

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-12838-2023 (O&M)
Date of Decision:- 02.06.2023

Somveer Singh Petitioner

Versus

State of Haryana and others Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. P.S. Sullar, Advocate for the petitioner.

Mr. Geeta Sharma, DAG, Haryana.

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GURVINDER SINGH GILL, J.

1. The petitioner (accused) assails order dated 11.01.2023 passed by learned Additional Sessions Judge, Narnaul (Annexure P-3) vide which an application filed by the prosecution under Section 306 Cr.P.C. for grant of pardon to the petitioner has been declined.
2. It is a case where allegations are broadly to the effect that the petitioner who was working as a Registry Clerk and co-accused Amit Kumar who was Naib Tehsildar, Sub-Tehsil Satnali, Narnaul, had been demanding amount from the complainant for getting sale-deeds registered. When a trap was laid, it is the co-accused Amit Kumar, Naib Tehsildar, only who was caught red-handed.
3. During the proceedings of trial, the prosecution moved an application for grant of pardon to the petitioner who had not been caught at the spot. The trial Court declined the said application while observing that there was

sufficient evidence against co-accused Amit Kumar. The observations made in para No.6 of the impugned order are reproduced herein under:

“6. So, it appears to this Court that this application is not being genuinely moved by the Investigating Officer of this case, rather, it has been moved for giving indirect benefit to accused Somvir Singh so that under the guise of becoming approver he should be escaped from the punishment if it is warranted later on the basis of available evidence. Resultantly, I find this application devoid of merits. Consequently, it is dismissed. Since sufficient evidence is available against accused Somvir Singh who demanded money from the complainant as bribe for Arnit Kumar out of which accused Amit Kumar gave Rs.10,000/- to him as his share as per the disclosure statement of Amit Kumar. Therefore, without making further delay, the challan should be submitted by the Investigating officer of this case against accused Somvir Singh and necessary permission for his prosecution should also be obtained by him from competent authority because he was public servant at the relevant time.....”

4. At the time of issuance of notice of motion, this Court had narrowed down controversy by framing the following three questions :-

- (i) Does an accused himself have *locus-standi* to move an application for grant of Pardon in terms of Section 306 Cr.P.C. or as to whether the said provisions are for the purpose of facilitating prosecution only under the limited circumstances of lack of evidence against co-accused?
- (ii) Can “Pardon” in terms of Section 306 Cr.P.C. be termed as beneficial legislation for the benefit of accused as is “Pardon” granted in terms of Article 72 or Article 161 of Constitution of India?
- (iii) Upon an application under Section 306 Cr.P.C. moved by prosecution being dismissed by trial Court, does the accused for whom “Pardon” is sought, have locus-standi to challenge that order?

5. This Court has heard learned counsel for the petitioner as well as learned State counsel.

6. Each of the three questions framed above is being discussed individually herein-under :-

7. Question (i)

Does an accused himself have locus-standi to move an application for grant of Pardon in terms of Section 306 Cr.P.C. or as to whether the said provisions are for the purpose of facilitating prosecution only under the limited circumstances of lack of evidence against co-accused?

The learned counsel for the petitioner places reliance upon judgment of Hon'ble Supreme Court rendered in Lt. Commander Pascal Fernandes versus State of Maharashtra AIR 1968 Supreme Court 595, wherein an application was made by one accused Jagasia to the Court praying therein that he be tendered pardon and made an approver and be examined as a prosecution witness. The reasons furnished by the accused Jagasia were that he had full and complete knowledge of all the facts which had taken place between the officers and the contractors and was in a position to disclose how the conspiracy was entered into amongst the accused. The said application was, however, opposed by other co-accused who contended that it was essentially for the prosecution to move such an application and that any such application, in any case, was not legally tenable after framing of charges and that in case pardon is granted to him, the same would be an act of favour to him (Jagasia) and would be highly prejudicial to the defence of other co-accused. The trial Court, however, accepted the application and granted permission to the applicant Jagasia to turn approver. The co-accused filed a revision in the High Court where the prosecution expressed that it had no objection for grant of pardon. Consequently, the High Court upheld the order of the trial Court granting tender of conditional pardon.

8. The said order was, thereafter, challenged in the Hon'ble Supreme Court wherein it was held that there was nothing in the Code (Cr.PC) that an application to become approver is essentially to be filed by the prosecution only. The relevant extract reads as under :-

“12. There can be no doubt that the Section is enabling and its terms are wide enough to enable the Special Judge to tender a pardon to any person who is supposed to have been directly or indirectly concerned in, or privy to, an offence. This must necessarily include a person arraigned before him. But it may be possible to tender pardon to a person not so arraigned. The power so conferred can also be exercised at any time after the case is received for trial and before its conclusion. **There is nothing in the language of the Section to show that the Special Judge must be moved by the prosecution. He may consider an offer by an accused as in this case.** The action, therefore, was not outside the jurisdiction of the Special Judge in this case.”

(emphasis supplied)

9. However, the Hon'ble Apex Court added a word of caution in the concluding part of the judgment which reads as under :-

“.....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. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favourably the tender of pardon to Jagasia **we say no more than to caution Magistrates and Judges in the matter of tender of pardon suo motu at the request of the accused. This practice is to be avoided.** Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed.”

(emphasis supplied)

10. Extracts from Pascal Fernandes' case (supra), as reproduced above, make it clear that while there is no absolute bar against an accused moving an application for turning an approver, but such a practice should ideally be avoided.
11. The learned counsel also pressed into service another judgment of Hon'ble Supreme Court rendered in Jasbir Singh vs. Vipin Kumar Jaggi, 2001(3) RCR(Criminal) 818. In the cited case, the allegation against the appellant was that he was the kingpin of an international network of drug smugglers. According to the prosecution, the evidence against the appellant included 'chits' recording some details of smuggling of drugs and contacts in the United States of America and a recorded conversation between the appellant and the co-accused/respondent No. 1 relating to the smuggling of drugs to the USA. The said co-accused/respondent no.1 applied to the NCB under provisions of Section 64 of NDPS Act, 1985, to be made an approver as he was willing to co-operate with the NCB in securing a conviction of the appellant. During pendency of said application with NCB, the co-accused/respondent no.1 also filed an application under Section 306 Cr.PC, directly in the Court. The said application was supported by NCB through Public Prosecutor. However, the appellant Jasbir opposed the application before the Sessions Judge who rejected the same.
12. Thereafter, NCB considered the application which had been moved by the co-accused/respondent no.1, praying for immunity. The NCB, while accepting the application, granted immunity to respondent No. 1 under Section 64 of NDPS Act 1985, after recording reasons in writing. It was noted that the appellant was a "*big time drug trafficker and main organiser of the syndicate*."

He operates very cleverly avoiding direct exposure. The available evidence against him is the 'Chits' recovered from his house. The other evidence is his intercepted telephonic conversation with Shri Vipin Jaggi" (co-accused/namely the respondent No. 1). The NCB was of the opinion that the evidence was "crucial" for the prosecution of the appellant. The order took note of the rejection of the application of co-accused/respondent no.1 for pardon by the Sessions Judge but went on to state that the powers under Section 64 of the NDPS Act 1985, were independent and did not conflict with the powers conferred on the Court under Sections 306 and 307 of the Criminal Procedure Code, 1973.

13. Subsequently, when the prosecution moved an application under Section 311 of the Criminal Procedure Code, 1973 before the Sessions Judge for leave to examine respondent No. 1 as a witness, the same was opposed by the appellant Jasbir Singh. The Sessions Judge observed that the application under Section 311 Cr.P.C. was a "*misuse of process of Court*" and that the grant of immunity under Section 64 of the NDPS Act to an accused who was facing trial before the Court would amount to vesting the power of judicial authority in the Government.
14. The decision of the Sessions Judge was challenged by Respondent No. 1, before the High Court which reversed the decision of Session Court as regards disallowing application of prosecution under Section 311 to examine respondent no.1/approver. The appellant/accused Jasbir, thus, filed appeal in Hon'ble Supreme Court challenging order of High Court. Hon'ble Supreme Court, while dismissing the appeal, held that if there is a conflict between the powers of the Court under Section 307 Cr.P.C. and the power of the Central

Government under Section 64 of the Narcotic Drugs and Psychotropic Substances Act, 1985, then it must be held that Section 64 of the NDPS Act would prevail both on the ground that the Act being a special Act overrides the Criminal Procedure Code which is a general Act and also because the later enactment must prevail over the earlier one. Some of the observations made in the said judgment indicate the underlying purpose for granting pardon. The relevant extracts from Jasbir Singh's case (supra) are reproduced herein-under :-

- “14. The grant of pardon by Court is rooted in the premise that most criminals try to avoid detection. Crimes like smuggling, by definition are carried on secretly. The persons involved in such criminal activity would obviously try to conceal and hide any evidence of their activities in as many ways as human ingenuity can devise. That is why the prosecution is often compelled to rely on the evidence of an accomplice to bring the most serious offenders to book. Besides ".....to keep the sword hanging over the head of an accomplice and to examine him as a witness is to encourage perjury.
16. The issue has to be weighed in the balance so that at the cost of not bringing one of the offenders to book, the others or at least the principal offender can be convicted. ".....The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principal is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence."
21. In contrast the power of tendering pardon under Section 307 is restricted to one consideration alone namely the obtaining of evidence from the person to whom pardon is granted relating to the offences being tried. But it needs to be noted at this stage that the power under Section 321 not only emphasises the role of the Executive in the trial of offences but also that the Executive can exercise the power at any time during the trial but before the judgment is delivered. This will be relevant in construing the language of Section 64 of the Act.”

(emphasis supplied)

15. The aforesaid observations are in tune with the language of Section 307 Cr.P.C. wherein the very opening line shows that it is a view to obtaining

evidence that an accused may be tendered pardon. Section 306 Cr.P.C. reads as under :-

"306. Tender of pardon to accomplice.

- (1) **With a view to obtaining the evidence** of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) to (5) x x x

16. None of the above cited two judgments, anywhere indicates that even in cases where the prosecution has evidence, the Court is obliged to grant pardon in case any such application is moved before it. In CBI Vs. Ashok Kumar Aggarwal 2013(15) SCC 222, a similar suggestion had been made by the Additional Solicitor General of India, which was turned down by Hon'ble Supreme Court while observing as under :

"14. It was contended by Mr. K.V. Vishwanathan, learned ASG, that the court must invariably agree to tendering a pardon if the proposal to pardon originates from the prosecution or if the prosecution supports it. Since the prosecution, as in this case, supported the plea of respondent no.2 for grant of pardon and for becoming an approver, the High Court committed an error in reversing the order of the Special Judge. If this contention is accepted, it would completely marginalise the role of the court and take away the discretion of a judge in ensuring a fair trial and doing justice in a criminal case. We, therefore, reject the contention."

17. During the course of arguments, the learned counsel for the petitioner pressed into service a judgment of Hon'ble Andhra Pradesh High Court in Crl. Revn. Case No. 954 of 2000 Konajeti Rajababu versus State of A.P. and another wherein the High Court while relying upon Lt. Commander Pascal Fernandes's case held that a request for grant of pardon need not necessarily be made by the prosecution only. Hon'ble Andhra Pradesh High Court summed up the scope of Sections 306 and 307 Cr.P.C. as under :-

“13. From the foregoing discussion with reference to the relevant provisions in the Code and the law laid down by the Apex Court, it can be summarised thus:

- (1) The power to grant pardon enjoined under Sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court,
- (2) The power of the Court is not circumscribed by any condition except the one, namely, that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned in, or privy to, an offence.
- (3) The Court has to proceed with great caution and on sufficient grounds recognising the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.
- (4) The secrecy of the crime and paucity of evidence, solely for the apprehension of the other offenders, recovery of the incriminating objects and production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.
- (5) The disclosure of the person seeking pardon must be complete.
- (6) While tendering pardon, the Court should make an offer to the one least guilty among the several accused.
- (7) The reasons for tendering pardon must be recorded and also about the factum of accepting of pardon by the concerned.”

18. The ratio, culled out from above referred judgments makes it amply clear that even an accused can move an application seeking grant of pardon though the Court concerned is expected to seek response of the prosecution while considering any such request made on behalf of the accused. However, it has been cautioned in Pascal Fernandes' case (supra) that such practice should be avoided. Ultimately, it is the discretion of the Court whether to allow or decline such application. The language of Section 306 Cr.P.C. and also the

judgments also make it clear that the purpose of granting pardon to an accused is to facilitate the prosecution to prove its case with the help of statement of approver in addition to other evidence as may have been collected, particularly when otherwise there is some dearth of evidence.

19. The first question, as such, is answered accordingly partly in favour of the accused to the extent that an application under Section 306 Cr.P.C. for seeking pardon can be moved by a convict also and that any such application need not necessarily originate from the prosecution only. However, practice of such applications at the instance should normally be avoided and that any such application is to be treated with caution and upon such application being filed, the response of the State should be sought by the trial Court. The prime consideration while exercising discretion at the cost of sparing one accused from punishment is to facilitate prosecution in proving its case qua other accused particularly the principal accused.

20. Question No. (ii)

Can “Pardon” in terms of Section 306 Cr.P.C. be termed as beneficial legislation for the benefit of accused as is “Pardon” granted in terms of Article 72 or Article 161 of Constitution of India?

While grant of pardon certainly turns out beneficial to such accused who is granted pardon as he would be spared from the penal consequences of conviction but the object and purpose of Section 306 Cr.P.C. is not just to extend benefit to an accused but is to enable the prosecution to obtain evidence particularly where there is lack of evidence to substantiate the case of prosecution as in the cases of conspiracy etc. where conspiracy is hatched in secrecy or regarding certain *modus operandi* in respect of which complete

clarity is not there. Hon'ble Apex Court, in Suresh Chandra Bahri vs. State of Punjab 1994(3) RCR(Criminal) 1, explained the object of Section 306 Cr.P.C. in the following words:

“42. We have already reproduced above Section 306 of the Code the provisions of which apply to any offence triable exclusively by the Court of Special Judge to any offence punishable with imprisonment extending to seven years or with a more serious sentence. Section 306 of the Code lays down a clear exception to the principle that no inducement shall be offered to a person to disclose what he knows about the procedure. **Since many a times the crime is committed in a manner for which no clue or any trace is available for its detection and, therefore, pardon is granted for apprehension of the other offenders for the recovery of the incriminating objects and the production of the evidence which otherwise is unobtainable. The dominant object is that the offenders of the heinous and grave offences do not go unpunished,** the Legislature in its wisdom considered it necessary to introduce this Section and confine its operation to cases mentioned in Section 306 of the Code. The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.”

(emphasis supplied)

21. Thus, the dominant purpose of Section 306 Cr.P.C. has been held to be that the offenders of the heinous and grave offences do not go unpunished on account of lack of evidence. As a matter of fact the object of Section 306 Cr.P.C. can be discerned from the very opening words of the section which read as - ‘*With a view to obtaining the evidence*’. Thus, evidently Section 306 Cr.PC is a piece of legislation enacted to help the prosecution to bring

offenders to book, particularly where prosecution finds there is paucity of evidence though the same may mean that one of the co-accused has to be extended benefit of pardon, in lieu thereof. It is the sheer need of the prosecution to have evidence to prevent offenders from escaping punishment, which is the paramount consideration for granting pardon in terms of Section 306 Cr.PC. On the other hand, pardon granted to a convict, post his conviction, by President or Governor under Article 72 or 161 of the Constitution of India, is granted to a convict with the sole object of extending benefit of releasing him pre-maturely, having regard to his conduct and other circumstances. The second question posed to this Court stands answered accordingly.

22. Question No. (iii) :

Upon an application under Section 306 Cr.P.C. moved by prosecution being dismissed by trial Court, does the accused for whom "Pardon" is sought, have locus-standi to challenge that order?

Since this Court while answering question no. (i) has already held that an accused does have a right to move an application independently to the trial Court under Section 306 Cr.P.C. seeking pardon, the same would necessarily imply that any order passed by the trial Court under Section 306 Cr.P.C. by which an accused is aggrieved can be challenged by such accused by filing appropriate petition before a Higher Court. The third question stands answered accordingly.

23. In the case in hand, the application moved by the prosecution for grant of pardon to petitioner was declined by the trial Court upon finding that there was sufficient evidence against the accused Somveer Singh and co-accused

Amit Kumar. The trial Court further observed that the application had rather been moved to extend favour to Somveer Singh under the guise of becoming approver. The relevant extracts from the impugned orders are reproduced herein-under:-

- “5. No plausible reason has been given by the applicant as to why pardon should be granted to accused Somvir Singh when sufficient evidence against accused Somvir Singh and his co-accused Amit Kumar is available on record because their voices had been recorded by the complainant whereby they were demanding money and in that demand accused Somvir Singh was playing a vital role because of Sub Ordinate Clerk of Tehsildar Amit Kumar.
6. So, it appears to this Court that this application is not being genuinely moved by the Investigating Officer of this case, rather, it has been moved for giving in direct benefit to accused Somvir Singh so that under the guise of becoming approver he should be escaped from the punishment if it is warranted later on the basis of available evidence. Resultantly, I find this application devoid of merits. Consequently, it is dismissed. Since sufficient evidence is available against accused Somvir Singh who demanded money from the complainant as bribe for Amit Kumar out of which accused Amit Kumar gave Rs. 10,000/- to him as his share as per the disclosure statement of Amit Kumar. Therefore, without making further delay, the challan should be submitted by the Investigating Officer of this case against accused Somvir Singh and necessary permission for his prosecution should also be obtained by him from competent authority because he was public servant at the relevant time.”
24. In the present case, upon receipt of complaint made by the complainant, a trap was laid and co-accused Amit Kumar was caught red-handed while accepting bribe. The recovery of tainted currency notes, presence of shadow witness and other witnesses would constitute sufficient evidence against accused. Further, the complainant had also recorded audio-conversation which had taken place between the accused and complainant wherein the accused had raised demand of bribe. It is not a case where there is some deep-rooted conspiracy which is to be unearthed and regarding which there is lack of evidence or such a case where the *modus operandi* of any scam is

unknown. The present case is a trap case where there is sufficient evidence available with the prosecution against the accused. As such, the trial Court has correctly observed that the application is motivated and has been filed with oblique motives. As already discussed above, it is only the lack of evidence which could justify grant of pardon to one of the co-accused. Any such application is to be examined minutely and cannot be accepted as of right. This is precisely what that has been held in Ashok Kumar Aggarwal's case (supra).

25. In view of the aforestated position, this Court does not find any reason to differ with the observations as recorded by the trial Court. There is no infirmity in the impugned order and the same is upheld. The petition, consequently, is dismissed.

02.06.2023

kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Whether Reportable

Yes / No

Yes / No