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Court : Delhi

Decided On : Aug-12-1986

Reported in : ILR1987Delhi550

Judge : Jagdish Chandra, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 164, 306, 306(4), 308 and 308(1)

Appeal No. : Criminal Revn. No. 92 of 1986

Appellant : Jagjit Singh

Respondent : The State

Advocate for Pet/Ap. : Mr. Bawa

Judgement :
ORDER

1. In the case State v. Kartar Singh Narang etc. (popularly known as Bomb Blast case of Delhi) Jagjit Singh s/o Bharat Singh r/o 52/64, Ramjas Road, Karol Bagh, New Delhi was granted pardon and made approver on recording his statement under S. 164 of the Code of Criminal Procedure 1973 (in short Cr.P.C.) by a Magistrate during investigation of the case. Subsequently, he was examined as a witness during committal proceedings before a Metropolitan Magistrate wherein he resoled completely from his previous statement recorded under S. 164 Cr.P.C.

and he also made it clear before the committing Magistrate that he did not want to become an approver and thus sought to cast away the pardon granted to him as approver and desired to be tried for the offence in respect of which he had been granted the pardon. The case was committed to the court of session and on the day when the accused persons appeared the petitioner was also produced but the petitioner made an application that since he had not accepted the pardon and even if any pardon had been granted to him, he was not willing to accept the same and depose as a prosecution witness and that he knew nothing about the case, he may be tried along with the other accused persons for the offence in respect of which pardon has (been) granted to him. The learned Addl. Sessions Judge rejected his prayer vide order dated 1-3-1986 and aggrieved by that order the petitioner has now filed this criminal revision challenging the correctness and validity thereof.

2. The learned trial court, in the impugned order, was of the opinion that S. 306(4)(a) Cr.P.C. made it mandatory for the examination of the approver as a witness in the court of the committing Magistrate during enquiry as also in the subsequent trial, if any, implying thereby that the approver had got to be examined before the court of session also if the case was committed by the enquiring Magistrate to that court and that thereby a duty had been cast on the trial court to examine him as an approver.

3. In order to appreciate the relevant provision of law on this point and also to arrive at a correct conclusion in respect thereof it appears necessary to set out the relevant portions of the sections of Cr.P.C. appearing on the question calling for determination :-

S. 306

(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.

..... (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;

.....' 'Section 308(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 willfully 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 S. 195 or S. 340 shall apply to that offence.'

It was strenuously contended by Mr. Bawa learned counsel for the petitioner that as soon as the petitioner resoled before the committing Magistrate who took cognizance of the offence, from his previous statement recorded during investigation by a Magistrate under S. 164 Cr.P.C. on the basis of which he had been granted pardon and made approver, there was left hardly any sense in examining him as a witness of the prosecution as an approver during trial and more so when he and accused persons appeared before the learned trial court, he

made an application to the learned trial court that he had not accepted the pardon and even if any pardon had been granted to him he was not willing to accept the same or to depose as a prosecution witness as an approver for the prosecution and that he knew nothing about the case and that he be tried for the offence along with the other accused persons. What Mr. Bawa really wants to convey is that as soon as the petitioner resoled in the committing court from his earlier statement recorded under S. 164 Cr.P.C., he cast away the pardon granted to him and, thus, no longer remained an approver and so could not be produced as a witness by the prosecution in the trial court and that he would not support the prosecution during trial if examined there as a witness. He has also submitted that the grant of pardon is a matter of contract and of utmost good faith between the State granting the pardon on the one hand and the person accepting the pardon on the other and that as the State has the power to revoke the pardon the approver has also got the reciprocal right to cast away the pardon granted to him. None of these contentions raised by Mr. Bawa appear to be correct in the face of the mandate contained in sub-section (4)(a) of S. 306 Cr.P.C. set out above and which is to the effect that such a person shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any, meaning thereby that if the order of committal has been made by the committing Magistrate, the approver has to be examined in the court of session as well which is the trial court, and there is no escape from the same and in this view of the mandate it is not open to the State to withdraw the pardon from the approver nor would it be open to the approver to disown and cast away the pardon granted to him before the last terminal stage of his appearing in the witness box in the trial court, and it is only his not making full and true disclosure of all the facts relating to the case in the witness box in the trial court that the pardon can be said to have been withdrawn by the State and the approver having thrown off the pardon and this too happens only when, as contemplated under S. 308 Cr.P.C., the Public Prosecutor certifies that in his opinion such person has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which pardon was tendered to him. The amplitude of the pardon starts from the time it is given to an approver and ends only by his resiling from or concealing the truth in the witness box in the trial court coupled with the certificate, as aforesaid, of the Public

Prosecutor and during that period neither the State nor the approver can abrogate the pardon.

4. It is the proceedings during trial which are really material for the decision of the case and it is from that angle that the examination of an approver as a witness of the prosecution during trial is essential. It is not absolutely necessary that an approver disowning his previous statement during enquiry before a committing Magistrate shall certainly do so even in the witness box during trial and cases can be there when such an approver after resiling from his earlier statement before the committing court, may stand up again in favor of the prosecution in the witness box during trial and successfully explains the reasonableness of the circumstances under which he resoled from his earliest statement before the committing Magistrate and the trial court may be satisfied with that Explanationn of the approver and may lean towards accepting his testimony during trial as against his resiling statement before the committing Magistrate.

5. The matter can be looked at from another angle also. If the contention of Mr. Bawa, as referred to above is accepted at this stage before the petitioner's evidence during trial, he would be entitled to take up the defense in the case of perjury against him for giving the false evidence as contemplated under S. 308(1) Cr.P.C. that even though he had resoled from his earlier statement in the committing court, that was not the end of the matter and that it was the duty of the prosecution to have examined him as its witness even during trial and that he would have stood up as a true witness in support of the prosecution and short of that the offence of giving false evidence could not be said to have been made out against him and that the prosecution had acted prematurely. In this view of the matter also the production of the petitioner would be necessary for the prosecution to examine the petitioner as its witness even during trial.

6. Thus, in view of the aforesaid the legislature appears to have acted in full wisdom in enacting sub-section (4)(a) of S. 306, Cr.P.C. mandating the examination of the approver as a witness both in the court of committing Magistrate as well as in subsequent trial, if the case is committed by the committing Magistrate to the court of session. Mr. Bawa has strongly relied upon in

re : Arusami Goundan, : AIR1959 Mad274 in support of his contention and it fully supports him by laying down at page 277 (of AIR) : (at P. 855 of Cri LJ) as follows :-

'.... The Procedure Code now insists that accomplices who have been tendered a pardon must be examined both in the committing court and in the court of session. This provision is inserted in the interests of justice and is not intended for the benefit of the approver. Its purpose is to ensure that all the evidence obtained from the accomplice is placed before the court so that justice may be done as between the State and the persons placed in their trial. It is not an ordeal through which an approver has to pass before he can win to safety.

..... The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter; it may be in the committing court, or, it may be in the sessions court. But, the obligation to make a full and true disclosure rests on the approver at every stage at which he can be lawfully required to give evidence. If at any stage he either willfully conceals material particulars or gives false evidence he would have failed to comply with the conditions on which the pardon was tendered to him and thereby incurred its forfeiture.

Neither as a matter of reason or logic, nor as a matter of statutory interpretation can it be said that S. 339(1) is dependent on or connected with S. 337(2) in the sense that the approver must be examined both in the committing court and the Sessions Court before it can be held that he has forfeited his pardon. It is sufficient if he fails to conform to the conditions on which the pardon has been granted to him at either stage. As explained in the earliest of the cases we have referred to where a pardon had been tendered and accepted, the utmost good faith must be kept on both sides.'

With all respect I have not been able to induce myself to accept the reasoning of this Madras authority, in view of the reasons already set out above.

7. This very point was also dealt with in Emperor v. Shahdino Dhaniparto AIR 1940 Sind 114 : (1940 (41) Cri LJ 747 wherein the judgment was delivered by

Weston J. and wherein it was held as follows :-

'When an accused after accepting pardon denies all knowledge of facts before the committing Magistrate and the case is committed to Sessions Court the pardon cannot be forfeited before the accused is examined in the Sessions Court. Once a pardon is tendered and accepted S. 337(2) renders it obligatory for the prosecution to examine the approver both in the committing Magistrate's Court and in the Sessions Court should the case be committed ..... he may have made in the Court of the committing Magistrate, should be examined as a witness in the Sessions trial. With the exception of evidence admitted under S. 288, it is upon evidence led in the Sessions Court that the guilt or innocence of the accused is determined and it is in the Sessions Court the approver has his duty to perform.'

These authorities were dealing with the interpretation of S. 337(2) of the earlier Criminal Procedure Code, 1898 and that provision is the same as in sub-section (4)(a) of S. 306 regarding the examination of the approver as a witness both in the committing court as well as trial court if commitment takes place. The perusal of this authority shows that the approver after accepting pardon denied all knowledge of the offence before the committing Magistrate. He was again sent to jail from where he made an application through an advocate asking that the committing Magistrate should recall him and re-examine him as the evidence he had given regarding the denial of knowledge of offence had been given by him under fear of the co-accused with whom he had been kept in custody and who had threatened and maltreated him and he had also asked that he should be kept in custody in another place separate from the co-accused. Thereafter he made a full and true disclosure of facts relating to the offence before the court of Session during trial. It was held as follows :-

'When the evidence given by the approver in the Sessions Court is in accordance with the conditions of his pardon and is evidence upon which reliance may very well be placed, then the fact that in the Committing Magistrate's Court the approver gave false evidence cannot necessarily be taken to be non-compliance with the conditions of pardon.'

8. An important factor which emerges from this authority is that the examination of an approver as a witness during trial in the court of session is necessary and obligatory for the reason that even if he has resoled from his pardon statement during commitment proceedings before the committing Magistrate, he may stand up again in favor of the prosecution as a witness during the trial and he may be able to give a satisfactory Explanationn as to why he resoled in the committing court and the Explanationn may find favor with the trial court.

9. This Sind authority (Emperor's case (1940 (41) Cri LJ 747) (supra) has also been taken note of by : AIR1959 Mad274 (supra) in para 16 thereof and has been sought to be distinguished but with all respect the effort to distinguish the same simply looks idle as the distinguishing point is that the approver in that case had been frightened by the other co-accused who were detained in the same sub-jail and as soon as practicable thereafter he made a representation to that effect to the Magistrate who thereupon had him removed to another place. Such an Explanationn or any other reasonable Explanationn regarding his resiling statement can be given by an approver even in the witness-box before the court of session and it is for that court to appraise and appreciate the same and till then the pardon certainly continues and cannot be withdrawn by the State or cast away by the approver.

10. It is this possibility and contingency which has been ignored in : AIR1959 Mad274 (supra) and it is this very possibility and contingency which appears earlier corresponding provision of S. 337(2) of the earlier Criminal Procedure Code, 1898 before its amendment in 1923 and S. 337(2) before that amendment provided that 'every person accepting a pardon shall be examined as a witness in the case'. Though the grant pardon by the State in consideration of the promise of the witness to disclose the truth are embedded in good faith, the span of good S. 306 Cr.P.C. which can end not on the initial resiling of such a person in the committing court but can be determined only after his statement in the witness-box during trial as his resiling statement before the committing Magistrate may be proved to be the result of certain coercive circumstances to which he might have been subjected before making that resiling statement and those circumstances may be accepted as genuine and reasonable by the trial court and unless and until

that possibility is excluded which can be excluded only by his statement in the witness box during trial, the span of good faith cannot be determined.

11. The last contention of Mr. Bawa that no person can be compelled to appear as a witness against himself and the petitioner who does not want to remain an approver cannot be compelled to appear as a witness during trial in the court of session, cannot be accepted as on account of the petitioner's special position as an approver the mandate of law that he shall be examined both before the committing Magistrate as well as during trial as a witness, is binding not only on the trial court and the prosecution but also on the approver as well.

12. In view of the above discussion, there appears no justification for interference in the order under revision passed by the learned Addl. Sessions Judge and consequently the revision petition is dismissed.

13. Revision dismissed.