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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 25th January, 2023

Pronounced on: 24th March, 2023

+ CRL.M.C. 1274/2013 & CRL.M.A. 7269/2017 (Stay)

RAHUL YADAV & ANR.

..... Petitioners

Through: Mr. Rajat Aneja & Ms. Anushka,
Advocates.

versus

STATE & ANR.

..... Respondents

Through: Mr. Hitesh Vali, APP for State with
SI Dinesh Kumar, PS Tilak Nagar.
Mr. Vikas Pahwa, Senior Advocate
with Mr. Arun Kanwa, Advocate for
Respondent No. 2.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present petition under Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') is directed against the orders dated 21.08.2012 and 28.09.2012, passed by Shri Rakesh Siddharth, learned Additional Sessions Judge ('ASJ'), Tis Hazari Courts in SC No. 57/2011, titled 'State vs. Jagan Nath & Ors.', arising out of FIR No. 08/2011, under Sections 380/328 of the Indian Penal Code, 1860 ('IPC'), registered at PS Tilak Nagar.

2. By way of the aforesaid orders, the learned ASJ, dealt with and allowed the application filed on behalf of respondent no. 2 herein under Section 307 read with Section 306(1) of the CrPC and granted the benefit of being an approver to her.

3. Briefly stated, the facts relevant for adjudication of the present petition are as under:

- i. On 08.01.2011, a complaint was filed by the husband of respondent no. 2, alleging that on 08.01.2011, when he got up in the morning at about 10:00/11:00 A.M, he found his father, his brother and his children in an unconscious condition. It was alleged that he saw his wife, i.e., respondent no. 2 for a moment, after which she could not be seen in the house. It was further alleged that he then received a call from his mother-in-law, to whom he explained the aforesaid position and tried to search for respondent no. 2 but she had disappeared. The complainant alleged that he got suspicious and on searching his house, he found that 2 kg of gold and Rs. 5 lakh in cash was missing from the locker of his parents.
- ii. The complainant further alleged that respondent no. 2 served the family members with coffee and after consuming the same, they had become unconscious. Thereafter, it is stated that the complainant called his uncles, etc. and narrated the whole incident to them. Complainant suspected that respondent no. 2 had done all the said acts knowingly, including the act of committing theft by drugging the former and his family. The complainant sought legal action against her and recovery of the stolen articles.
- iii. Accordingly, FIR bearing no. 08/2011, under Section 320/328 of the IPC was registered at PS Tilak Nagar.
- iv. It is the case of the prosecution that on the next day, respondent no. 2 was traced from a hotel in Bahadurgarh, Haryana. During her interrogation, she revealed that petitioner no. 1, Rahul Yadav, was her

internet friend and often used to chat with her through the internet. It was during these chatting sessions that they exchanged phone numbers and started discussing their family setups/financial and other matters with each other. Petitioner no. 1 projected himself to be a billionaire and slowly lured her and prepared her mind to flee from her home with gold and cash so that they can start living separately. Petitioner no. 1 impressed her by showing fake and false dreams. It was further disclosed that she dreamt of spending her life with petitioner no. 1. It was stated that at the same time, petitioner no. 1 used to threaten her with dire consequences to her children, in case she would not follow his commands.

- v. It was further disclosed that one day petitioner no.1 made a plan and convinced her to implement it so that they can live together forever. As per the plan, on 07.01.2011, petitioner no. 1 threw 4-5 pouches of drugs wrapped in paper, in the balcony of respondent no. 2's house. At about 8:00/9:00 PM, she mixed the said drugs with coffee and served it to the family members. As a result, every member of respondent no. 2's family became unconscious. As planned, she decamped with 2 kg gold and Rs. 5 lakh cash from the house on 08.01.2011, at about 12:00 PM. As a result of consuming the laced coffee, Mr. Gulshan (father-in-law), Mrs. Saroj (mother-in-law) and Raman (brother-in-law/*dewar*) were admitted in Kalra Hospital on 08.01.2011 and got discharged from on 09.01.2011. Respondent no. 2 further confessed that after fleeing from home, she joined petitioner no. 1 in an already waiting car and they went to a hotel in Bahadurgarh, Haryana where he took the 2 kg gold, Rs. 5 lakhs and 2 gold bangles from her and asked her to stay at the

hotel and promised her that he would come back. However, petitioner no. 1 never turned up. Respondent no. 2 was arrested in this case on 09.01.2011 and was granted bail on 04.02.2011.

- vi. As per the case of the prosecution, petitioner no. 1 was absconding and order of proclamation was issued against him. However, he finally surrendered before the Court on 30.05.2011. During his interrogation, he revealed that after the incident on 08.01.2011, he took respondent no. 2 to VC Hotel in Bahardurgarh (Haryana) and fled away in the night of 08/09.01.2011 deceptively with 2 kg gold, Rs. 5 lakh cash and 2 gold bangles, leaving respondent no. 2 alone at the hotel. On 09.01.2011, he met his father Jagan Nath/petitioner no. 2 and narrated whole story to him, who in turn induced petitioner no. 1 to purchase a car from the said amount in the name of the former, i.e, petitioner no. 1/Jagan Nath. It was further disclosed that both – petitioners no. 1 and 2 left Delhi and visited Mumbai, Jaipur and Ahmedabad with the case property by road and finally returned to Delhi in the 3rd week of January 2011. It was further disclosed that on 23.01.2011, petitioner no. 2 induced petitioner no. 1 to sell 1 kg gold so that they could spend their life lavishly. Both of them visited PP Jewellers, where petitioner no. 1 got 1 kg gold and about Rs. 4 lakhs cash exchanged with some ornaments. Petitioner no. 1 went to Manali and sold the said ornaments to some unknown tourist at a very low price of about Rs. 6 lakhs. As he had spent the whole money there, petitioner no. 1 came back to Delhi in the 3rd week of January 2011.
- vii. It is stated in the chargesheet that petitioner no. 2 induced Rahul Yadav - petitioner no. 1 to purchase a flat in the former's name and paid Rs. 1

lakh as advance. On 28.01.2011, petitioner no.1 went to PP Jewellers, Pitampura and paid Rs. 50,000/- as advance saying that he would bring 1 kg gold brick on 30.01.2011 for exchanging into 10 biscuits of gold as he has to give them to someone as a gift in a marriage ceremony. As per the chargesheet, petitioner no. 1 went to PP Jewellers, Pitampura on 30.01.2011 and got 1 kg gold exchanged with 10 gold biscuits, weighing 100 grams each. He paid Rs. 1,00,000/- as exchange / labour charges. Mr. Narender Aggarwal from PP Jewellers stated that petitioner no. 1 had been a known customer to them.

- viii. During police custody remand, some medical and household item bills, car No. DL 3 F 0028 (with registration certificate and key), property documents pertaining to plot No. 1-9-95, first floor Sector 16, Rohini, Delhi and 1 kg gold (10 gold biscuits, weighing 100 gms each) were recovered at the instance of petitioner no.1 from the Flat No. 1-9/59, FF Sector 16, Rohini, Delhi. After collecting sufficient evidence, petitioner no. 2 was arrested under Sections 411/414 IPC on 07.06.2011.
- ix. Thereafter, chargesheet was filed in the Court of learned Metropolitan Magistrate against respondent no. 2 for offences under Sections 320/380 of the IPC. Petitioner no. 1 was chargesheeted for offences under Sections 328/380/411/34 of the IPC and petitioner no. 2 was chargehseeted for offences under Sections 411/414/34 of the IPC.
- x. During the pendency of the chargesheet and after committal of the aforesaid case to Court of the learned ASJ, an application was filed by respondent no. 2 on or about 18.10.2011 under Section 307 read with Section 306(1) of the CrPC seeking permission to turn approver and grant of pardon. Notice on the said application was issued by the

learned ASJ; however, in the meantime respondent no. 2 filed another application dated 27.02.2012, seeking withdrawal of the said application with leave to file fresh application. The application was allowed by learned Additional Sessions Judge *vide* order dated 21.03.2012.

- xi. Thereafter, respondent no. 2 on 19.04.2012, filed another application under Section 307 read with Section 306 (1) of the CrPC seeking permission to turn approver and grant of pardon. After hearing the arguments on behalf of respondent no. 2 as well as the prosecution, the aforesaid application was allowed by the learned Additional Sessions Judge *vide* order dated 21.08.2012, with the following observations:

“11. Keeping in view all facts and circumstances of the case, this court is of the opinion that it is only subsequent to the testimony of the accused Rakhi Sahni that the same can be determinable whether she shall be entitled to the concessions as would befit an approver as per the provisions of Section 307 Cr. P.C. as the provisions of Section 308 Cr. P.C. would follow.

12. Application is accordingly, allowed. File be sent to the Court of Ld. ACMM for recording of statement of accused as per provisions of Section 306 Cr. P.C. Ahlmad is directed to send the file complete in all respects to the Court of Ld. ACMM on or before 30.08.2012.”

- xii. Thereafter, the statement of respondent no. 2 under Section 306 of the CrPC was recorded by the learned CMM. The learned ASJ after going through the said statement of respondent no. 2, granted the benefit of being an approver, *vide* order dated 28.09.2012.
- xiii. Aggrieved by the said order, the present petition has been preferred by the petitioners.
- xiv. Charges have been framed for offences under Section 328/380/411/34

IPC against Rahul Yadav/petitioner no. 1 and under Section 411/414/34
IPC against Jagan Nath Yadav/petitioner no. 2.

4. The learned counsel for the petitioners submits that the FIR, statements of respondent no. 2, and the chargesheet clearly indicates her active role, thus making her one of the main accused in the present case. Therefore, it is contended that respondent no. 2 should have not been granted the benefit of being an approver, and especially not without imposing any restrictions or conditions, as has been done in the present case. Further, the order dated 28.09.2012 is a non-speaking order, which does not provide for any reasons for granting benefit of approver and tendering pardon to the respondent no. 2. It is argued that recording reason for tendering pardon is mandatory as per Section 306(3)(a) CrPC. In this regard, the learned counsel relied upon the following judgments, wherein the Courts have held that reasons for granting pardon must be recorded by the learned Courts:

- i. Prabhat Ranjan Sarkar & Ors. v. State of Bihar, (1974) CrL. L.J. 957
- ii. Konajeti Rajababu v. State of Andhra Pradesh & Anr., (2002) CrL. L.J. 2990

5. Learned counsel for the petitioner has specifically drawn the attention of this Court to the objection raised by learned APP for granting the benefit of approver to respondent no. 2. He points out to para 10 of the impugned order dated 21.03.2012, which reads as follows:

“10. The Ld. Addl. PP has opposed the application as the first application was withdrawn by the Ld. Counsel for the accused Rakhi Sahni and the prosecution had already opined that she being main accused does not deserve any pardon.”

Pressing on the submission that it is a well settled legal position regarding approval of the prosecution before granting pardon, the learned

counsel relied upon a judgment passed by Hon'ble Supreme Court of India in the case of Jasbir Singh v. Vipin Kumar Jaggi & Ors., (2001) 8 SCC 289, wherein it was held as under:

"18. Although the power to actually grant the pardon is vested in the Court, obviously the Court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. This was the view expressed in Lt. Commander Pascal Fernandes v. State of Maharashtra where it was said:

"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."

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20. The role of the prosecutor under Section 307 is distinct and different from the part he is called on to play under the provisions of Section 321 CrPC. Under Section 321, the Public Prosecutor or the Assistant Public Prosecutor in charge of a case may, with the consent of the court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried. The most noticeable difference between this section and Section 307 of the Act is that unlike the grant of pardon under Section 307, withdrawal from prosecution under Section 321 CrPC is unconditional

although it does provide for the express permission of the Central Government in specified cases. Section 321 also does not spell out the circumstances under which the power may be exercised, either by the prosecution or by the court is granting consent...

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..."

Reliance was also placed on the following judgments:

- i. Al-Saleha Begi v. State, (2001) CrL. L.J. 1500
- ii. M. Hidayatullah v. Bhargava and C.A. Vaidailingam, AIR 1968 SC 594
- iii. L.N. Aswathama & Anr. v. P. Prakash, (2009) 3 CHN 162 (SC)
- iv. Lt. Commander Pascal Fernandes v. State of Maharashtra, (1) AIR 1968 SC 594

6. The learned counsel for the petitioners further argued that there were inconsistencies in the statement of respondent no. 2, which have not been taken into consideration by the learned ASJ. The subsequent statement has been conveniently and maliciously changed by the respondent no. 2, causing grave prejudice to the petitioners. It is also contended that the requirement of Section 306 and 307 have not been fulfilled, as respondent no. 2 did not accept her guilt or intention to cause the offence before the learned Metropolitan Magistrate, however, bare perusal of her statement before the Police, clearly indicates her intention to commit the said act.

7. *Per Contra*, learned Senior Counsel for respondent no. 2 argued that approval of the prosecution is not a condition precedent before granting of pardon, rather, it is merely a requirement that the prosecution be heard and their view be considered by the learned Court. It is further submitted that after reading the statement of respondent no. 2, recorded before the learned

Metropolitan Magistrate on 03.09.2012, the learned prosecutor did not raise any objection when the impugned order dated 28.09.2012 was passed.

8. It was further argued that the order dated 21.08.2012 is an exhaustive and reasoned order. The learned ASJ, therein, has opined that only after recording the statement of respondent no. 2, it could be ascertained whether the benefit would be granted to her or not. It is further submitted that only after considering the statement and applying judicial mind, pardon was granted to respondent no. 2, therefore the only condition precedent to granting of pardon was fulfilled.

9. Learned Senior Counsel urged that respondent no. 2 is rather a victim of circumstances than being the main accused, considering which the learned Additional Sessions Judge has allowed respondent no. 2's application of becoming an approver. It is also stated that her statements have been consistent throughout.

10. Further, he asserts that the object of Section 306 and 307 is to procure evidence of an accomplice for enabling facilitation of conviction of others and the power to grant pardon is discretionary in nature, therefore, the co-accused, i.e., petitioners have no locus to question the grant of pardon. In furtherance of the submission, he relied upon the following judgments:

- i. Ashok Kumar Aggarwal v. CBI, 2002 (61) DRJ 31
- ii. Satyajit Kumar Baruah v. Assam Tea Brokers, 1995 Cri. L.J. 2361

11. The status report filed on behalf of respondent no. 1/State supports the case of respondent no. 2. The learned APP for the State further supports the impugned orders passed by learned ASJ and submits that the testimony of respondent no. 2 will be crucial for the prosecution of petitioner no. 1 and 2. It was further submitted that the testimony of the approver is a substantial piece

of evidence, and in support of his submission, he relied upon Sections 133 and 114B of Indian Evidence Act, 1872. By way of the status report it was also highlighted that petitioner no. 1 is involved in various other cases.

12. Heard the learned counsels for the parties and perused the records.

13. The provision of Sections 306 and 307 of the CrPC, 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) This section applies to—

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section

(1) shall record— (a) his reasons for so doing; (b) whether the tender was or was not accepted by the person to whom it was made, and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section

(1)— (a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any; (b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case—

(a) commit it for trial—

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal Law Amendment Act, 1952 (46 of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.

307. Power to direct tender of pardon.—At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.”

14. The Hon’ble Supreme Court of India, in *Jasbir Singh v. Vipin Kumar Jaggi*, (2001) 8 SCC 289, while considering the provision of Section 307 of the CrPC, observed as under:

“**14.** The grant of pardon by a 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” [*Laxmipat Choraria v. State of Maharashtra*, AIR 1968 SC 938 : 1968 Cri LJ 1124] (AIR p. 945, para 14).

15. It was in recognition of this need that the Code of Criminal Procedure, 1898 contained provisions like Sections 337 and 338 under which the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of the First Class at the stage of inquiry, and the trial court, after commitment and before judgment, could grant pardon to a co-accused. The pardon was made conditional upon the person 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”. [Vide Section 337 CrPC, 1898]

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 principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence.”
[Suresh Chandra Bahri v. State of Bihar, 1995 Supp (1) SCC 80, 106 (para 42)]”

15. In *Lt. Commander Pascal Fernandes v. State of Maharashtra*, (1968) 1 SCR 695, the Hon’ble Supreme Court of India, observed as follows:

“**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.”

16. The principle culled out from the above pronouncements is that the power of granting pardon to an accused turned approver is within the exclusive domain of the Court concerned. This power can be exercised;

- a) with a view to obtain evidence of any person supposed to have been directly or indirectly concerned or privy to an offence to which section 306(2) applies;

- b) and is further subject to such person to give a full and true disclosure of the whole of the circumstances within his/her knowledge relative to the offence and to every other person concerned, whether as principal or abettor.

17. This grant or pardon is further subject to section 308 of the CrPC which provides as under:

"308. Trial of person not complying with conditions of pardon.—(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under subsection (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made; in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial, the Court shall—

(a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the Court of a Magistrate, before the

evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

18. Thus, even if the person is granted pardon and he/she does not abide by condition under Section 306 or Section 307 of the CrPC then the same can be withdrawn and the person so granted pardon can be prosecuted. A combined reading of the aforesaid provisions of Sections 306/307/308 of the CrPC demonstrates the inherent scheme of checks and balances in cases where a person is granted pardon and is examined as an approver. Any grant of pardon to a person would be subject to the conditions mentioned in the aforesaid provisions.

19. Every case has its own set of facts and circumstances which will be relevant for the concerned Court to determine whether or not the power for granting pardon is to be exercised. However, the fundamental premise would be the subjective satisfaction of the Court concerned. Exercise of such discretionary power shall be governed by the judicial conscience of the concerned Court. The concerned Court has to examine whether the person seeking pardon was directly or indirectly involved or privy to an offence and further if such person is ready to make a full and true disclosure of the circumstances within his/her knowledge relating to the said offence and to

any other person concerned, whether as a principal or an abettor. In other words, the person seeking pardon cannot make an exculpatory statement. The person seeking pardon has to demonstrate that he/she was directly or indirectly involved in the commission of the offence and thus, has knowledge of the circumstances relating to the offence and to any other person involved in the commission of the said offence as a principal or an abettor.

20. An additional factor in any given set of facts and circumstances to be considered while granting pardon would be the nature of evidence sought to be put forth by the person seeking to become an approver. For instance, in a case of conspiracy, a co-conspirator can bring on record, direct evidence of such conspiracy which would otherwise be circumstantial *qua* any other person privy to such conspiracy. If the person seeking to become an approver is capable of bringing on record, evidence linking other co-accused persons in support of the prosecution case, then granting pardon to such a person would be appropriate. Needless to state, the testimony of the approver, though admissible in evidence, has to undergo rigours of cross-examination before reliance can be placed upon it by the learned trial Court.

21. In the present petition, the case of the prosecution is that respondent no. 2, in connivance with petitioner no. 1 administered some stupefying substance to her husband/complainant and other family members and decamped with 2 kg of gold and cash worth Rs. 5 lakhs. It is also the case of the prosecution that after decamping with 2 kg of gold and cash worth Rs. 5 laks, respondent no. 2 met petitioner no. 1 in a hotel in Bahadurgarh, Haryana. After which petitioner no. 1 took the said gold jewellery and cash from respondent no. 2, promising her that he would come back, but never turned up. Petitioner no. 1 after absconding for a while, surrendered himself. At the instance of petitioner

no. 1, a car, property documents and 1kg gold (10 Gold Biscuits of 100gms each) have been recovered, which are alleged to be procured from the stolen property.

22. In these circumstances, the contention of the learned counsel for the petitioners that respondent no. 2 was the main accused cannot be accepted. As per the case of the prosecution, respondent no. 2 did not obtain any benefit from her participation in the crime.

23. Learned counsel for the respondent no. 2 in order to assist this Court has placed on record a chart comparing the disclosure statement made by respondent no. 2, after her arrest on 09.01.2011, and her statement recorded under Section 306 of the CrPC, before the learned Metropolitan Magistrate on 03.09.2012, which is reproduced herein under;

Disclosure Statement dt. 09.01.2011	2nd statement dt. 03.09.2012
I made friendship with a boy on internet.	She learnt how to operate internet in 2010. Started chatting with Rahul who informed her about his family and business and phone numbers were exchanged. <u>For daily conversation a phone and sim were given by Rahul so that nobody could become suspicious about their conversation.</u>
About 15-20 days back I went to birthday party of my niece at Subhash Nagar, where I met Rahul through phone.	<u>One day I met him in Rajouri Garden and gifted me another phone and started keeping an eye over my husband and children.</u>
He lured me to spend time with him. He had an eye on jewellery and money of my house.	

He illicit info about family and started showing interest in Family matters.	<u>Rahul also told me about the accident occurred with my husband on the phone.</u> He then informed about the sale of plot and the money received whereas she informed him about the purchase of gold after which he commanded her to get the same when she got scared, he threatened her with killing her husband or trapping him in a criminal case.
Rahul started demanding money from me and started showing interest in my family.	
Rahul told me that my husband sold one floor for Rs. 60 lakhs and kept the payment he received in locker.	
I told Rahul that my husband has purchased gold for that Rs. 60 Lakhs.	I told Rahul that my husband has purchased gold for that Rs. 60 Lakhs.
Rahul gave 4-5 packets of unknown substance and to give it to family and get all articles from home.	<u>Rahul and his father came to my house and parceled me five small packets through balcony of my house to me in which some intoxication was packet and I served it to the family members.</u>
I reached Subhash Nagar through metro-where Rahul was already present and we both went to VC Hotel, Bahadurgarh where she gave pan card and booked a room.	I came out of my house with 2 kg gold and 5 lakh rupees and reached Subahsh Nagar metro station from where Rahul took me Bahadurgarh and booked a room by showing Pan Card.
Rahul got a new phone and destroyed the old sim. In the night Rahul took 2 kg gold, 5 lakhs and jewellery that she was wearing. I trusted the promises made by Rahul and committed such a mistake.	<u>Rahul gave me something to eat and after eating that I became unconscious. In the meantime, he took the phone from her and destroyed the phone from her. In haste he left his phone in the room. When I regained consciousness, I</u>

	<u>started banging the door and the door was opened by an old lady. I took phone from her and called my aunty and shared all the information with her after that my father and some relative came with the police and got me arrested.</u>
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24. It may be noted that the highlighted portion in the second column is with respect to the statement of respondent no. 2 before, the learned Magistrate, which was not narrated by her in her first statement in police custody. A bare perusal of the said highlighted portion shows that some of the facts narrated can be stated to be in the nature of giving further details with respect to the incident narrated in her first statement. Even the second statement is inculpatory in nature which demonstrates that she was directly involved in the commission of the offence and was ready to make a full and true disclosure of the circumstances within her knowledge relating to the offence and to other persons, including the petitioners and this satisfies the requirement of Section 306(1) of the CrPC.

25. Contention of the learned counsel appearing on behalf of the petitioner that respondent no. 2 has made significant shift from her earlier confessional statement, dated 09.11.2011, with malicious intention cannot be examined at this stage. Whether the highlighted portion is an improvement discrediting her testimony can be determined during the course of trial. The petitioners will have the opportunity to cross-examine respondent no. 2 with respect to the same.

26. It was next contended by the learned counsel for the petitioners that the order dated 28.09.2012, granting pardon is a one line order and therefore

cryptic in nature. It is submitted that as per the provision of Section 306(3) of the CrPC., the Magistrate has to record his reasons for tendering pardon to an accused and application of mind should be part of the order. It was further submitted by the learned counsel for the petitioner that mere recording the fact that the learned ASJ has read the statement made by respondent no. 2, would not satisfy the requirements of Section 306(3) of the CrPC. On the other hand, learned Senior Counsel appearing on behalf of respondent no. 2 submitted that the learned ASJ had applied his mind judicially and was conscious of the procedure to be followed for the purposes of Section 306 of the CrPC. It was submitted that the application of mind by the learned trial Court is apparent from the fact that respondent no. 2 was allowed to withdraw her first application for grant of pardon with liberty to file fresh with better details. It was submitted that the order dated 21.08.2011 was a detailed order wherein the learned trial Court, after considering the averments made in the second application and arguments at the bar directed that the statement of respondent no. 2 needs to be recorded before granting her pardon.

27. A perusal of the order dated 21.08.2012 reflects that the learned trial Court had carefully and meticulously examined the facts of the case and the averments made on behalf of the parties and observed as under:

"9. Charge sheet was filed. Case has been registered wherein an application has been moved that the aforesaid accused Rakhi Sahni seeks to become approver and be pardoned. Under the provisions of Section 307 Cr. P.C. where the accused seeks to become approver after the charge sheet has been filed, the accused cannot be pardoned in totality. However, leeway can be given and the gravity of the offence can be taken into consideration and the accused can be given concession in both the provisions of law as well as sentence only subsequent to her recording of testimony as Section 133 of Indian Evidence Act which is very explicit that the testimony of an accomplice can only be of corroborative nature and

conviction cannot be based on mere testimony of an accomplice. The provision is applicable only on the condition that the applicant gives evidence in terms of the case of the prosecution and does not resile from it.

10. The Ld. Addl. PP has opposed the application as the first application was withdrawn by the Ld. Counsel for the accused Rakhi Sahni and the prosecution had already opined that she being main accused does not deserve any pardon.

11. Keeping in view all facts and circumstances of the case, this court is of the opinion that it is only subsequent to the testimony of the accused Rakhi Sahni that the same can be determinable whether she shall be entitled to the concessions as would befit an approver as per the provisions of Section 307 Cr. P.C. as the provisions of Section 308 Cr. P.C. would follow."

28. Subsequently, the statement of respondent no. 2 was recorded and after examining the statement of respondent no. 2, learned trial Court *vide* order dated 28.09.2012 granted the benefit to respondent no. 2 to become an approver. Learned trial Court, while passing the order dated 21.08.2012 noted the objection of the learned prosecutor. But, it is pertinent to note that after recording the statement of respondent no. 2, the prosecution did not oppose the grant of benefit of pardon on 27.09.2012. In fact, the stand of the prosecution before this Court is in favour of grant of pardon to respondent no. 2. A perusal of the observation made by the learned trial Court, as referred to hereinabove, shows that the learned trial Court ensured that a true and full disclosure by respondent no. 2 is on record before granting benefit of pardon under Section 306 of the CrPC.

29. It is a settled position of law that the tender of pardon is within the domain of the Court before whom the request of granting pardon is made. The concerned Court, while granting pardon, has to see whether the proposed approver was directly or indirectly concerned with the offence, in order to obtain evidence of such person for the purposes of trial of the offence pending

before it. If, in the facts and circumstances of the case, the aforesaid requirements are fulfilled then the concerned Court would proceed and grant pardon to such person. Thus, it is apparent that for exercising such a discretionary power to grant pardon, the Court needs to examine the nature of evidence proposed to be put forth by a person seeking the same. In such a situation, learned trial Court in the present case adopted the right procedure by directing recording of the statement made by respondent no. 2. The contention of the petitioners that by not recording reasons for satisfaction, the impugned order is vitiated cannot be accepted as a perusal of the record shows that the learned trial Court, at the first instance, directed recording of statement of respondent no. 2 and subsequently, after examining the same proceeded to grant benefit of pardon. The statement so recorded becomes part of the record and will be read along with the order dated 28.09.2012. In fact, *vide* order dated 21.08.2012, learned trial Court had already indicated reasons to the effect that the grant of pardon would depend on the statement of respondent no. 2 with respect to nature of evidence, she would lead for the purposes of trial. There is no requirement of a detailed analysis of the facts to be made by the learned trial Court before exercising its discretion to grant benefit of pardon to a person. As pointed out above, the only requirement is the satisfaction of judicial conscience of the learned trial Court with respect to the evidence that the person being granted pardon is bringing on record and to ensure that the main offenders may not escape punishment for lack of evidence. In the present case, the present applicant has made an inculpatory statement wherein she has admitted the offence committed by her and has further divulged details with respect to her conspiracy with petitioner no. 1. The nature of evidence sought to be put forth by the prosecution through

respondent no. 2 is otherwise not available on record. The main beneficiary of the offence in the present case as per the allegations of the prosecution are the petitioners in the present case. The evidence of respondent no. 2 is a vital link between the petitioners and the offence committed. Needless to state that the petitioners will have ample opportunity during the course of the trial to challenge the testimony of respondent no. 2 through cross-examination.

30. It was also contended on behalf of the petitioner that the order granting pardon has been passed without imposing any restrictions or conditions. As noted herein before, the condition in granting pardon to a person is in built and has to be complied with by way of necessary implication. In the present case, the condition of making a true and complete disclosure has been satisfied by recording the statement of respondent no. 2 by the learned Metropolitan Magistrate. It is further pertinent to note that the learned ASJ, in his order dated 21.08.2012, has observed as under:

“11. Keeping in view all facts and circumstances of the case, this court is of the opinion that it is only subsequent to the testimony of the accused Rakhi Sahni that the same can be determinable whether she shall be entitled to the concessions as would befit an approver **as per the provisions of Section 307 Cr. P.C. as the provisions of Section 308 Cr. P.C. would follow.**”

(emphasis supplied)

31. In view of the aforesaid discussion, this Court is of the opinion that the orders dated 21.08.2012 and 28.09.2012 granting pardon to respondent no. 2 passed by Shri Rakesh Siddharth, learned ASJ, Tis Hazari Courts in case bearing no. SC No. 57/2011, titled “State vs. Jagan Nath & Ors.”, arising out of FIR bearing no. 08/2011, registered at PS Tilak Nagar do not suffer from any illegality or infirmity.

32. Accordingly, the present petition is dismissed and disposed of.

33. Pending application(s), if any, also stand disposed of.
34. Needless to state, that nothing stated herein above is an opinion on the merits of the case pending adjudication before the learned trial Court.
35. Copy of this judgment be sent to the concerned trial Court for necessary information and compliance.

AMIT SHARMA
JUDGE

MARCH 24, 2023/ab

