

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 1906/2011**

%

Reserved on: 01.12. 2011

Decided on: 13.12. 2011

BANGARU LAXMAN

..... Petitioner

Through: Mr. Sunil Kumar, Sr. Adv. with Mr.
Manish Mohan and Mr. Atul Kumar,
Advs.

versus

STATE THR. CBI & ANR.

..... Respondents

Through: Mr. Narender Mann, Standing
Counsel for CBI.
Ms. Madhurima Tatia, Adv. for R-2.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The Petitioner is an accused before the learned Special Judge, CBI, Rohini in complaint case No.8/2009 under Sections 120B IPC read with Sections 7 and 9 of the Prevention of Corruption Act, 1988. The allegations against the Petitioner are that he accepted illegal gratification from the journalists of tehelka.com posing as arms dealers. During the course of investigation on 21st March, 2005, Respondent No.2 herein Mr. T. Satyamurthy appeared before the learned Special Judge, CBI and prayed for anticipatory bail under Section 438 Cr.P.C. The said prayer was not opposed by the CBI and Respondent No.2 was, thus, granted the relief of anticipatory bail. On 21st April, 2005, the Respondent No.2 appeared before the learned

Metropolitan Magistrate and got his statement recorded under Section 164 Cr.P.C. in the presence of the Investigating Officer. Before filing of the charge sheet on 3rd July, 2006, the CBI moved an application before the learned Special Judge, CBI seeking pardon for Respondent No.2, co-accused so as to make him a witness/approver in the case. Learned Special Judge on 17th July, 2006 allowed the said application of Respondent No.1/ CBI under Section 306 Cr.P.C. after perusing the statement of Respondent No.2 recorded under Section 164 Cr.P.C.

2. The Petitioner being aggrieved by the order granting pardon approached this Court by way of a criminal revision petition No.769/2006, which was dismissed by this Court vide its order dated 30th August, 2010. The Petitioner took the matter to the Hon'ble Supreme Court by way of special leave petition. On 22nd November, 2011 Hon'ble Supreme Court dismissed the SLP of the Petitioner holding that the Special Judge was competent to grant pardon to Respondent No.2 under Section 306 Cr.P.C. The matter does not rest there. Thereafter on 16th January, 2008, the Petitioner filed an application before the learned Special Judge, CBI seeking an order in terms of Section 306 (4)(b) Cr.P.C. for taking the Respondent No.2, an approver in this case, into custody on the specific ground that he

was never arrested before grant of pardon and that according to the said provision, an approver unless he is already on bail, is required to be detained in custody until termination of the trial. Vide order dated 7th April, 2011 the learned Special Judge dismissed the application of the Petitioner. This is the order impugned in the present petition.

3. Learned counsel for the Petitioner contends that the learned Special Judge fell into grave error in not exercising power under Section 306(4)(b) Cr.P.C. Respondent No.2 had been granted anticipatory bail, however, he was not arrested. According to the learned counsel, the expression “anticipatory bail” is really a misnomer as what is actually contemplated under Section 438 Cr.P.C. is an order directing the release of an accused on bail in the event of his arrest. Thus, as long as the person is not arrested, he cannot be on bail. In the present case though Respondent No.2 had been granted an order that in the event of arrest he would be released on bail, however, he was never granted bail as he was not arrested. Learned counsel contends that since Respondent No.2 is not on bail, the provision of Section 306(4)(b) Cr.P.C. comes into play. According to learned counsel, the finding of the learned Special Judge that the words “unless already on bail” are synonymous to “unless he is in custody” is erroneous.

4. According to the learned counsel, the terms “arrest” and “custody” are not interchangeable. Reliance is placed on *Roshan Beevi and others v. Joint Secretary to Government of Tamil Nadu and others*, 1984 CRL.L.J. 134 to contend that the person granted pardon may not necessarily be an accused. Reliance is also placed on *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420 to contend that the dominant object of requiring an approver to be detained in custody until conclusion of 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 has chosen to expose as well as with a view to prevent him from the temptation of saving his onetime friends and companions after he is granted pardon and released from the custody. It is, thus, contended that the provisions of Section 306(4)(b) is based on the principle of public policy and public interest and violation thereof cannot be tolerated in terms of the order of the Hon’ble Supreme Court. Thus, according to the Petitioner, compliance of Section 306(4)(b) Cr.P.C. is mandatory. As the Petitioner is entitled to a free and fair criminal trial in accordance with the procedure established by law, he has a

fundamental right under Article 21 of the Constitution to file an application and ensure compliance of Section 306(4)(b) Cr.P.C.

5. Per contra, learned counsel for the CBI states that the words “any person supposed to have been directly or indirectly concerned in or privy to an offence” cannot be read in isolation. They are to be read in conjunction with the words used in the end of Section 306(1) with “whether as principal or abettor”. It is contended that there is no distinction in grant of bail under Sections 436/437/438/439 Cr.P.C. Even under Section 438 Cr.P.C. the person is to be released on bail on being arrested. It is further contended that once bail is granted, it enures to the person till conclusion of the trial. Since Respondent No.2 was granted anticipatory bail, he cannot be taken into custody on being granted pardon. The Hon’ble Supreme Court has already upheld the validity of the order granting pardon to Respondent No.2. The Petitioner is devising ways and means to wriggle out of the evidence in the form of accomplice evidence of Respondent No.2. The present petition has been filed to thwart the criminal justice process. The evidence of Respondent No.2 has already been recorded. Prosecution evidence is complete during trial. The case is fixed for recording of statement of accused on 2nd December, 2011 and thus, the provisions of Section 306(4)(b)

Cr.P.C., which is based on public policy even if interpreted as contended by the learned counsel, cannot be given effect to. No useful purpose will be served in sending Respondent No.2 in custody.

4. Learned counsel for Respondent No.2 contends that the requirement of Section 306(4)(b) Cr.P.C. is a procedural requirement. There is no legal obligation on the Trial Court or a right in favour of the accused to insist for compliance thereof. Reliance is placed on *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*, (2009) SCC 498. A Full Bench of this Court in *Prem Chand v. State*, 1995 CRL.L.J.1534 has held that since the approver's evidence was recorded, he could be released on bail as no useful purpose would be served in his further detention in jail and the administration of justice was not likely to be affected on his release. In the present case also, statement of Respondent No.2 has already been recorded. Therefore, no useful purpose will be served in now sending him in custody.

5. I have heard learned counsel for the parties at length. Before advertng to the contentions, it would be relevant to reproduce the relevant portions of Section 306 Cr.P.C:-

“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 Justice

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) xx xx xx xx

(3) xx xx xx xx

(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.

6. A perusal of Section 306(1) shows that though the initial clause uses the words “any person directly or indirectly concerned in or privy to an offence to which this section applies”, however, the person is qualified by the subsequent portion of the sub-section which states “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”.

7. In *Suresh Chand Bahri (supra)* the Hon’ble Supreme Court was dealing with a case where the approver was examined by the committing

Magistrate and was subsequently released on bail by the High Court. While dealing with this situation, it was held that release would in no way affect the validity of pardon granted to approver. The relevant portion of the judgment reads as follow:-

“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-sec. (4) of S. 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. 4735/1986 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 also recorded from 6-9-1986 to 19-11-1986. It is no doubt true that clause (b) of S. 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 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 and resentment of his associates in a crime 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 custody. It is for these reasons that clause (b) of S. 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 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 to the approver Ram Sagar.”

8. In *Prem Chand (supra)* the Full Bench of this Court held:-

“8. It is the provisions of S. 306(4)(b) providing that every person accepting a tender of pardon, shall unless he is already on bail, be detained in custody until the termination of the trial which have come up for interpretation. Its constitutional validity has also been challenged.

9. So far as the language used in S. 306(4)(b), it is quite explicit that the person accepting tender of pardon unless already on bail, has to be detained in custody till the end of the trial. The word used is "shall", and there is almost a unanimity of opinion of different High Courts that the legislature has not envisaged grant of bail to a person during the trial after he has accepted pardon. The underlying object of requiring the approver to remain in custody until the termination of trial is not to punish him for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, and secondly to prevent him from the temptation of saving his erstwhile friends and companions, who may be inclined to assert their influences, by resiling from the terms of grant of pardon. In fact, the Madras High Court in the case *Karuppa Servai v. Kundaru* AIR 1952 Mad 833: (1953 CrL.L.J. 45), has observed that this provision is based on very salutary principles of public policy and public interest. The approver's

position was considered to be like a sealed will in a will forgery case, and he should not be allowed to let off on bail. The Rajasthan High Court has in *Ayodhya Singh v. State* 1973 Cri.L.J. 768 and *Lallu v. State* 1979 Raj LW 465 taken the view that the provisions in this regard are mandatory, and that Court cannot go behind the wisdom of the legislature as expressly laid down under Section 306, Cr. P.C. In the former case the circumstance that the disposal of the case was likely to take a long period of time as the prosecution had cited 174 witnesses, was not considered as valid ground for bail when the law prohibits any such release till the termination of the trial. In *Mukesh Ramchandra Reddy* 1958 Cri.L.J. 343, the Andhra Pradesh High Court has as well interpreted the word "shall" in the said provisions as primarily obligatory and casting a duty on the Court to detain an accused to whom pardon has been tendered, in custody until the termination of the trial. The Punjab High Court in *A. L. Mehra v. State* AIR 1958 Punj 72: (1958 Cri.LJ 413), declined to draw an analogy from the power available with the Court to grant bail to accused at any stage of the trial, and it was observed that it was not within the competency of the Court to admit an approver to bail when the law declares in unambiguous language that the approver shall not be released until the decision of the case. These special provisions were treated to override the general provisions entitling the Court to grant bail.

10. There is, therefore, little doubt that so far as the plain reading of S. 306(4)(b), Cr. P.C., the same leaves no manner of doubt that a person accepting a tender of pardon has to be kept in custody till the trial is over unless he was on bail at the time of the grant of pardon. This has been almost the uniform view of judicial decisions, and the use of the word "shall" has been interpreted to leave no flexibility in this regard. The general power of grant of bail available to the Courts under the Code is thus circumscribed by the special provisions. In fact, an accused loses his character as such when pardon is granted to him. He is, of course, an

accomplice. However, the character of accused can be again attributed to him if his case falls under S. 308, Cr. P. C. That is when the Public Prosecutor certifies that he has by willfully concealing anything essential, or by giving false evidence has not complied with the condition on which the tender was made. Rather even at this stage he is entitled to show that he has, in fact, complied with the condition upon which such tender was made. If he succeeds in doing so, that is the end of the matter. If, however, the Court is satisfied with the certification by the Public Prosecutor in spite of the submission by the approver, then his trial starts and he acquires the character of accused. It is as such that in Sub-sec. (4) of Section 308 the word used qua him for the first time is "accused".

11-12. The crucial questions raised from the side of the petitioner are whether the provisions of S. 306(4)(b) in all their rigidity can be treated as constitutionally valid, and further whether in the exercise of inherent powers under Section 482, Cr. P. C., the Court can release an approver during the course of trial when it is in the ends of justice and his detention amounts to abuse of process of Court.

13. In the case *State of Karnataka v. L. Muniswamy* AIR 1977 SC 1489 : (1977 CriLJ 1125) it has been observed as under (at p. 1128 of Cri LJ):

“The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction.”

13A. The Supreme Court has further in the case *Maneka Gandhi v. Union of India* AIR 1978 SC 597 observed that it

is not a valid argument to say that the expression "personal liberty" in Art. 21 must be so interpreted so as to avoid overlapping between that Article and Art. 19(1). The expression "personal liberty" in Art. 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19. It was further observed that if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Art. 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Art. 14. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive, otherwise, it should be no procedure at all and the requirement of Art. 21 would not be satisfied.

16. Section 482 of the Cr. P. C. is to the following effect:-

“Nothing in this Code shall be deemed to limit or affect the inherent powers 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.”

17. The power available under this provision is notwithstanding anything else contained in the Code. In case the High Court is satisfied that an order needs to be made to prevent abuse of the process of any Court, or otherwise to secure the ends of justice, the inherent powers are available, and they are not limited or affected by anything else contained in the Code. We are not oblivious that these powers have not to be ordinarily invoked where specific

provisions are contained in the Code or specific prohibitions enacted. However, in cases where the circumstances unmitigatingly bring out that a grave injustice is being done, and an abuse of process of court is taking place, either as a result of the acts of the accused taking place, either as a result of the acts of the accused or the unavoidable procedural delays in the Courts, we are of the firm opinion that the inherent powers should and need to be exercised. The approver's evidence in the present case has already been recorded, and no useful purpose is being served in his detention. The administration of justice is not in any manner likely to be affected by his release. There is no reason to suppose that the machinery of law would not be able to give protection to the petitioner in case any adventurism is sought to be displayed by his confederates, or their supporters. The conduct of the petitioner in seeking his release itself shows that he carries no apprehensions. It would not be, therefore, correct for the Court to still create such fears and profess to provide him unsolicited protection by detaining him for indefinite period. Thus in the case of A. L. Mehra, (1958 Cri LJ 413) (supra) the Punjab High Court released the approver from confinement in exercise of inherent powers to prevent the abuse of the process of court, finding that he had been in confinement for several months. Similarly the Madras High Court in the case of Karuppa Servai (1953 Cri LJ 45) (supra) laid emphasis on the detention of an approver till he has deposed at the trial in the Sessions Court truly and fully to matters within his knowledge.

18. We are further of the opinion that there is no rational basis for inflexible classification of approvers who are in detention, and those who because of fortuitous circumstances happen to be on bail at the time of grant of pardon. A person being granted bail and still not in detention are not considered in law as incompatible. So far as allurements of release if allowed pardon, it is inherently there in any pardon. As such too much of significance and rigidity need not be attached to time factor. Moreover, a witness, even though an accomplice

need not be detained for more than what is essential for procurement of or enabling him to give his evidence. His personal liberty can, therefore, be curtailed, if at all, for beneficial ends of administration of justice, and once they are served, his further detention becomes irrelevant. His detention till that earlier stage, may also be considered proper to avoid creation of the impression of too ready an approver to serve his personal end of immediate or early let off even in cases where the involvement of the other accused in that crime may turn out to be doubtful. The existence of the provision of detention thus may serve as a damper to opportunists who may be too keen to oblige the police, and also prevent a possible abuse of this process as a short-cut by investigating agencies when they find no other evidence available or dubiously seek to involve innocent persons.”

9. Thus, the decisions of the Hon’ble Supreme Court and the Full Bench of this Court clearly hold that though it is mandatory to keep the person in custody unless on bail, however, the Court is empowered, in the interest of justice, to avoid abuse of process of law and for the right to life and liberty of an approver to grant bail, if not granted earlier. The pardon does not get vitiated on this count.

10. In the present case firstly in the interest of justice and the fundamental right to life and liberty of Respondent No.2 when his statement has already been recorded before the learned Metropolitan Magistrate, no useful purpose will be served to send him in custody now. Further Respondent No.2 has already been granted an order of anticipatory bail, which enures to his

benefit till conclusion of the trial as held in *Siddharam Satingappa Mhetre v. State of Maharashtra and others*, (2011) 1 SCC 694. In view of the order of anticipatory bail directing sending Respondent No.2 custody is not possible as the moment he is arrested he has to be released on bail as directed by the Court while granting anticipatory bail. The evidence of Respondent No.2 and all other prosecution witnesses has been recorded. The case does not fall in the ambit of Section 308 Cr.P.C. Respondent No.2 though not on bail technically, however, even if this Court directs him to be arrested, would have to be released on bail in view of the anticipatory bail order. I find no reason to interfere with the impugned order.

11. The petition is dismissed.

(MUKTA GUPTA)
JUDGE

December 13, 2011/vkm