



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.09.2021

PRONOUNCED ON : 17.09.2021

CORAM

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

CRL.R.C.NO.614 OF 2020

AND CRL.M.P.NOS.4599 & 4600 OF 2020

S.S.Govindaraj .. Petitioner/Petitioner/Accused No.1

Vs.

State represented by  
The Additional Superintendent of Police,  
CBI/SCB, Chennai.

.. Respondent/Respondent/Complainant

Prayer: Criminal Original Petition filed under Section 397 r/w 401 of Cr.P.C., to call for the records relating to the proceedings in Crl.M.P.No.181 of 2019 in C.C.No.291 of 2012 dated 05.03.2020 on the file of the Chief Judicial Magistrate, Coimbatore and set aside the same.

|                |                                                        |
|----------------|--------------------------------------------------------|
| For Petitioner | .. Mr.V.Karthikeyan                                    |
| For Respondent | .. Mr.K.Srinivasan,<br>Special Public Prosecutor (CBI) |

ORDER

This Revision Petition has been filed questioning the order dated 05.03.2020 in Crl.M.P.No.181 of 2019 in C.C.No.291 of 2012 passed by the learned Chief Judicial Magistrate Coimbatore.

2.This petition has been filed by the 1<sup>st</sup> accused in C.C.No.291 of 2012. The said calendar case had been taken cognizance pursuant to final report filed by the respondent under Sections 420, 468, 471 and 120B of IPC. Charges had been framed and twenty six witnesses have been examined. The only witnesses who have to be examined are the approver, who was originally shown in the First Information Report as A3 and the Investigating Officer.



3.A perusal of the records show that a First Information Report in Crime No.RC 6(S)/2011/CBI/SCB/Chennai had been registered on 21.06.2021 against S.S Govindaraj (A1), K.R.Easwaramuthy (A2) and A.Rajasekaran (A3) on the basis of a complaint dated 20.06.2011 given by the Zonal Manager, Indian Bank Zonal Office, Coimbatore. Final report was filed on 30.10.2012 for offences under Section 120 B read with 420, 468 and 471 of IPC against S.S Govindaraj (A1) and K.R.Easwaramuthy (A2). A.Rajasekaran who was arrayed as A3 in the First Information Report was shown as Approver since at the time of filing final report he had been granted pardon after following due process.

4.In the list of documents filed along with the final report, 99 documents have been cited by the prosecution. Document No.95 is the statement of A.Rajasekaran recorded under Section 164 Cr.P.C., on 14.03.2012 by the XIX Metropolitan Magistrate, Chennai. Document No.96 is the order dated 28.06.2012 passed by the Chief Judicial Magistrate, Coimbatore in Crl.M.P.No.1091 of 2012 granting pardon to A.Rajasekaran under Section 306 Cr.P.C. However, in the final report A.Rajasekaran was not cited as a witness. Crl.M.P.No.1358 of 2018 was filed by the respondent / prosecution to examine him / approver as a witness and the said petition was allowed by order dated 14.11.2018. That order has not been challenged by any of the accused. Thereafter, when the prosecution wanted to examine the Approver / A.Rajasekaran as a witness, the present petitioner / A1 filed Crl.M.P.No.181 of 2019 to set aside the order of grant of pardon made in Crl.M.P.No.1091 of 2012 dated 28.06.2012. That petition came to be dismissed by order dated 05.03.2020 passed by the Chief Judicial Magistrate, Coimbatore. Questioning that particular order, the present Criminal Revision Case has been filed.

5.The main ground urged by Mr.V.Karthikeyan, learned counsel for the petitioner / A1 is that when A.Rajasekaran / approver was examined by the XIX Metropolitan Magistrate Chennai on 14.03.2012, the petitioner herein was not granted a right of cross-examination of the approver. It had been stated that therefore, the grant of pardon by the Chief Judicial Magistrate, Coimbatore to the approver was not in order and should be interfered with.

6.This contention had been strongly disputed by Mr.K.Srinivasan, learned Special Public Prosecutor (CBI) who pointed out that the petitioner herein had not questioned the permission granted by the trial court to examine the approver as witness in Crl.M.P.No.1358 of 2018. It was also pointed out that when the approver was examined as witness during trial, the petitioner would have every opportunity to cross-examine him. It



was also contended that pardon had been granted after following due procedure and there was no irregularity in the same.

7.I have carefully considered the arguments put forth.

WEB COPY

8.The learned counsel for the petitioner primarily relied on a Full Bench judgment of the Gujarat High Court reported in AIR 1962 Guj 283 FB, Kalu Khada and others V. The State. In that case, the Gujarat High Court had examined interpretation of Section 337 of old Cr.P.C., which provision is pari materia to Section 306 of Cr.P.C., 1973. In paragraph 6, the questions which came up for consideration before the Full Bench were set out:

"6.Two questions were canvassed before us and both of them involve questions of interpretation of some of the sections of the Code of Criminal Procedure, and in particular, section 337. They are:

(1) Whether the Sub-divisional Magistrate, who tendered pardon in these cases, is, after the passing of the Bombay Act 23 of 1951, competent to tender pardon?

(2) Assuming that he is, whether the failure to examine, in the course of the committal proceedings, the person who was tendered pardon and who accepted such pardon, rendered the committal order passed by the learned Magistrate illegal."

9.The Full Bench of Gujarat High Court finally held as follows:

"25.The tender of pardon is made on the footing that an approver shall make a full and frank disclosure at all stages of the case. That being so, the failure to examine him before the committing Magistrate would not only be in breach of the express provisions of sub-section (2) of section 337 but would also be inconsistent with and in violation of the duty to make a full disclosure at all stages. The breach of sub-section (2) of section 337, therefore, is of a mandatory rather than a mere directory provision and such a breach would render the proceedings and the order illegal. The intended benefit for an accused for which sub-section (2) of section 337 appears to have been enacted would seem to consist in

(1) that the approver would have to disclose his evidence at the preliminary stage before the committal order is passed, and

(2) that an accused thus not only knows what the evidence is against him but gets an



WEB COPY

opportunity to rely upon the deposition of an approver before the committing Court for the purpose of proving the approver's evidence at the trial untrustworthy, if there are contradictions or improvements.

26. There can be thus no question that if the approver is not examined at both the stages, as required by sub-section (2), the accused in the trial would lose this benefit and it cannot be gainsaid that he would be prejudiced if he were to lose the opportunity of showing the approver's evidence unreliable. It would be deprivation of an important and in some cases a vital right which would cause him prejudice resulting in failure of justice. Even if, therefore, the breach of sub-section (2) is not to be regarded as illegal, section 537 of the Code would not cure such an irregularity and that section cannot be invoked to cure any such irregularity. Though the tender of pardon by the Sub-divisional Magistrate at the stage of investigation in this case and its acceptance by the approver Nanji Suleman cannot be said to be incompetent or unauthorised as contended by Mr. Desai, the failure on the part of the prosecution to examine the approver before the committing Court rendered the proceedings before the former and the committal order illegal and void. We, therefore, make the rule absolute in Criminal Application No. 364 of 1961 and No. 367 of 1931, and set aside the orders of the learned committing Magistrates committing the accused to the Court of Session, Amreli. No orders on the other two Criminal Revision Applications."

10. That was the case where there was committal proceedings and the approver was not examined even before the committal Court and therefore, the Full Bench held that the proceedings stood vitiated as a right which had accrued to the accused had been lost.

11. The actual issue in the present case is whether the accused / petitioner has a right to cross-examine when the approver is examined as witness.

12. In *Asokan L.S V. State of Kerala* reported in 2005 Cri LJ 3848 (FB), a Full Bench of the Kerala High Court had an occasion to examine such a situation. The reference to the Full Bench was as follows:-



"The interesting question which comes up for consideration before us upon a reference by a Division Bench is the following:-

"Whether the statement of an approver examined before the appropriate Magistrate under clause (a) of sub Sec. (4) of Sec. 306 Cr.P.C., is relevant and admissible under Sec. 33 of the Evidence Act during the subsequent trial in which he is not available for examination by reason of his death in the meanwhile?"

13.The Full Bench answered the reference as follows:-

"25.We accordingly answer this reference as follows:- Since the appellants/accused had no right to cross-examine the approver while he was examined before the Chief Judicial Magistrate under Section 306(4) (a) Cr.P.C., even if any of them had an opportunity to cross-examine the approver at that stage, the statement of the approver examined under Sec. 306(4) (a) Cr.P.C. is not relevant or admissible under Sec. 33 of the Evidence Act during the subsequent trial in which the approver was not available for examination by reason of his death in the meanwhile."

14.It had been very categorically held that the accused had no right to cross-examine the approver while he was examined before the Chief Judicial Magistrate under Section 306 (4) (a) of Cr.P.C. It was further held that even if they had an opportunity to cross-examine the approver, the statement of the approver is not relevant or admissible under Section 33 of the Evidence Act, 1872 during the subsequent trial.

15.In Suresh Chandra Bahri Vs. State of Bihar with Gurbachan reported in AIR 1994 SC 2420, the Hon'ble Supreme Court held as follows:

"30.A bare reading of clause (a) of sub-section (4) of Section 306 of the Code will go to show that every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (i) or (ii) of clause (a) of sub-



WEB COPY

section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial. As envisaged in sub-section (1) of Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, the failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal. The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as



unreliable. ....”

16. The Hon'ble Supreme Court had stated that it is imperative that the approver is examined as witness before the committal court.

17. In the instant case, it should be kept in mind that the First Information Report had been lodged before the Chief Judicial Magistrate. Thereafter, the 3<sup>rd</sup> accused had expressed intention to disclose all material facts and his statement has been recorded under Section 164 of Cr.P.C., by a competent Magistrate and thereafter, after following due procedure, the Chief Judicial Magistrate, Coimbatore had granted pardon. There is no irregularity in the instant case.

18. In *Ranadhir Basu V. State of West Bengal*, reported in (2000) 3 SCC 161 : AIR 2000 SC 908, the Hon'ble Supreme Court had held as follows:

“7. .... the object of Section 306 (4) is to provide an opportunity to the accused to show to the Court that the approver's evidence at the trial is untrustworthy in view of the contradictions or improvements made by him during his evidence at the trial. Considering the object and purpose of examining the person accepting tender of pardon as a witness is thus limited. The proceeding which takes place before the Magistrate at that stage is neither an inquiry nor a trial. Therefore, the submission of the learned counsel that Sudipa should have been examined as a witness in open court and not in the chamber and that while she was examined the Magistrate should have kept the accused present and afforded to them an opportunity to cross-examine Sudipa cannot be accepted. The phrase “examination of a witness” does not necessarily mean examination and cross-examination of that witness. What type of examination of a witness is contemplated would depend upon the object and purpose of that provision. Section 202 CrPC also contemplates examination of witness yet it has been held, considering the object and purpose of that provision, that the accused has no locus standi at that stage. ....

19. In *Yakub Abdul Razak Memon V. State of Maharashtra* reported in (2013) 13 SCC 1, the Hon'ble Supreme Court had held as follows:



WEB COPY

"In the present case, the Chief Investigating Officer, Bomb Blast Case (CIO), in his letter dated 28.09.1993, addressed to the Chief Metropolitan Magistrate (CMM) stated that after the Bombay Blast that took place on 12.03.1993, one of the accused i.e. PW 2 who also participated in the conspiracy right from the very beginning until the conspiracy culminated with the blasts on 12.03.1993, and who had been arrested has submitted an application from jail on 20.09.1993 expressing his voluntary readiness and willingness to confess his guilt before the Court. In the said letter, it was further stated that except the participants, nobody had any personal knowledge of how, when, where and why the criminal conspiracy was hatched and how all the details were chalked out to perfect and execute the said conspiracy, how different acts were carried out with the determined intention of achieving the object of the said conspiracy including training in Pakistan, how RDX explosives and other firearms were smuggled into India, how the RDX laden vehicles were planted at different places in Bombay and how the Bomb Blasts took place. Accordingly, the CIO suggested that instead of a mere confession, the evidence of PW 2 before the court as a prosecution witness would help the prosecution to a great extent in collecting evidence against the other offenders co-conspirators. This letter/application of CIO on 28.09.1993 was submitted to the court whereupon the TADA Court issued a warrant directing that the accused (PW 2) be produced and forwarded to the CMM on 28.09.1993 itself with a further direction to the CMM to tender pardon to him on the condition of true and full disclosure of facts by PW 2 pertaining to the Bombay Blast offences within his personal knowledge. (Paras 275 to 277)

The CMM recorded that on going through the replies given by the accused PW 2 to several queries, he was satisfied that the accused PW 2 is ready and willing to give a full and true disclosure of all the circumstances within his knowledge relating to Bombay Bomb Blasts case. The CMM also carefully perused the report of the CIO and was fully satisfied that it is a case of conspiracy and in pursuance of the said conspiracy, the accused PW 2 and other persons had planted and caused the explosion of bombs at



WEB COPY

various places in Bombay on 12.03.1993. After recording the same, on 28.09.1993 itself, the CMM passed an order in view of the powers conferred on him under Section 306 Cr.P.C and tendered pardon to the accused, (PW 2) on the condition of his making a full and true disclosure of all the circumstances within his knowledge relating to the blasts which occurred on 12.03.1993 and also in respect of the offence of conspiracy and such other offences connected therewith in the commission thereof. The said order was read over and explained to PW 2 in Hindi and he accepted the tender of pardon on the aforesaid condition. The abovementioned letter of the CIO dated 28.09.1993 and the consequential order passed by the CMM dated 28.09.1993 giving pardon to PW 2 and recording PW 2's statement satisfy the procedure prescribed and there is no flaw with regard to the grant of pardon and the recording of statement of PW 2 thereafter. (Paras 278 and 279)"

20. In State of H.P V. Surinder Mohan reported in (2000) 2 SCC 396 : AIR 2000 SC 1892, the Hon'ble Supreme Court was concerned in a case where the accused and some other persons were arrested in connection with murder of two persons. While in custody, he submitted an application through the Superintendent of Jail to the CJM expressing his intention to make a true disclosure of the facts regarding the incident. The CJM issued a notice fixing a date. On that day, the accused was produced before the CJM. It was explained to the approver that his statement could be used against him also and with a view to give time to the accused before becoming an approver, the case was adjourned to another date and on that day he was examined and pardon was granted to him. But at that stage the remaining accused were not asked to cross-examine him. A formal challan was submitted before the Magistrate by the investigating officer. After complying with the objections, the case was committed to the Court of Session. During the trial the approver was examined and on the same day he was cross-examined by the counsel for the accused. Witnesses for the defence were examined. During the period when the arguments were heard and the Sessions Judge visited the spot with a view to appreciate the evidence-on-record the contention was raised for the first time that the procedure prescribed under Section 306(4)(a) Cr.P.C was not complied with and therefore, the trial was vitiated. Till then none of the accused raised such an objection and they never felt the need to raise it. The Additional Sessions Judge acquitted the accused-respondents for the offence under Sections 302, 380, 457, 120-B read with Section 34 IPC. The State's appeal before the High Court was dismissed solely on



the ground that the Chief Judicial Magistrate had failed to comply with the mandatory directions contained in Section 306(4) (a) Cr.P.C as no statement of the approver was recorded by the Chief Judicial Magistrate during the committal proceedings, which vitiated the committal of the accused persons to the Court of Session and consequently the trial by the Sessions Judge. The Hon'ble Supreme Court held as follows:

"Acceptance of this objection would only promote technical plea which would adversely affect dispensation of justice. In such circumstances, provisions of Section 465 Cr.P.C., would come into operation. Before or after the case was committed to the Sessions Court, the accused had not raised any objection that they were not permitted to cross-examine the approver, nor did they contend so when the approver was examined and cross-examined during the trial. Therefore, at the stage of final arguments, the accused cannot raise the said contention. Further, after cross-examining the approver in detail, there is no question of failure of justice nor any prejudice being caused to the accused on account of that omission.(Para 18) From Section 306 it can be stated that???

(1) the purpose of the section is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence "during investigation, inquiry or trial";

(2) the Chief Judicial Magistrate or Metropolitan Magistrate is empowered to tender a pardon to such person "at any stage of investigation or inquiry into or the trial of the offence";

(3) the condition for tender of such pardon is that the person is to make a full and true disclosure of the whole circumstances within his knowledge relating to the offence;

(4) a person accepting pardon under subsection (1) is to be "examined" as a witness in the Court of the Magistrate taking cognizance of the offence and in subsequent trial, if any;

(5) further, if the case is committed for trial to the Court of Session, Section 307 empowers the Sessions Court trying the case to tender a pardon on the same conditions to such person before the judgment is passed.



WEB COPY

From the aforesaid ingredients, it is clear that at the stage of investigation, inquiry or trial of the offence, the person to whom pardon is to be granted, is to be examined for collecting the evidence of a person who is directly or indirectly concerned in or privy to an offence. At the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right to cross-examination would arise only at the time of trial. During the course of investigation by the police, the question of cross-examination by the accused does not arise."

21. In State by Assistant Commissioner of Police, Crime Record Bureau, Chennai V. Saravanan and Others reported in 2004 (1) MWN (Cr.) 242, a learned Single Judge of this Court, in an issue whether or not an accused can be permitted to cross-examine an approver, at the pre-committal stage? Placing reliance on Ranadhir Basu V. State of West Bengal, held in Para 6 as under:

"6. On a reading of the above observation, it is clear that the ratio decided by the Supreme Court is that the committal proceeding which takes place before the committal court at that stage is neither an enquiry nor a trial. Therefore, the contention that the accused must be given opportunity to cross-examine in the committal court when the approver is examined cannot be accepted. The phrase "examination of witness" does not mean examination and cross-examination of that witness. Therefore, it is clear that the accused cannot claim as a right to cross-examination."

22. In State of Maharashtra (DCB, CID, Unit-II, Mumbai C.R.No.06/2004) Through Prashant Pandharinath Raje Senior Inspector of Police, DCB CID Unit II V. Narendra G. Goel R/a 221/222, Kshitig Apartment 47, Napean Sea Road, Mumbai - 400 036 reported in 2016 SCC OnLine Bom 2278, a Division Bench of the Bombay High Court held as follows:

16. The examination which is contemplated under Section 306(4) of the Code, cannot be equated with the 'examination' of a witness under Section 138 of the Evidence Act. If what is contended by the learned counsel for the respondent is to be accepted, and the accused is given a right to cross-examine an approver at the pre-committal stage, the same would not



WEB COPY

only be contrary to law, but would lead to hazardous consequences, as a Magistrate would be required to deal with and decide the admissibility of any question raised in the examination/cross examination by the accused, in a case exclusively triable by the Court of Sessions. Under Section 306 of Code of Criminal Procedure, what cannot be lost sight of is, that when an approver is being examined by a Magistrate, he is merely recording his statement, after grant of pardon and as such, he merely acts as a post office by recording the statement under Section 306(4) and thereafter, forwards it to the Court of Sessions, which is the Court competent to try the case. Thus, the term 'examination' used in Section 306(4) of the Code, cannot be construed to mean an examination, contemplated under Section 138 of the Evidence Act. The accused will get an opportunity to cross examine the approver, only after the case is committed to the Court of Sessions, when the approver is examined as a prosecution witness, after which the accused will have a right to cross examine the approver and bring out the contradictions or improvements made by him during his evidence at the trial.

17. In conclusion, we may note that under Section 306 of the Cr.P.C, the Magistrate is only empowered to examine the approver, as at this stage, the proceeding before the concerned Magistrate is neither an inquiry nor a trial, and therefore the accused has no right to cross-examine the approver. The Magistrate does not have the jurisdiction and discretion to "appreciate the evidence" which will be adduced before the Sessions Court and give any findings on the merits of the case. His duty is only to record the examination under Section 306(4)(a) and forward it to the Court of Sessions, whilst committing the case. The examination of the approver as contemplated under Section 306(4)(a) cannot in any circumstance, be equated with the examination contemplated under Section 138 of the Evidence Act. Infact, the examination is more or less akin to an examination contemplated under Section 200 of the Code of Criminal Procedure. Hence, an accused has no



right to cross examine an approver at the pre-committal stage.

23. The ratio laid down in all the judgments are very clear that the petitioner has no inherent right to cross-examine at the time of committal. The said examination is not an examination under Section 138 of the Evidence Act, 1872. As pointed out, if the accused is given a right to cross-examine the approver at the pre-committal stage, it would only be contrary to law but would lead to a situation where the Magistrate will have to decide whether the questions raised are admissible in a case triable by the Chief Judicial Magistrate. The Magistrate is only to empowered to examine the approver under Section 306 of Cr.P.C. It is neither an inquiry nor a trial. Therefore the accused has no right to cross-examine the approver. The Magistrate cannot appreciate the evidence. It is an examination as contemplated under Section 200 Cr.P.C. Therefore, the accused does not have any right to cross-examine the approver at the pre-committal stage.

24. I therefore hold that the order of the learned Chief Judicial Magistrate, Coimbatore, does not suffer from any infirmity. It is also seen that the application has been filed after 26 witnesses have been examined. Only the approver and the Investigating Officer alone have to be examined during trial. The petitioner herein will have every right to cross-examine the approver during the course of trial. I find no reason to interfere with the well considered order passed by the learned Chief Judicial Magistrate, Coimbatore. The present Criminal Revision Case is therefore dismissed. Consequently, the connected miscellaneous petitions are closed.

25. A direction is given to the learned Chief Judicial Magistrate, Coimbatore to proceed with the trial forthwith and endeavour to dispose the calendar case on or before 31.12.2021.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

smv

To

The Additional Superintendent of Police,  
CBI / SCB, Chennai.



2. The Chief Judicial Magistrate,  
Coimbatore

3. The Special Public Prosecutor (CBI)  
High Court, Madras.

+1cc to Mr.V.Karthikeyan, Advocate, S.R.No.47469

Crl.R.C.No.614  
of 2020  
and Crl.M.P.Nos.4599 & 4600 of 2020

SVI (CO)  
PM/05/10/2021