that clause (b) of Section 306 (4) casts a duty on the Court to keep the approver under detention till the termination of the trial and thus the provisions are based on statutory principles of public policy and public interest, violation of which could not be tolerated. But one thing is clear that the release of an approver on bail may be illegal which can be set aside by a superior Court, but such a release would not have any effect on the validity of the pardon once validly granted to an approver. **In these circumstances even though the approver was not granted any bail by the committing Magistrate or by the trial Judge yet his release by the High Court would not in any way effect the validity of the pardon granted to the approver Ram Sagar.**

**In 2022 Supreme(Jhk) 910** [Sudhanshu Ranjan @ Chhotu Singh—Petitioner Versus The Union of India, through National Investigation Agency, New Delhi-Opposite Party] also relied by Ld. Counsel for petitioner, Jharkhand High Court while granting bail to the approver in para 21 held as under:-

21. It is an admitted fact that by order of this Court, the deposition of the petitioner was recorded and 8 accused persons already cross-examined this petitioner and the petitioner was discharged. The other accused persons are not apprehended by some of the accused persons have not appeared in the court.

**The question remains that the petitioner who is approver under section 306 Cr.pc whether can be allowed to remain in jail custody for indefinite period or not?** The two of the accused persons have been granted bail by the Division Bench of this court and by the Hon'ble Supreme Court as discussed (Supra). The accused has been given a right to apply for bail but the approver not as it is apparent from the perusal of section 439 Cr.pc. Thus, there is no doubt in the given situation where some of the accused persons are absconding and some are before the Court, the trial will be prolonged and when the approver has been examined and has supported the prosecution case, he may be detained in jail despite that fact that even some of the accused persons have been granted bail. **A person who has been made approver cannot be allowed to be remained in jail custody indefinitely. Moreover, section 306(4)(b) Cr.pc seems to be directory and not mandatory. To keep the approver indefinitely in jail is not the intention of the legislature.** In the case of Aamir Abbas v. State, through NIA(Supra), there was threat to the life and warning received by the petitioner of that case and in view of that, the Delhi High Court has not allowed the approver to get out from the jail. The petitioner is in jail custody for more than three years.

6. Ratios of the judgments (Supra) make the legal proposition manifestly clear, that the dominant object of keeping an approver to be detained in custody till the termination of trial is not intended to punish the approver for having come forward to give evidence in support of prosecution, but to protect him from possible indignation, rage and resentment of his associates in a crime to whom he was chosen to expose, and such provision is based on public interest, there cannot be any quarrel with legal position that in terms of section 306(4)(b) Cr.pc bail to approver who was in custody cannot be granted, however, in an appropriate case High Court can release the approver on bail in exercise of its inherent powers u/s 482 Cr.pc. Ratios of the judgments (Supra) squarely apply to the facts of the case in hand. It is unambiguously reiterated here, that petitioner/accused arrested on 02.06.2018 in the case in hand has turned approver and was granted pardon by the trial court vide its order dated 07.10.2021. Petitioner/approver has also been examined as prosecution witness (PW No.1) by the trial court on 25.04.2022 & 26.04.2022 wherein, he has supported the prosecution case in the trial court. From the date of arrest on 02.06.2018 for the last more than 4½ years petitioner/approver is lying in judicial custody in District Jail Ambphala Jammu. Sub-Section 4 of Section 306 Cr.pc cannot be interpreted in a manner which would defeat the mandate contained in Article 21 of the

Constitution of India dealing with life and personal liberty of an individual being of paramount importance in human existence. What purpose it is to be achieved by keeping an approver in custody during the trial after he satisfactorily complied with the terms and conditions of tender of pardon, he gets right to be released and cannot be allowed to remain in jail custody indefinitely. The dominant object is, that once an accused is granted pardon under the relevant provisions of the Code of Criminal Procedure, he ceases to be an accused and appears witness for the prosecution (vide AIR 1989 SC 589).

7. In view of the aforesaid discussion, the law is no longer res-integra that the High Court in exercise of its inherent powers u/s 482 Cr.pc in appropriate case can release an approver on bail. Viewed thus, instant petition is allowed and petitioner/applicant is admitted to bail on his furnishing surety bond in the sum of Rs. 50000/- to the satisfaction of the Registrar Judicial of this Court with direction to furnish personal bond of the like amount before Superintendent District Jail Ambphala Jammu where he is presently lying in judicial custody, with the direction to appear before the trial Court if and when required.
8. Disposed of accordingly.

Jammu:  
11.04.2023  
Vijay

**(Mohan Lal)**  
**Judge**

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