Prem Chand Vs. State

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Court : Delhi

Decided On : Nov-30-1984

Reported in : 1985(1)Crimes99; 27(1985)DLT256

Judge : Yogeshwar Dayal,; D.R. Khanna and; Ufalik Sharief-ud-Din, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 306

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 819 of 1984

Appellant : Prem Chand

Respondent : State

Advocate for Pet/Ap. : D.C. Mathur,; T.L. Garg,; I.U. Khan and;

Judgement :

D.R. Khanna, J.

(1) On a reference being made by the Single Judge for consideration of the proprietory of grant of bail to an approver who has been now in detention for over two years, and whose statement has already been recorded by the Session Court, this matter has come before the Full Bench. The entire background has been given in the order of the Single Judge, reference to which is advisable for resolving the controversy involved.

(2) It is, however, unfortunate that at the time of the hearing before the Full Bench, none appeared from the side of the State. This has been in spite of the notice having been served upon the Attorney General, since the constitutional validity of the provisions contained in Section 306(4)(b) of the Code of Criminal Procedure has been assailed. Appearance was made on behalf of the accused only, and they contested the release of the approver during the trial as had been done before the Single Judge.

(3) The brief background is that three persons, Satinder Singh, Gurvinder Singh and Sarvjeet Singh are being tried in the Court of Sessions in two separate cases under Sections 394, 397. 342 & 34 IPC. They are as a result of two bank robberies committed in the months of June and September, 1981 in New Delhi. The same set of accused was said to be involved in each of the robberies. Prem Chand, petitioner, was also taken into custody-in both the cases in April, 1982, but he has turned approver on being granted pardon. No material progress, however, has taken place in any of the cases, although charges were framed in mid 1983. So far the evidence of the approver only has been recorded and in one of the cases, one further witness was examined. There are said to be about 100 witnesses in each case. Earlier in criminal Misc. (Main) No. 525 of 1983, G.C. Jain. J. had directed on 1 1-7-1983 that the cases would be fixed for recording of evidence at least three days in a week, and every possible effort should be made to expedite their disposal. However, in spite of that, there appears to be no early possibility of conclusion of trials. The petitioner's grievance is that although formally the hearings used to be fixed thrice a week, they often were of short durations as the accused persons have been delaying the expeditious disposal.

(4) At present the accused are on bail for short durations because of special reasons. Similar bails were allowed to them earlier too at one time or the other. The petitioner too was allowed interim bail for a short while once.

(5) The petitioner contends that in his deposition, he has made a full and true disclosure of the whole of the circumstances within his knowledge, relating to the offence and to every other person concerned in both the cases and thus has duly complied with the grant of pardon. He, thereforee, seeks that he should be

released on bail as he has already suffered detention for about 21 years. This has been opposed before us by the accused.

(6) Section 306 of the Code of Criminal Procedure makes provision for tender of pardon to an accomplice. It is provided that 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 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. Subsection (4) of this Section next reads as under :

'(4)Every person accepting a tender of pardon made under subsection (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.'

(7) Under Section 308, in case the Public Prosecutor certifies that in his opinion the person who has accepted a tender of pardon 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. Such person, however, has not to be tried jointly with any of the other accused. Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under Section 164, or by a court under sub-section (4) of section 306 can be given in evidence against him at such trial. At the same time, the accused person is left entitled to plead at such trial that he has complied with the condition upon which such tender was made, in which case it is for the prosecution to prove that the condition has not been complied with. If the court then finds that he, in fact, complied with the terms of grant of pardon, it shall, notwithstanding anything contained in the Code, pass judgment of acquittal.

(8) It is the provisions of section 306(4)(b) providing that every person accepting a tender of pardon, shall unless he is already on bail, be detained in custody until the termination of the trial which have come up for interpretation. Its constitutional validity has also been challenged.

(9) So far as the language used in Section 306(4)(b), it is quite explicit that the person accepting tender of pardon unless already on bail, has to be detained in custody till the end of the trial. The word used is 'shall', and there is almost a unanimity of opinion of different High Courts .that the legislature has not envisaged grant of bail to a person during the trial after he has accepted pardon. The underlying object of requiring the approver to remain in custody until the termination of trial is not to punish him for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, and secondly to prevent him from the temptation of saving his erstwhile friends and companions, who may be inclined to assert their influences, by resiling from the terms of grant of pardon. In fact, the Madras High Court in the case Karuppa Servai v. Kundaru alias Muniandi Thevan, : AIR1952 Mad833 , has observed that this provision is based on very salutary principles of public policy and public interest. The approver's position was considered to be like a sealed will in a will forgery case, and he should not be allowed to let off on bail. The Rajasthan High Court .has in Ayodhya Singh v. State and Lallu v. State 1979 30 R LW 465 taken the view that the provisions in this regard are mandatory, and that Court cannot go behind the wisdom of the legislature as expressly laid down under Section 306 Cr.P.C. In the former case the circumstance that the disposal of the case was likely to take a long period of time as the prosecution had cited 174 witnesses, was not considered as valid ground for bail when the law prohibits any such release till the termination of the trial. In Mukesh Ramachandra Reddy and others 1958 Cr. L.J 343, the Andhra Pradesh High Court has as well interpreted the word 'shall' in. the said provisions as primarily obligatory and casting a duty on the court to detain an accused to whom pardon has been tendered, in custody until the termination of the trial. The Punjab High Court in A.L. Mehra v. The State, , declined to draw an analogy from the power available with the Court to grant bail to accused at any stage of the trial, and it was observed that it was not within the competency of the court to admit an approver to bail when the law declares in

unambiguous language that the approver shall not be released until the decision of the case. These special provisions were treated to override the general provisions entitling the court to grant bail.

(10) There is, thereforee, little doubt that so far as the plain reading of section 306(4)(b) Cr.P.C., the same leaves no manner of doubt that a person accepting a tender of pardon has to be kept in custody till the trial is over unless he was on bail at the time of the grant of pardon. This has been almost the uniform view of judicial decisions, and the use of the word 'shall' has been interpreted to leave no flexibility in this regard. The general power of grant of bail available to the courts under the Code is thus circumscribed by the special provisions. In fact, an accused loses his character as such when pardon is granted to him. He is, of course, an accomplice. However, the character of accused can be again attributed to him if his case falls under Section 308 Cr.P.C. That is when the Public Prosecutor certifies that he has by willfully concealing anything essential, or by giving false evidence has not complied with the condition on which the tender was made. Rather even at this stage he is entitled to show that he has, in fact, complied with the condition upon which such tender was made. If he succeeds in doing so, that is the end of the matter. If, however, the Court is satisfied with the certification by the Public Prosecutor in spite of the submission by the approver, then his trial starts and he acquires the character of accused. It is as such that in sub-section (4) of Section 308 the word used qua him for the first time is 'accused'.

(11) The crucial questions raised from the side of the petitioner are whether the provisions of Section 306(4)(b) in all their rigidity can be treated as constitutionally valid, and further whether in the exercise of inherent powers under Section 482 Cr.P.C., the Court can release an approver during the course of trial when it is in the ends of justice and his detention amounts to abuse of process of Court.

(12) In the case Stale of Karnataka v. L. Muniswamy and others, : 1977 CriLJ1125 , it has been observed as under :

'THE ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the

object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient juisdiction.'

(13) The Supreme Court has further in the case Maneka Gandhi v. Union of India & another, : [1978]2SCR621 observed that it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted so as to avoid overlapping between that Article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. It was further observed that if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a breeding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.

(14) The Single Judge (Khanna, J.) has in the order of reference observed as under:

'the petitioner's case is that so far as he is concerned, his evidence has already been recorded, and, thereforee, one of the preventive objects underlying Section 306(4)(b) viz. that he may not be susceptible to easy accessibility of the accused to resile, has been served, and there is little likelihood of his going back and being won over by the accused. Rather it is pointed out that the main opposition to the present petition is coming from the accused persons. Moreover, if he at any stage shows inclination to violate the conditions of his pardon, or resiles from what he has already deposed, he opens himself to a full trial under section 308 as an

accused with additional consequence of giving false evidence, and, thereforee, this is not a welcome proposition which he will like to entertain or embark upon. As regards the other object that he may not be done away with by the accused for having let them down the risk he states, is entirely his, and he is ready to take the same. He has pointed out that he has been in custody from about 2 years, and the manner in which the evidence of only one witness has so far been recorded, there being more than 100 witnesses, the trial is likely to take a couple of years more. This is likely to result because of the dilatory tactics adopted by the accused, and the threat extended by the father of one of them who is stated to be a multi-millionaire to the effect that he would ensure that he as well undergoes the same term which the other accused would have to undergo. With the amendment of law under which the period spent in judicial custody has to be set off against the sentence ' ultimately awarded, it is pleaded that the accused may be more interested to remain in judicial custody and get that set off against the sentence which according to him, is otherwise most likely to follow. 'The age old concept of an accomplice who has accepted pardon being a turn-coat and traitor to his companions, having no qualms to stab them in the back, and, thereforee, unworthy of credence on his own words alone unless corroboration available may perhaps now appear to be obsolete and hackneyed. The progressive trends in law rather look forward to and encourage a criminal to come back to right path and rehabilitate himself as a law abiding citizen in society. There is, thereforee, no reason to essentially paint such person in that black image. After all, if he is a turn-coat, it is for turning away from the company of alleged criminals and trying to turn a corner from the life of crime, though of course self-interest also plays its part. He may as well be genuinely remorseful and repentant and wanting to make a clean breast of himself. In the subtle manner in which crimes are not unoften committed these days leaving no trace for connecting them with the perpetrators, and the modern complex scientific instruments and gadgets available, detection of criminals does sometime become difficult. Not unoften recourse to the evidence of accomplice after grant of pardon has to be resorted to. When such a person volunteers to help in the administration of justice, should be essentially be put in a worse position than an accused who is entitled to grant of bail at any time Those good old days where a trial would just take a couple of days or weeks, are

somehow over because of the large tendencies with our courts. Sometimes such trials take years. The question is whether a person who has volunteered to help the administration of justice, turned his back to crime and the criminals, and seeks to lead a law abiding life in society, should be placed in a disadvantageous position 'Apart from the consideration whether this classification between accused persons and persons who have been granted pardon is reasonable or not, the other significant consideration which arises is whether inter se such persons who have been granted pardon, the classification between those who just because of fortuitous circumstances were granted bail earlier to the time of grant of pardon and those who were in custody at the time of such grant is reasonable. Ex facie much can be said against constitutional validity of such classifications. To place a total embargo on the release of an approver who happens to be in jail till the termination of the trial, would not satisfy the test of constitutionality under Articles 13, 14, 19, 21 and 22. Rather the scheme of the legislation shows that an approver, and he being on bail, are themselves not considered as incompatible. A person on bail can very well be treated as approver. The safeguards of his susceptibility to accessibility of the accused for resiling or providing protection to his life and safety do not matter in such eventuality. If that be so, why attach a lop-sided importance to these safeguards simply because he happens to be in custody at the time of the grant of pardon Perhaps it can be said that bail could not have been granted because of the gravity of the offence. However, with the changing concepts underlying the grant of bail, this factor alone cannot be determinative. There may as well be a case where the person was not able to procure surety earlier or the investigation was not over, and during its pendency, bail was not considered advisable. Rather the Madras High Court has in Karuppa Servai v. Kundaru alias Muniandi Thevan (supra) referred to his detention till the recording of his statement in the Court of Session.

(15) In both the Session cases, the petitioner has not been imp leaded as an accused. As already noted above, the scheme of different provisions of law, as referred to above, is that an approver does not acquire the character of an accused till after the trial, and that too when the Public Prosecutor certifies that he has by willfully concealing anything essential or by giving false evidence has not complied with the conditions on which the pardon was given. Rather even at this

stage, he is entitled to show that he has in fact complied with the conditions upon which the same was tendered. If he succeeds in doing so, that is the end of the matter. If, however, the court is satisfied with the certification by the Prosecutor in spite of the sub mission a of the approver then his trial starts and he acquires the character of the accused. It is as such that in sub-section (4) of Section 306 the word used qua him for the first time is 'accused'. During the course of the trial of the main accused, his position remains that of a witness. Can such a person who is at this stage not being formally accused of an offence, be detained The legislature has permitted this, as he is treated differently from the other witnesses appearing in criminal trials. He was, in fact, associated with the crime, and would have been treated as an accused in normal course, but for his volunteering to make a clean breast of himself and lay before the court the full and true facts involved in the crime as are known to him. He is, thereforee, not unoften termed as accomplice witness. His detention, thereforee has been considered advisable, and the object dissemble which has been taken note of in judicial decisions is that he should be kept away from susceptibilities and influences of his confederates from retracting what he has already volunteered to speak, and at the same time to protect him from their wrath in case be resists their pressures. However, in cases where his evidence has already been recorded, and there is nothing to show that the prosecution at any stage sought to get him declared hostile, and the Prosecutor too has not even raised a semblance of the contention that there would be likelihood of his moving later under Section 308 Cr. P.C., and further that in spite of his detention for along time, there is little possibility of early conclusion of the trial, the question to be considered is whether it would not amount to an abuse of process of court to still detain him and his release not in the interest of justice. As already noted above, the opposition to his release is coming from the side of the accused, while the State has not appeared to contest the same before us. In our opinion, the accused should have little say in such matter, for patronage to individual vendetta has no place in the administration of justice.

(16) Section 482 of the Code of Criminal Procedure is to the following effect: -

'NOTHING in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any

order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.'

(17) The power available under this provision is notwithstanding anything else contained in the Code. In case the High Court is satisfied that an order needs to be made to prevent abuse of the process of any court, or otherwise to secure the ends of justice, the inherent powers are available, and they are not limited or affected by anything else contained in the Code. We are not oblivious that these powers have not to be ordinarily invoked where specific provisions are contained in the Code or specific prohibitions enacted. However, in cases where the circumstances un-mitigating bring out that a grave injustice is being done, and an abuse of process of court is taking place either as. a result of the acts of the accused or the unavoidable procedural delays in the courts, we are of the firm opinion that the inherent powers should and need to be exercised. The approver's evidence in the present case has already been recorded, and no useful purpose is being served in his detention. The administration of justice is not in any manner likely to be affected by his release. There is no reason to suppose that the machinery of law would not be able to give protection to the petitioner in case any adventurism is sought to be displayed by his confederates, or their supporters. The conduct of the petitioner in seeking his release itself shows that the carries no apprehensions. It would not be, thereforee, correct for the court to still create such fears and profess to provide him unsolicited protection by detaining him for indefinite period. Thus in the case of A.L. Mehra (supra) the Punjab High Court released the approver from confinement in exercise of inherent powers to prevent the abuse of the process of court, finding that he had been in confinement for several months. Similarly the Madras High Court in the case Karuppa Servai (supra) laid emphasis on the detention of an approver till he has deposed at the trial in the Sessions court truly and fully to matters within his knowledge.

(18) We are further of the opinion that there is no rational basis for inflexible classification of approvers who are in detention, and those who because of fortuitous circumstances happen to be on bail at the time of grant of pardon A person being granted bail and still not in detention are not considered in law as incompatible. So far as allurement of release if allowed pardon, it is inherently

there in any pardon. As such too much of significance and rigidity need not be attached to time factor. Moreover, a witness, even though an accomplice need not be detained for more than what is essential for procurement of or enabling him to give his evidence. His personal liberty can, thereforee, be curtailed, if at all, for beneficial ends of administration of justice, and once they are served, his further detention becomes irrelevant. This detention till that earlier stage, may also be considered proper to avoid creation of the impression of too ready an approver to serve his personal end of immediate or early let off even in cases where the involvement of the other accused in that crime may turn out to be doubtful. The existence of the provision of detention thus may serve as a damper to opportunists who may be too keen to oblige the police, and also prevent a possible abuse of this process as a short-cut by investigating agencies when they find no other evidence available or dubiously seek to involve innocent persons.

(19) Thus the 48th Report of the Law Commission in para 24'21took note that in extra-ordinary cases of hardship an approver can approach the High Court whose powers as to bail are very wide.

(20) It will not be out of place to mention that when this matter was before Single Judge, it was argued on behalf of the petitioner that the provisions of Section 306(4)(b) in all its rigidity may land itself to constitutional challenge on the ground of being vocative of Article 21 read with Article 14 of the Constitution for being arbitrary and un-reasonable and in this background one. of us while making the reference order felt that if this Section applies in all its rigidity, it may have to be struck down. But since we find that in cases of hardship, the approver can approach this Court for release, we thought it fit not to go into the question of virus of this provision. In fact, but for the availability of this power with the High Court to release the approver perhaps the virus of Section 306(4)(b) of the Code of Criminal Procedure may be open to serious challenge.

(21) We as such direct the release of the petitioner subject to his furnishing a bond for Rs. 10,000.00 with one surety in the like amount in each of the cases, to the satisfaction of the Additional Sessions Judge before whom the two cases are pending to the effect that he will appear before the Court whenever required to do

so. dusty.