

State Vs. Bigyan Mallik and ors.

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Court : Orissa

Decided On : Mar-06-1975

Reported in : 1975CriLJ1937

Judge : R.N. Misra, J.

Appellant : State

Respondent : Bigyan Mallik and ors.

Judgement :

ORDER

R.N. Misra, J.

1. This is a reference made by learned Additional Sessions Judge of Cuttack under Section 395(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') in Sessions Trial No. 65-C of 1974.

2. By order dated 31-8-1974, the learned Sub-Divisional Judicial Magistrate of Cuttack committed the accused persons to stand their trial in the Court of Session; seven of them for an offence punishable under Section 395 of the Indian Penal Code and the two others under Section 412 thereof, On application made by the prosecution, accused Hari Das was granted pardon by the learned Sessions Judge on 1-10-1974 in exercise of powers vested in him under Section 307 of the Code. By the said order, the learned Sessions Judge directed pardon to be

tendered subject to the following conditions:

(a) He shall make 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 a principal or abettor in commission thereof.

(b) He shall remain in custody till termination of the trial.

(c) If he fails to comply with conditions of pardon he will suffer the consequences provided under law.

(d) He will give in writing that he will abide by such conditions.

On 20th of November, 1974, the case was posted for trial, scheduled to commence from 6th of January, 1975. On 23rd of December, 1974, the Public Prosecutor made an application to the court for a direction that the Sub-Divisional Judicial Magistrate of Cuttack may examine the approver Hari Das as provided under Section 306(4) of the Code. After hearing parties on the said prayer of the Public Prosecutor, the learned trial Judge has made this reference for elucidation of his doubt as to whether when pardon has been given by the learned Sessions Judge under Section 307 of the Code, it is necessary to comply with the requirement of Section 306(4) of the Code in so far as it requires that the person to whom pardon has been tendered should be examined as a witness in the Court of the Magistrate taking cognizance of the offence and also in the subsequent trial if any.

3. Sections 337 and 338 of the Old Code of Criminal Procedure dealt with the tendering of pardon to accused persons. Sub-section (1) of Section 337 made provision for the circumstances in which pardon could be tendered; the authorities who could exercise the power of tendering pardon and the conditions under which pardon could be tendered. Sub-section (2) required:

Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognisance of the offence and in the subsequent trial, if any.

Section 338 vested power in the trial Judge after commitment to direct tender of pardon. In exercise of this power, the Sessions Judge could tender pardon directly or, order the committing Magistrate or the District Magistrate to tender such pardon.

The new, Code makes analogous provisions in Sections 306 and 307 respectively. Certain changes have been brought in the new provisions. The power to tender pardon has now been vested in Judicial Magistrate and after the stage of commitment, the power to tender pardon has been vested in the Sessions Judge. Sub-section (4)(1)(a) of Section 306 requires that every person accepting a tender of pardon shall be examined as a witness in the court of the Magistrate taking cognisance of the offence and in the subsequent trial, if any. Section 307 makes the following provision:

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.

The phrase 'same condition' obviously makes reference to Section 306(1) of the Code where it has been provided thus:

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 ...

The requirement of Section 306(4)(1)(a) that the person accepting tender of pardon has to be examined as a witness in the court of the Magistrate and in the subsequent trial, if any, is not a condition subject to which pardon is granted. In fact, the conditions subject to which pardon has been tendered in this case make

no reference to the requirement of such examination.

4. Three decisions of this Court and an earlier decision of the Gujarat High Court have been referred to by the learned Additional Sessions Judge in his order of reference. In the case of *Kalu Khoda v. State* : AIR1962 Guj283 , the court was considering the provision of Section 337 (2) of the old Code of Criminal Procedure. Referring to Sub-sections (2) and (2-A), the court held:. That appears to be clear from the fact that Sub-section (2) expressly requires such a person to be examined. Under Sub-section (2-A) of Section 337, therefore, there are two conditions precedent which have to be observed before a committal order can be passed, viz.,

(1) that there is a person who has accepted a tender of pardon, and

(2) that such person has been already examined under Sub-section (2).

As has often been observed, the provisions of Sub-section (2) of Section 337 are for the benefit of an accused in such a case and are inserted in the interests of justice.

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 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.

The dictum of the Full Bench decision has in terms been approved by two Division Benches of this Court in *State v. Bauri Bissoi* (1969) 35 Cut LT 248 : 1969 Cri LJ 1419 and in *P, Apparao v. State* : AIR1967 Ori82 . The Gujarat decision as also the two Bench decisions of this Court arose out of cases where pardon had been tendered before the order of commitment was passed. Therefore, relying upon Sub-section (2) of Section 337 of the old Code and taking the view that compliance with the mandatory requirements has been violated, appropriate directions had been given.

In the case of *State v. Bidika Mangada* 1972 Cut LR (Cri) 505 a learned Single Judge of this Court examined the provisions of these two sections, namely, 337 and 338 of the old Code of Criminal Procedure. Pardon in this case had been granted by the District Magistrate while the cases were pending trial before the Court of Session. Acharya, J. took the view that the grant of pardon by the District Magistrate was obviously in exercise of the power under the proviso to Section 337(1) of the Code. Having taken that view, the learned Judge following the decisions, referred to above came to the conclusion that the commitment had to be quashed and the prosecution had to examine the approver in the new commitment proceeding as required under Sub-section (2) of Section 337.

5. I do not think under the provisions of Section 307 of the Code of 1973, the position is what has been laid down in the cases referred to above. The Court of Session has been vested with the power to tender pardon and the condition upon which pardon has to be tendered is the same as provided for in Section 306(1). Examination of the person to whom pardon is tendered is not a condition of the tender of pardon. Therefore, Parliament cannot be said to have intended that when for the first time at the sessions stage pardon is tendered, the committal becomes vitiated and must be taken afresh in order that the requirement of Sub-section (4)(1)(a) of Section 306 may be complied with. Undoubtedly, the examination of the person to whom pardon is tendered at two stages is a very helpful situation for the accused. But where at a later stage pardon is tenderable, the proceeding cannot be relegated to the pre-commitment stage merely on that

count. It may be pointed out that the new Code has come on the basis of a series of recommendation of the Law commission to expedite the process of trial so that there may be no delay in administration of criminal justice. Unless there is a statutory mandate to bring about automatic vacation of an order of commitment, I do not think, it would be appropriate to hold by mere analogy that under the new Code such a situation is contemplated.

6. I would accordingly take the view that in the instant case, there is no necessity to vacate the order of committal and to require the learned Sub-divisional Judicial Magistrate to record the evidence of Hari Das. The application of the Public Prosecutor should not have been entertained.

The reference is discharged. The records be returned.

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