

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION NO.596 OF 2022

Applicants : **Madhuri w/o Badrinarayan Gote,**
 Aged 32 Yrs., Occ. Household Work,
 R/o Amani tq. Malegaon, Dist. Washim,
 At present Central Jail, Washim,
 Tq. Dist. Washim,

– Versus –

Non-Applicants : 1. **State of Maharashtra,**
 Through P.S.O. Police Station,
 Washim City, Tq. & Dist. Washim.

2. **Sandip Motiram Jadhao,**
 Aged about 32 years, Occupation – Agriculturist,
 R/o Wasari, Tah. Malegaon, District Washim,
 At Present – Madhav Nagar, Lakhada,
 Tah. and Dist. Washim.

Mr. Anil Mardikar, Senior Advocate with Mr. Ved Deshpande,
Advocate for the Applicant.

Mrs. M.H. Deshmukh, A.P.P. for Non-Applicant No.1/State.

Mr. S.V. Sirpurkar, Advocate for Non-Applicant No.2.

CORAM : **VINAY JOSHI, J.**
RESERVED ON : **23rd AUGUST, 2022.**
PRONOUNCED ON: **26th AUGUST, 2022.**

J U D G M E N T :-

Heard finally by consent of both sides.

02] **Admit.**

03] The applicant, who is accused No.2 of Sessions Case No.34/2020, has impugned herein common order dated 17/02/2020 passed on Exh.21 and Exh.28, by which the trial Court declined to grant tender of pardon.

04] The facts in brief are that, at the instance of report lodged by informant-Sandip, crime was registered vide Crime No.23/2020 with Police Station Washim (City) for the offence punishable under Section 302, 364A, 363, 201 and 120B of the Indian Penal Code. The informant's niece, aged 15 years, went missing on 19/01/2020. During investigation, it was transpired that applicant-Madhuri (Accused No.2) had grudge against the father of minor girl (deceased) for which she hatched conspiracy with her husband Badrinarayan (Accused No.1) to eliminate the minor. In execution of designed plan, the minor was kidnapped, taken to secluded place, administered intoxicant and was eliminated by way of strangulation. Later on, both accused have burnt dead body, destroyed the remains and screened the offence. The investigation was carried out in which several articles have been seized at the instance of accused. The place of occurrence as well as the place where body was burnt, was disclosed by the accused. Circumstantial evidence was collected pointing towards the guilt of both. On completion of investigation, charge-sheet has been filed. The learned Magistrate has committed the case to the Court of Sessions for trial.

05] At this juncture, applicant-Madhuri (Accused No.2) has applied [Exh.21] for grant of tender of pardon. It is her contention that she had repentance about her deeds. She is ready to make true and complete disclosure about the whole of the circumstances, which are within her knowledge and thus claimed grant of tender of pardon. The learned Prosecutor did not object the said application, however, filed independent application [Exh.28] making similar request. It is the contention of the State that there is no eye witness to the occurrence. The applicant-Madhuri had direct knowledge being participant, she had agreed to make true disclosure and, therefore, State also urged for grant of tender of pardon.

06] The trial Court has considered both the applications. It is observed that applicant-Madhuri had played important role in the episode and she is the real culprit. There is no secrecy in the crime. Sufficient circumstantial evidence is available against both accused and, therefore, declined to grant tender of pardon. The said order is impugned by the applicant (Accused No.2) and supported by the prosecution.

07] The learned Senior Counsel appearing for the applicant has strongly assailed the impugned order contending that the trial Court has committed serious error in self-undertaking exercise of prejudging the adequacy of

evidence. The trial Court went wrong in deciding the propriety of tendering pardon especially when the prosecution is also seeking for grant of tender of pardon. It is argued that the exercise of the trial Court of ascertaining the role of the applicant in the crime was unwarranted and it is beyond the scope of Section 307 of the Code of Criminal Procedure (Code).

08] The learned Additional Public Prosecutor has repeated the said submission. Moreover, it is argued that there is no direct evidence regarding the occurrence. According to the prosecution, the tender of pardon will be in the interest of successful prosecution. It is submitted that having regard to nature of circumstantial evidence, it is hard without approver's testimony to establish the guilt. Therefore, the State has also sought the similar relief of grant of tender of pardon to applicant-Madhuri (Accused No.2). Notice was issued to the informant, who appeared through Advocate Mr. Sirpurkar. Upon instructions of the informant present in the Court, Advocate Mr. Sirpurkar made a statement that the informant also supports the urge of grant of tender of pardon.

09] Section 306 of the Code confers a power of grant of tender of pardon to accomplice by the Magistrate upon certain conditions as enshrined

under sub-clause (1) of Section 306 of the Code. Similar powers are invested with the Court of Sessions after committal, which would last till delivery of judgment. Principally, it is for the prosecution to seek for grant of tendering of pardon to one of the accused out of several, if the prosecution is of the view that for successful prosecution against other accused, it is necessary, failing which it is difficult to secure the conviction. Generally, the provision of grant of tender of pardon is invoked when the offences are committed in secrecy and the evidence collected during the course of investigation is of such nature that the prosecution has no confidence about securing conviction. The very nature of provision indicates that it is the right of the prosecution to seek for tender of pardon, obviously, it is discretion of Judge to decide the urge in either way.

10] Herein, the applicant-accused as well the prosecution, both are seeking for grant of tender of pardon in one voice. However, the learned Sessions Judge has refused to accord pardon by stating that the evidence collected during investigation is sufficient and the role played by applicant-Madhuri is important. Reading of the relevant provision of Sections 306 and 307 of the Code nowhere indicates that the role played by accused seeking pardon is important consideration for grant of pardon. In this regard, the

applicant's learned Counsel has rightly relied on the decision of this Court in the case of *A1-Saleha Beig s/o Abdul Gani Beig vs. State & Ors. - 2008 ALL MR (Cri) 802*, wherein it is observed that the role played by the accused can never be the consideration for grant or refusal of pardon. The learned Judge cannot go into the aspect of the nature of his/her involvement or possible weight of his evidence. The learned trial Judge has commented that the circumstantial evidence is available on record against both the accused. As a matter of fact, whether the circumstances brought by prosecution are sufficient to secure conviction is a matter of final adjudication. At this juncture, one cannot prejudge that the circumstantial evidence collected by the prosecution is adequate. The very action of the prosecution of seeking tender of pardon itself postulates that the prosecution is not sure of success on the basis of evidence collected during the process.

11] The learned Senior Counsel appearing for the applicant, by placing reliance on the decision of *Lt. Commander Pascal Fernandes vs. State of Maharashtra and others – AIR 1968 SC 594*, would submit that it is for the prosecution to seek for tender of pardon, which the Court shall normally accepts. In this regard, the observations of the Supreme Court in the above referred case of *Lt. Commander Fernandes* in paragraph 15 are useful, which reads as below :

“15. Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges, he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring, as a veritable director of prosecution. The power which the Special Judge exercises 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 State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case.....”

12] The learned Judge ought to have avoided to undertake the task of determining the propriety of tendering pardon when the prosecution itself

urges so on the basis of given facts. Undoubtedly, the offence was committed in secrecy for which there is no eye-witness. The evidence collected during the course of investigation indicates that the applicant was directly connected with the crime and she had a personal knowledge regarding the incident. The applicant has undertaken to make full and true disclosure of the whole of the circumstances within her knowledge relating to the crime.

13] Having regard to the above facts, the case for grant of tender of pardon is made out. The impugned common order dated 17/02/2022 is hereby quashed and set aside. The application filed by the prosecution for grant of tender of pardon to applicant-Madhuri w/o Badrinarayan Gote (Accused No.2) is allowed on condition of her making a full and true disclosure of the whole of the circumstances within her knowledge relating to the offence. Needless to say that it is open for the prosecution to resort to the provisions of Section 308 of the Code, if the circumstances warrant so. The application stands disposed of in the above terms.

(VINAY JOSHI, J.)

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