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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

WRIT PETITION NO.3919 OF 2014

Narendra G . Goel

Age : 62 years, Occ : Business

Resident of 221/222, Kshitiz Apartments,

47, Napean Sea Road,

Mumbai – 400 036.

...Petitioner

Versus

1. The State of Maharashtra
(Malabar Hill Police Station
and subsequent Investigation
carried out by Senior Inspector
of Police, DCB CID, Unit – II,
Satrasta, Mumbai.

2. Pradeep Prabhakar Parab
R/o Durga Nivas,
Sahkar Society, Room No.2,
Kokan Nagar, Bhandup,
Mumbai – 400 078.

3. Pawankumar Satyanarayan Goenka,
R/o. 2-A/19, Premnagar, S.V.Road,
Boriwali (W),
Mumbai.

...Respondents

Mr.Amit Jajoo a/w Mr.Mukesh Vats and Mr.Victor Basu i/b PKA
Advocates, for the Petitioner.

Mr.Raja B. Thakare, Special Public Prosecutor, for the Respondent – State.

Ms.Naima Shaikh i/b Khan Abdul Waheb, for the Respondent No.3.

***CORAM : V. M. KANADE &
REVATI MOHITE DERE, JJ.***

***RESERVED ON : 22nd FEBRUARY, 2016.
PRONOUNCED ON : 18th APRIL, 2016***

JUDGMENT (Per Revati Mohite Dere, J.) :- :

1. By this petition, preferred under Section 482 of the Code of Criminal Procedure and Article 227 of the Constitution of India, the petitioner has impugned the order dated 10th January, 2006 by which pardon was tendered by the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai, to the respondent no.2 herein; and the order dated 22nd September, 2014 passed by the learned Additional Chief Metropolitan Magistrate, in C.C.No.525/PW/2005, by which the application of the petitioner seeking compliance of the order dated 15th February, 2013 passed by the High Court in Writ Petition No.1309 of 2012, was dismissed. According to the petitioner, the learned Magistrate in compliance with the order dated 15th February, 2013, ought to have taken fresh cognizance, by giving the petitioner, an opportunity of being heard,

on the application for grant of pardon to the main accused (respondent no.2 herein).

2. At the outset, we may note a few facts as are necessary for deciding the present petition;

On 23rd August, 2003 Dr.Asha Goel, a Canadian National of Indian origin was found murdered in a flat belonging to her brother – Suresh Agarwal, at Malabar Hill, Mumbai. Pursuant thereto, at the behest of Suresh Agarwal, the brother of the deceased, the Malabar Hill Police Station, registered C.R.No.93 of 2003 against unknown persons, alleging offences punishable under Sections 302, 397, 452 r/w 34 and 120B of the Indian Penal Code. As there was no progress in the investigation, the case was transferred to the DCB, CID, Unit – II, Mumbai. Thereafter, accused came to be arrested and on completion of the investigation, charge-sheet came to be filed. Before the case was committed to the Court of Sessions, original accused no.1 i.e. respondent no.2 herein gave his confession, which was recorded by the learned Metropolitan Magistrate on 26th and 27th September, 2005. On 28th December, 2005, cognizance was taken and process was issued against the accused persons, copies were supplied under

Section 207 of Code of Criminal Procedure and the matter was adjourned to 19th January, 2006, for committal of the case under Section 209 of the Code of Criminal Procedure.

On 9th January, 2006, the prosecution preferred an application under Section 306 of the Cr.PC., before the learned Additional Chief Metropolitan Magistrate for grant of pardon to Pradeep Prabhakar Parab, respondent no.2 herein, which was granted. Thereafter, the case was committed to the Court of Sessions and the matter was posted for framing of charge by the learned Sessions Judge on 29th February, 2006. In the meantime, the petitioner preferred an application seeking his discharge from the said case, which was rejected by the learned Sessions Judge. Being aggrieved by the said order, the petitioner approached this Court, by filing Writ Petition No.1309 of 2012 and sought his discharge from the case. The principal ground on which discharge was sought, was that the procedure as contemplated under Section 306(4)(a) of Cr.PC was not complied with. The learned Special Public Prosecutor sought time to examine the said lacuna. In the meantime, the prosecution preferred an application before the learned Sessions Judge and sought permission to

examine the approver under Section 306(4)(a) of the Cr.P.C, before the learned Magistrate, however the said application was rejected. Being aggrieved by the said order, the State filed a Writ Petition No.2421 of 2012 in this Court. Both the aforesaid Writ Petitions came up before the learned Single Judge of this Court, who vide order dated 15th February, 2013, allowed the petition filed by the State. The learned Single Judge quashed and set aside the committal order and remitted the matter to the learned Magistrate for complying with the requirement of Section 306(4) of the Code of Criminal Procedure. As the committal order was set aside, the Writ Petition preferred by the Petitioner seeking his discharge was disposed of as infructuous. When the matter came up before the learned Magistrate, the Petitioner preferred an application stating that the High Court had directed the Magistrate to follow due procedure, in accordance with law. It was contended in the application, that in effect, the Magistrate had to start right from the stage of taking cognizance and sought compliance of the order dated 15th February, 2013, passed in Writ Petition No.1309 of 2012 by the High Court, both in letter and spirit. The learned Magistrate vide order dated 10th October, 2013 dismissed the application preferred by the petitioner and directed the approver to remain present on the next date for

recording his statement under Section 306(4) of Cr.PC. The said order dated 10th October, 2013 was challenged by the petitioner in Writ Petition No.3887 of 2013. The learned Single Judge, vide order dated 21st December, 2013 disposed of the petition, with liberty to the petitioner to seek an appropriate relief at an appropriate stage. Pursuant to the liberty granted to the petitioner, the petitioner again preferred an application before the learned Magistrate which came to be dismissed vide order 22nd September, 2014.

3. Learned Counsel for the petitioner has impugned the orders dated 10th January, 2006 and 22nd September, 2014 passed by the learned Metropolitan Magistrate. He contended that the order dated 10th January, 2006 granting tender of pardon to the respondent no.2, who is the main accused was improper, cryptic and illegal and was thus liable to be set aside. He submitted that the charge-sheet in the said case was filed on 28th December, 2005 and on the same day cognizance was taken by the learned Magistrate and the case was adjourned to 19th January, 2006 for committal of the case, to the Court of Sessions. According to him, without informing the accused persons including the petitioner, the Special Public Prosecutor

on 9th January, 2006 moved an application before the learned Additional Chief Metropolitan Magistrate, for grant of pardon to the respondent no.2 herein, which was allowed vide order dated 10th January, 2006. The learned counsel contended that neither the accused nor the learned Magistrate, were informed of the role of the respondent no.2 and as such the order granting pardon was passed by the learned Magistrate, without application of mind. He submitted that the petitioner had a right to be heard, before pardon was granted to the respondent no.2, more particularly, when respondent no.2 was the main accused. He submitted that the order granting pardon is not a reasoned order and that the condition stipulated in section 306 has not been complied with. He relied on certain Judgments in support of his submissions. He also submitted that pursuant to the order dated 15th February, 2013, passed by the High Court in Writ Petition No.1309 of 2012, the learned Magistrate ought to have taken fresh cognizance, by giving the petitioner an opportunity of being heard on the application seeking grant of pardon to respondent no.2 herein

4. Learned Special Public Prosecutor opposed the application. He submitted that no interference whatsoever was warranted, inasmuch as, the

orders were legal and in accordance with the provisions of law. He submitted that the condition for grant of pardon was complied with by the learned Judge both, in letter and in spirit and that reasons have been recorded for grant of pardon. He denied that respondent no.2 was the main accused. He submitted that the order granting pardon was of 2006 and as such no ground whatsoever was disclosed for challenging the said order belatedly. He contended that the order dated 15th February, 2013 passed by this Court, is being misconstrued. He submitted that this Court remitted the matter back to the Court of the learned Metropolitan Magistrate, for complying with the provisions of Section 306(4) i.e. only for examining the respondent no.2, the approver as a witness.

5. Heard the learned counsel for the applicant and the learned Special Public Prosecutor. Perused the impugned orders, the applications and various orders passed by this Court from time to time. By the impugned order dated 10th January, 2006, the learned Magistrate has granted pardon, after complying with the pre-requisites of Section 306 Cr.P.C. He has stated that pardon was granted to the respondent no.2, on the condition, that he would make full and true disclosure of the case and the

role played by the each of the accused. After having been satisfied that the requisites, as contemplated under Section 306 were complied with, the application was allowed and the respondent no2, herein, was granted pardon under Section 306 of Code of Criminal Procedure. We find no infirmity in the said order granting pardon.

6. It is pertinent to note, that the petitioner had not challenged the order dated 10th January, 2006, granting pardon until 2013. What was challenged by the petitioner in this Court in Writ Petition No.1309 of 2012, was the order passed by the learned Sessions Judge, rejecting his discharge application, on the premise, that there was non-compliance of the mandatory provision of Section 306(4) of Code of Criminal Procedure i.e. the approver was not examined, before committing the case to the Court of Sessions. The application filed by the petitioner stating therein, that the High Court vide order dated 15th February, 2013, passed in Writ Petition No.1309 of 2012 had relegated the case back to pre-cognizance stage i.e. the stage as on 28th December, 2005, is completely misconceived. In the petition preferred by the State, being Writ Petition No.2421 of 2012, seeking examination of the approver under Section 306(4)(a), this Court

vide order dated 15th February, 2013 passed the following order :-

1. An order has been passed by the learned Magistrate committing the case to the Sessions Court. One accused has turned approver. However his statement under Section 306(4) has not been recorded. The statement would have to be recorded. The committal order is set aside. The papers are sent to the Court of the learned Magistrate. The learned Magistrate shall follow due legal process and record the statement of the approver under Section 306(4) of the Cr.P.C.
2. The record and proceedings shall be sent by the Registrar of the Sessions Court to the learned Magistrate expeditiously. The case has been pending since the incident which transpired 10 years ago. Hence the Magistrate is requested to expeditiously follow due legal procedure.
3. The Writ Petition is disposed of accordingly.

7. In view of the aforesaid order, the following order was passed in the Petition preferred by the petitioner i.e. in Writ Petition No.1309 of 2012, seeking his discharge from the case;-

1. The learned Magistrate committed this case to the Sessions Court. One of the accused turned approver. Based upon his statement recorded under Section 164 of the Cr.P.C the petitioner has been made an accused. The petitioner applied for discharge. His discharge application has been rejected on the ground that the approver's statement has been recorded under Section 306(4) of the Cr. P.C. It is seen that that statement does not implicate the petitioner. The statement under Section 164 made by the approver implicates the petitioner.
2. In Writ Petition No. 2421 of 2012 the committal order has been set aside. The record and proceedings have been directed to be sent by the Sessions Court to the Court of learned Magistrate. The learned Magistrate has been directed to follow due

legal process and record the statement of the approver under Section 306(4) of the Cr.P.C and commit the case to Sessions Court in accordance with law.

3. Hence at present there is no committal order. Consequently, at present the petitioner is not an accused. Hence the discharge application has become infructuous and so is this petition.

4. The petition is disposed of accordingly.

8. In view of the aforesaid order, the learned Magistrate rightly proceeded with the examination of the approver under Section 306(4)(a). It was not open for the Magistrate to go back to the pre-cognizance stage and deal with the question, whether the grant of pardon was proper or not. The order granting pardon is of 2006. This order dated 10th January, 2006, by which pardon was granted was never challenged till 2013. Even otherwise, we do not find any infirmity in the order dated 10th January, 2006 granting pardon to respondent No.2 herein. This Court remitted the case, only on the ground of non-compliance of the mandatory provision of Section 306(4), for examination of the approver, after which the case was to be committed to the Sessions Court. Thus, in the light of this, it cannot be said that there is non-compliance of the order dated 15th February, 2013 by the learned Magistrate.

9. Accordingly, no interference is warranted in the orders impugned before us. The petition being devoid of merit is dismissed.

REVATI MOHITE DERE, J.

V. M. KANADE, J.