

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1238 OF 2015

Dipak Lotan Mali,
Age 42 years, Occu. Labour work,
R/o Warwade, Shirpur, Taluka
Shirpur, District Dhule

..Petitioner
(Orig.Accused No.2)

Versus

1. The State of Maharashtra,
Through Investigating Officer
of Nardana Police Station,
Nardana, Taluka Shindkheda,
District Dhule
2. Anil Sahebrao Patil,
Age 30 years,
R/o Lon Bhavras, Taluka Amalner,
presently Vidya Vihar Colony,
Shirpur, District Dhule

.. Respondents

- WITH -

CRIMINAL APPLICATION NO.5203 OF 2015

Subhash Ramchandra Patil
Age 29 years, Occu.Aгри.,
R/o Mhaisar, Taluka Shindkheda,
District Dhule

..Applicant

Versus

1. The State of Maharashtra,
2. Anil Sahebrao Patil,
At present R/o Vidya Vihar Colony,
Shirpur, District Dhule

.. Respondents

Mr S.P. Brahme, Advocate for petitioner in Writ Petition No.1238 of 2015
Mr Joydeep Chatterji, Advocate for applicant in Criminal Application No.5203 of 2015
Mr R.B. Bagul, A.P.P. for respondent No.1-State
Respondent No.2 served

CORAM : N.W. SAMBRE, J.

DATE : 30th October 2015

PER COURT

Heard learned Counsel for petitioners and learned A.P.P.

2. Since the prayer in both these matters is identical, these matters are heard and decided together by this common order.

3. The petitioner/applicant have questioned the orders dated 16th September 2015 passed below Exh.54 by the learned Sessions Judge, Dhule in Sessions Case No.107 of 2014. By the orders impugned, learned Sessions Judge has tendered pardon to accused No.3 Anil.

4. The facts in brief, as are necessary for deciding the issue are as under:

5. The petitioner/applicant are the accused Nos.2 and 1, respectively in Sessions Case No.107 of 2014, whereas accused No.3 Anil is the one who is granted pardon by the Sessions Court in the same offence, punishable under Sections 302, 201 of the Indian Penal Code.

6. The accused No.1 - Subhash was having illicit relation with wife of deceased Rajendra, who was strangulated by the accused persons in connivance with each other which resulted into filing of charge-sheet against all the three accused.

7. After examining the two witnesses by the prosecution, accused No.3 Anil submitted an application Exh.54 styling one under Section 307 of the Cr.P.C. requesting for tendering pardon to him, as he was ready and willing to disclose the true and correct facts in support of the prosecution story. The petitioner/applicant objected the said application preferred by accused No.3 Anil under Section 307 of Cr.P.C. by giving a detailed say. The say of the learned A.P.P. was also obtained by learned Sessions Judge and as such passed the orders impugned, which are questioned in the present matters.

8. Mr Brahme, learned Counsel for the petitioner Dipak and Mr Chatterji, learned Counsel for the applicant Subhash have made common submissions. According to learned Counsel Mr Brahme, the no objection given by the prosecution to the application under Section 307 of Cr.P.C. is not sufficient compliance, as according to him, the application Exh.54 under Section 307 Cr.P.C. was not supported with an affidavit. He would then urge that the application, as is contemplated under the scheme of Section 307 of Cr.P.C. is required to be moved by the prosecution and not the accused and prosecution is duty bound to satisfy that the evidence of approver is necessary for the prosecution and securing conviction of the accused persons. He would then urge that the learned Sessions Judge, having proceeded to record the statement of the accused exceeded the jurisdiction vested in him and has taken up the task himself and to declare the accused Anil as an approver under Section 307 of Cr.P.C.

9. Mr Chatterji would add that the application under Section 307 of Cr.P.C. was strongly objected by the applicant. According to him, the say given by the prosecution on 15th September 2015 cannot be considered as sufficient to form an opinion by the learned Judge for granting pardon. He would then urge that no powers are vested in the learned Sessions Judge to record the statement of accused – approver Anil. According to him, learned Sessions Judge has exceeded his jurisdiction. Learned Counsel for the petitioner/applicant have relied upon the relevant observations of the judgment made by this Court in the matter of **Al-Saleha Beig Vs. State & Ors.**, reported in **2008 (2) Bom. C.R. (Cri.) 432** so as to draw support for the above referred submissions. The petitioner/applicant also relied upon the judgment of Apex Court in the matter of **Jasbir Singh Vs. Vipin Kumar Jaggi**, reported in **AIR 2001 (SC) 2734**, wherein the Apex Court taking into consideration the law laid down in the case of **Pascal Fernandes Vs. State of Maharashtra** has provided the considerations for declaring the accused an approver under Section 307 of Cr.P.C.

10. While opposing the present writ petition and application, learned A.P.P. would urge that Section 307 of Cr.P.C. is itself a code and provides for the procedure to be adopted as is apparent from the language of the said Section. He would then submit that the order passed by learned Sessions Judge is after considering all the facets of the matter and the effect of considering and granting an application of accused Anil as an approver. According to him, as the approver – accused No.3 Anil was an eye witness to the incident, otherwise, the case being based on circumstantial evidence, the prosecution was

right in supporting the application for grant of pardon to accused No.3 Anil and to declare him as approver under Section 307 of Cr.P.C. According to him, the petition/application lac merit and the same are filed with an intention to delay the trial and sought dismissal of the same.

11. Having bestowed my anxious thoughts over the submissions made by respective parties, it is noticed that the accused persons are charged for an offence punishable under Section 302 and 201 of Indian Penal Code for murdering one Rajendra.

12. Accused No.3 Anil was driving the vehicle when the murder took place in the running vehicle. It appears from the record that accused Anil was involved in the commission of offence by driving the vehicle and also destroying certain evidence at the behest of present petitioner/applicant.

13. After commencement of trial pursuant to the complaint by Dattatraya, the real brother of deceased Rajendra, it is required to be noted that at Exh.38 charge was framed against all the three accused for an offence punishable under Section 302 and Section 201 of Indian Penal Code on 19th May 2015.

14. After recording the evidence, the accused No.3 Anil moved application Exh.54 on 15th September 2015 under Section 307 of Cr.P.C. claiming therein that the statement which was given by him under Section 162 of Cr.P.C. to the Police, he is ready and willing to stand by the same before the Court and statement be accordingly

recorded. He then pleaded that he be declared as an approver. The said application Exh.54 appears to have been objected by the accused. Learned Sessions Judge since was alive to the fact that the application was not on affidavit, has proceeded to record his statement on oath pursuant to Exh.54, wherein he has stated in tune with his statement recorded by the Police. Though the petitioner/applicant herein have objected the same, the learned Sessions Judge, upon considering the scheme of Section 307 of Cr.P.C. which empowers the Court to direct tender of pardon, has proceeded to deal with the application including that of objection raised by the petitioner/applicant. Learned Sessions Judge has proceeded to note that the powers under Section 307 of Cr.P.C. could be exercised at any stage of the case and then evaluated the submissions qua the application moved by the accused person and tenability of the same. The Court then relying upon the judgment of Al-Saleha Beig and Jasbir Singh (cited supra), has noted that even an accused can move such application, however, was alive to the fact while considering the same that the said request of the accused was supported by the prosecution, that too on the ground that the accused was ready and willing to give the true and correct disclosure of the events so as to secure conviction by the prosecution.

15. What is noted in the present matters is, the entire prosecution case is based on circumstantial evidence and if the pardon is granted to accused No.3 Anil as is ordered in the present case, of course, after satisfying the requirement under Section 307 of Cr.P.C., the

prosecution will be able to establish the guilt of the accused persons.

16. Apart from above, it is required to be taken note of the fact that the learned Sessions Judge has given ample opportunity to the accused persons herein and has not only recorded the statement of accused No.3 – an approver on oath so as to ascertain the contents of his application Exh.54 and his intention to depose the true and correct story, as was narrated to prosecution and only thereafter has proceeded to grant the application for pardon under Section 307 of Cr.P.C. The occasion for the Sessions Court was the application by the accused which was duly supported by the prosecution and the application of mind by the Sessions Court to said issue under the provisions of Section 307 of Cr.P.C.

17. In my opinion, the learned Sessions Judge while granting application under Section 307 of Cr.P.C., has not taken the said task to itself but is upon the application of the accused, further consented by the prosecution and ensuring the same by learned Sessions Judge by recording his statement on oath.

18. It will be appropriate, in my opinion to refer to paragraph 12 of the judgment in the matter of Al-Saleha Beig (cited supra), which reads thus :

“12. Thus, the role played by the accused can never be the consideration for a grant or refusal of pardon. All that the learned Judge has to consider is whether the person to whom the pardon is to be granted wants to make a full and true disclosure of the whole of the circumstances within his

knowledge relating to the offence. The learned Judge cannot go into the aspect of the nature of his involvement or possible weight of his evidence. Ordinarily it is the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Court, the learned Judge must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the right as a veritable director of the prosecution. The power which the Court exercise is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecution joins in the request. The proper course for the learned Judge is to ask for a statement from the prosecution on the request of the prisoner. The learned Judge must not take on himself the task of determining the propriety of tendering pardon. The learned Judge is not expected to consider possible weight of the approvers evidence, even before it was given. Whether the approver had played a lesser or greater role is immaterial. It is for the prosecution to examine this aspect from the point of view of the interest of the case. It is the prerogative of the prosecution."

Though the learned Counsel have tried to refer upon the said judgment, so also the judgment of Apex Court in the matter of Jasbir Singh, particularly paragraphs 18 and 19, which is based on the judgment of Apex Court in the matter of Pascal Fernandes Vs. State of Maharashtra, I see no deviation or contrary approach on the part of learned Sessions Judge in granting pardon. As such, the writ petition as well as the application, which lac merits, stand dismissed.

(N.W. SAMBRE, J.)