

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.363 OF 2015**

S.P. Rajkumar

Age: 45 years, presently residing at

A-1, Greater Mumbai Police Club

Azad Maidan, Mumba- 400 001

...Applicant

Versus

1. Central Bureau of Investigation,

S.C.B., Mumbai

2. State of Maharashtra

3. Mr. Nathuba Jadeja

Age-Adult, Occ- service (SRP)

Residing at Mespar, Gondaltaluk,

District-Rajkot, Gujarat

4. Mr. Gurudayalsingh Chaudhary

Age-adult, Occ- Service (SRP),

Residing at village Naulaja,

Tehsil Narnol, Dist-Mahendragarh,

Haryana.

...Respondents

.....

Mr. V.M. Thorat, Advocate with Mr. M.V. Thorat, for the Applicant.

Mr. S.K. Shinde, P. P. with Mr. Y.M. Nakhwa, Additional P.P. for C.B.I.

Mr. J.H. Ramugade, APP for the Respondent -State.

Mr. Pratap Patil for Respondent Nos. 3 and 4.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

ORDER RESERVED ON : 17th OCTOBER, 2015.

ORDER PRONOUNCED ON: 28th MARCH, 2016.

JUDGMENT:-

Rule. By consent rule is made returnable forthwith.

2. The Applicant, the accused No 2 in Sessions Case No. 177

of 2013 @ 178 of 2013 @ 577 of 2013 @ 312 of 2014, has challenged the impugned order dated 28.7.2015 whereby the learned Sessions Judge has dismissed the application filed by him to drop PW 105-Nathuba Jadeja and PW 106 Gurudayalsingh Chaudhary as prosecution witnesses and to array them as accused in the said sessions case.

3. The brief facts necessary to decide this application are as under:-

The Applicant is a senior IPS Officer of Gujarat Cadre. In the year 2005 he was posted as Superintendent of police of anti terrorist squad, Ahmedabad, Gujarat. It is alleged that pursuant to secret information received from the State of Rajasthan that one Sohrabuddin was to reach Gujarat on 26.11.2005 with an intention to spread terror and target the leaders of State of Gujarat, the Anti Terrorist Squad Gujarat registered a crime no.15 of 2005 against Sohrabuddin under sections 120 B, 121, 121 A, 122, 123, 307, 186, 254 of the IPC r/w. section 25(1) of the Arms Act. It was alleged that Sohrabuddin was killed in an encounter. By order dated 1.2.2007 the said crime registered against Soharabuddin was closed as abated.

4. Rubabuddin, the brother of Sorabuddin had written a letter to the Honourable the Chief Justice of India to direct an enquiry in the

matter of his brother's death and disappearance of his sister-in-law Kausarbi. The Honourable Supreme Court of India had directed the Director General of Police, Gujarat to inquire into the matter. Pursuant to the directions of the Apex Court, an enquiry was conducted. It was revealed that Sohrabuddin was allegedly killed in a fake encounter on 26.11.2005. Some days later Kausarbi, wife of Sohrabuddin was also killed. The C.I.D. Crime, Gujarat investigated the crime and filed a charge-sheet against 13 accused persons. Not being satisfied with the action, Rubabuddin filed a Writ petition before the Apex Court with a request to direct the C.B.I. to investigate the crime afresh. By order dated 12.1.2010 in Writ Petition No.6 of 2007, the Honourable Supreme Court directed the C.B.I. to investigate into the matter and pursuant to the said directions, CBI authorities took over the investigation.

5. In the meantime Crime no. 115 of 2006 was registered by Gujrat Police claiming that Tulsiram Prajapati had been killed in an encounter. Narmadabai, mother of Tulsiram Prajapati filed a petition before the Apex Court alleging that the officials of Rajasthan and Gujrat Police had killed her son on 27/28.12.2006 in a fake encounter. The Honourable Supreme Court by order dated 8.4.2011 in Writ

petition (criminal) 115 of 2007 directed the CBI to investigate the case relating to the killing of Tulsidas Prajapati. During the course of investigation, the CBI recorded statements of several witnesses. After completing the investigation, one main charge sheet and 3 supplementary chargesheets were filed before the Addl. Chief Metropolitan Magistrate, Mirzapur, Ahmedabad. By order dated 22.9.2012 the Honourable Supreme Court transferred the case to Mumbai.

6. The Charge sheet submitted by CBI mentions Nathuba Jadeja-PW-105 and Gurudayalsingh- PW-106 as prosecution witnesses. The Applicant herein, who is one of the accused in the said sessions case, filed an application under section 193 r/w section 319 of the Criminal Procedure Code to drop PW-105 Nathuba Jadeja and PW -106 Gurudayalsingh as the prosecution witnesses and to array them as accused in the said case. The Applicant had alleged that there was prima facie material to indicate that the prosecution witnesses PW-105 Nathuba Jadeja and PW-106 Gurudayalsingh had actively participated in the alleged crime of abduction and killing of Sohrabuddin as well as in disposal of the dead body of Kausarbi. It was further alleged that though in the course of investigation said Nathuba Jadeja and

Gurudayalsingh were consistently treated as the accused, in the chargesheet filed on 16.7.2007 they have been shown as prosecution witnesses. The Applicant claimed that the names of said Nathuba Jadeja and Gurudayalsingh were dropped as accused without there being any reasonable justification and this has been observed by the Apex Court in its order dated 12.1.2010 in Writ Petition No.6 of 2007. The Applicant claimed that considering the active role played by said Nathuba Jadeja and Gurudayalsingh in commission of the crime, they have to be dropped as prosecution witnesses and are required to be added as accused in Sessions Case No.312 of 2014.

7. The said application was resisted by the State mainly on the ground that the Applicant, who is an accused No.2 in the said case has no locus standi to raise such a grievance. It is further stated that even otherwise there is no material against these two witnesses to array them as accused.

8. The learned Special Judge held that Nathuba Jadeja and Gurudayalsingh were never treated or arrayed as accused persons. On the contrary their statements were recorded under section 161 as well as section 164 of the Cr.P.C. The learned Special Judge further held that it was the privilege of the prosecution as to whom to examine as

its witness amongst the persons who are involved in commission of crime. It was further held that the witnesses could not have been implicated as accused based on the statement recorded under section 161 of the Cr.P.C. in view of the protection afforded to them under sub section (2) of section 161 of Cr.P.C. and proviso to section 132 of Evidence Act and under Article 20(3) of the Constitution. Hence, by the impugned order dated 28.7.2015 the learned Special Judge dismissed the said application filed by the aforesaid Applicant. Being aggrieved by the said order, the Applicant has preferred this revision application.

9. Mr. V.M. Thorat, the learned counsel for the Applicant has submitted that the preliminary enquiry report submitted by Mr. V.L. Solanki as well as action taken reports submitted before the Apex Court clearly indicate that the said witnesses have participated in the fake encounter and have played an active role in disposing of the body of Kausarbi.

10. The learned counsel for the Applicant has submitted that there is no bar in arraying any person as an accused on the basis of his self incriminating statement under section 161 or 164 of the Cr.P.C. The only embargo is on relying upon such statement for the purpose of

framing of charge, or using the self incriminating statement as evidence against the maker of the statement. The learned counsel for the Applicant therefore contends that the question of admissibility or non admissibility of the evidence cannot be looked into at the stage of investigation and arrest and the question whether the said material can be relied upon to proceed against the accused or not has to be considered at the stage of framing of charge. He has submitted that the learned Special Judge has erred in holding that the witnesses viz. Nathuba Jadeja and Gurudayalsingh were protected by provisions of sub section (2) of section 161 of Cr.P.C. and proviso to section 132 of Evidence Act and Article 20(3) of the Constitution.

11. The learned counsel for the Applicant has submitted that the learned trial Judge has erred in not adding the prosecution witnesses PW-105 and PW-106 as the accused despite there being prima facie material on record to prove their complicity in the crime. He therefore claims that the learned Judge has failed to exercise his jurisdiction under section 193 of the Cr.P.C. The learned counsel for the Applicant has further urged that the prosecution could not have cited PW-105 and PW-106 as prosecution witnesses without complying with the provision of section 306 of the Cr.P.C.

12. Mr. S.K. Shinde, the learned Public Prosecutor submitted that the names of these two witnesses are not reflected in the FIR. He has further submitted that these witnesses were never treated as accused and could not have been arrayed as accused based on their self incriminating statements under sections 161 and 164(5) of the Cr.P.C. The learned Public Prosecutor has further submitted that the question of granting pardon to these two witnesses is a matter between the Court and the prosecution and that the Applicant, who is a co-accused has no right to be heard in the matter. In support of his contention the learned PP has relied upon the decision of the Apex Court in **R. Dineshkumar @ Deena Vs. State represented by Inspector of Police & Ors. AIR 2015 SC 1816**, **Selvi v. State of Karnataka (2010)7 SCC 263**, **Aghnoo Nagesia v. State of Bihar AIR 1966 SC 119**, **Laxmipat Choraria v. State of Maharashtra AIR SC 938** and **Central Bureau of Investigation V/s. Ashok Kumar Aggarwal, (2013) 15 SCC 222** .

13. I have perused the records and considered the submissions advanced by the learned counsel for the Applicant and learned P.P for the CBI. At the outset it may be mentioned that the scope and ambit of section 193 and 319 of the Cr.P.C. has been considered by the Apex Court in **Dharam Pal & Ors. Vs. State of Haryana, AIR 2013 SC**

3018. The Apex Court after considering the views expressed in **Kishun Singh Vs. State of Bihar [(1993) 2 SCC 16]**, has held that upon committal of the case the sessions court has jurisdiction to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the material available on record. It was further held that the Sessions Court is not required to wait till the stage of section 319 of Cr.P.C. before proceeding against the person, against whom a prima facie case was made out from the material contained in the case papers sent by the learned Magistrate while committing the case to the court of sessions.

14. It is thus, well settled that in exercise of powers under section 193 Crpc, the Sessions Court can summon any person as accused if the material contained in the case papers prima facie shows his complicity in commission of the alleged crime. The question which therefore, calls for my determination is whether the material on record prima facie discloses involvement of PW-105 and PW 106 in commission of the said crime.

15. The main contention of the applicant is that the preliminary inquiry report submitted by Solanki implicates these two witnesses. It may be mentioned that the said preliminary inquiry report implicates

these two witnesses, on the basis of their statements under sections 161 and 164 (5) of the Cr.P.C. Apart from the self incriminating statements under sections 161 and 164 of Cr.P.C., the learned counsel for the Applicant has not been able to point out any other material to show the complicity of these witnesses in the said crime. The crucial question which therefore, arises is whether these witnesses can be summoned as accused based on their self incriminatory statements under sections 161 and 164 (5) of Cr.P.C.

16. Dealing with the question in **Selvi & Ors. Vs. State of Karnataka (2010) 7 SCC 263** the Apex court has held that right against self incrimination is an essential safeguard in criminal procedure. While considering the scope of Section 161(2) of Cr.P.C. vis-a-vis Article 20 (3) of the constitution, the Apex Court held that while there is requirement of formal accusation for a person to invoke Article 20(3), the protection contemplated by section 161 (2) of the Cr.P.C. is wider. Section 161 (2) read with section 161 (1) protects "any person supposed to be acquainted with the facts and circumstances of the case" in the course of examination by the police. Therefore, the "right against self incrimination" protects person who have been formally accused as well as those who are examined as

suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated.

17. The Apex Court while considering the scope of section 161 (2) of the Cr.P.C. vis-a-vis section 132 of the Evidence Act, has further held that even though section 161 (2) casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage, section 132 of the Evidence Act limits the applicability of this protection to witnesses during the trial stage. The later provision provides that witnesses cannot refuse to answer questions during a trial on the ground that the answers could incriminate them. However, the proviso to this section stipulates that the content of such answers cannot expose the witness to arrest or prosecution, except for a prosecution for giving false evidence. The Apex Court therefore held that the protection accorded to witnesses at the stage of trial is not as wide as the one accorded to the accused, suspects and witnesses during investigation under section 161 (2) of Cr.P.C.

18. A similar issue arose for consideration in **R. Dineshkumar**

@ Deena Vs. State represented by Inspector of Police & Ors. AIR 2015 SC 1816. One of the questions before the Apex Court was whether the prosecution witness could be prosecuted by summoning him as an additional accused under section 319 of the Cr.P.C. on the basis of his evidence in the said case and his statement under section 164 of the Cr.P.C. The Apex Court after referring to its previous decisions in *Nandini Satpathy Vs. PL. Dani* (1978) 2 SCC 424 and considering several provisions which operate as 'privilege against self-incrimination' held that no prosecution can be launched against the maker of a statement falling within the sweep of section 132 of the Evidence Act.

19. The principles laid down in the aforesaid decisions are squarely applicable to the facts of the present case. As stated earlier, the trial of the case has not commenced and there is no evidence before the Court within the meaning of section 3 of the Indian Evidence Act to invoke powers under section 319 of the Cr.P.C. Apart from the self incriminating statements recorded under section 161 and 164 (5) of the Cr.P.C. there is no other material on record to prima facie indicate the complicity of PW 105 and PW 106 in the said case. Considering the statutory immunity against self incrimination, no

prosecution can be launched against these witnesses on the basis of their statements under sections 161 and 164 (5) of the Cr.P.C. Consequently, in the absence of any other material on record, the learned Sessions Judge could not have summoned these persons as accused in exercise of powers under section 193 of the Cr.P.C.

20. The contention of the learned counsel for the Applicant that there is no bar to consider the statements recorded by the police officer Solanki, in the course of the preliminary inquiry has no merits, in the light of the provision of section 25 of the Evidence Act, which is another facet of the rule against self incrimination. In **Aghnoo Nageshia Vs. State of Bihar 1966 SC AIR 119** the Apex Court has held as under :

"Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in ss. 24 to 30 of the Evidence Act and ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25

provides : "No confession made to a police officer, shall be proved as against a person accused of an offence." The terms of s. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person 138 other than a police officer. Section 26 does not qualify the absolute ban imposed by s. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by ss. 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence

Order investigation, save as mentioned in the proviso and in cases falling under sub-s (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of s. 27 of the Evidence Act. The words of s. 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under s. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by s. 27 of the Evidence Act, a confession by an accused to a police officer- is absolutely protected under s. 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by s. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by s. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them.”

21. In the light of above, the prosecution witnesses PW-105 and PW-106 also cannot be summoned as accused on the basis of the admission of guilt or confessional statement made before the police

officer Solanki. It is also pertinent to note that the statements of PW-105 and PW-106 implicate the Applicant and several other accused in the said sessions case. It is therefore apparent that the endeavor of the Applicant is nothing but an attempt to jettison the incriminating evidence against them. Suffice it to say that the process of the court cannot be permitted to be used for an oblique/ ulterior purpose. Moreover it is the prerogative of the prosecution to decide whether the evidence of the said witnesses is essential to unravel the truth. The accused certainly has no legal right to raise any grievance in the matter.

22. The contention of the Applicant that the prosecution cannot examine PW-105 and PW-106 as witnesses without granting a pardon under section 306 of Cr.Pc. is devoid of merits in view of the decisions of the Apex Court in **Prithipal Singh Etc vs State Of Punjab & Anr. Etc SCC 2010 (1) page 10** , wherein the Apex Court has held as under:

“The issue was again considered by this Court in Chandran alias Manichan alias [Maniyan & Ors. v. State of Kerala](#), (2011) 5 SCC 161, wherein the Court had an occasion to appreciate the evidence of a person who had not been put on trial, but could have been tried jointly with accused and found his

evidence reliable in view of the law laid down by this Court in [Laxmipat Choraria & Ors. v. State of Maharashtra](#), AIR 1968 SC 938. The Court held as under:

"78. The argument raised was that this evidence could not be taken into consideration and it would be inadmissible because this witness, though was an accomplice he was neither granted pardon under [Section 306](#) CrPC nor was he prosecuted and the prosecution unfairly presented him as a witness for the prosecution. The contention is clearly incorrect in view of the decision of this Court in [Laxmipat Choraria](#) (supra). While commenting on this aspect, Hidayatullah, J. observed in AIR para 13 that there were a number of decisions in the High Courts in which the examination of one of the suspects as the witness was not held to be illegal and accomplice evidence was received subject to safeguards as admissible evidence in the case. The Court in [Laxmipat Choraria](#) (supra) held:

"13. On the side of the State many cases were cited from the High Courts in India in which the examination of one of the suspects as a witness was not held to be illegal and accomplice evidence was received subject to safeguards as admissible evidence in the case. In those cases, [Section 342](#) of the Code and [Section 5](#) of the Oaths Act were considered and the word 'accused' as used in those sections was held to denote a person actually on trial before a court and not a person who could have been so tried... the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was received although the

procedure of [Section 337](#) of the Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. [Section 5](#) of the Oaths Act and [Section 342](#) of the Code of Criminal Procedure do not stand in the way of such a procedure."

21. In view of the above, the law on the issue can be summarised to the effect that the deposition of an accomplice in a crime who has not been made an accused/put to trial, can be relied upon, however, the evidence is required to be considered with care and caution. An accomplice who has not been put on trial is a competent witness as he deposes in the court after taking oath and there is no prohibition in any law not to act upon his deposition without corroboration."

23. Be that as may, Section 307 vests powers in a court to which the case is committed to tender a pardon, with a view to unravel the truth. These powers can be exercised at any time after the commitment of the case but before the judgment. The only mandate is the satisfaction of the court that the accused would make a full and true disclosure of the circumstances within his knowledge relating to the offence and every other person concerned in the commission of

the offence. There can be thus no dispute that it is exclusively within the judicial discretion of the Court to grant a pardon under section 307 of the Cr.P.C. These powers cannot be exercised at the behest of the co-accused, particularly to stifle or scuttle a legitimate prosecution.

24. Considering all the aforesaid facts and circumstances, the application has no merits and is hereby dismissed. Rule is discharged.

(ANUJA PRABHUDESSAI, J.)