



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL WRIT PETITION NO. 472 OF 2023

State of Maharashtra,
Through Sub-Divisional Police
Officer, Washim

.... PETITIONER

// VERSUS //

Madhuri Badrinarayan Gote,
R/o. Amani, Tq. Malegaon,
District Washim, at Present District
Central Prison, Washim

... RESPONDENT

Ms Mayuri Deshmukh, APP for the petitioner/respondent
Mr S. S. Das, Advocate for the respondent

CORAM : G. A. SANAP, J.
DATE : 11/08/2023

ORAL JUDGMENT :

1 Heard.

2 Rule. Rule made returnable forthwith. Heard finally
with the consent of learned Advocates for the parties.

3 In this writ petition, filed by the State, challenge is to
the order dated 18.05.2023 passed by the learned Additional

Sessions Judge, Washim whereby the learned Sessions Judge rejected the application made by the Special Prosecutor. In this application Exh. 69, the prayer was made by the prosecution to reject the vakalatnama filed by the Advocate Mr More for the approver and to shift the respondent approver Madhuri Gote to Central Jail, Akola. The respondent herein referred to as 'Approver' was co-accused in crime No. 23/2020 registered at Police Station Washim City for the offences punishable under Sections 302, 364-A, 363, 201 & 120-B of the Indian Penal Code. The crime involved murder of 15 years old niece of the informant. The approver was accused No.2. The accused No.1 is the husband of the approver. As per the case of the prosecution, the minor girl was kidnapped, taken to secluded place, administered intoxicant and strangulated. The accused burnt the death body and destroyed the evidence. The investigation in the crime led to filing of the chargesheet against accused No.1 and the approver. Learned Magistrate committed the case to the Sessions Court for trial.

4 During the pendency of the case before the Sessions

Court the approver made an application dated 30.11.2021 and expressed her desire to become an approver. The copy of this application, made by the approver, was provided to the learned Special Public Prosecutor, appointed for conducting the case. Learned Special Public Prosecutor thereafter made an application and prayed before the Court to tender pardon to the approver/accused No.2.

5 The say of the approver was called by the learned Judge. The accused No.2 gave her say and agreed to become an approver and to narrate the true facts related to the crime, on oath before the Court. Learned Additional Sessions Judge, Washim by order dated 17.02.2022 rejected the application made by the approver as well as the subsequent application made by the learned Special Public Prosecutor.

6 The approver/accused No.2 being aggrieved by this order challenged the same before this Court. This Court (Coram: Vinay Joshi, J) set aside the order dated 17.02.2022 passed by the

learned Additional Sessions Judge, Washim. This Court (Coram: Vinay Joshi, J) by way of consequential relief allowed the application made by the prosecution to tender pardon to the approver on condition of accused No.2 making a full and true disclosure of whole of the circumstances within her knowledge relating to the offence.

7 It is therefore apparent that from the date of this order, being an approver, accused No.2 became the witness for the prosecution. It is not out of place to mention that on the date of acceptance of an application of the approver and on tender of a pardon, the approver by deeming fiction gets discharged from the case. The approver then becomes the witness and does not remain an accused.

8 In this case, the charge was framed on 06.05.2021. The application to become an approver was made after framing the charge. Recording of evidence of prosecution witness No.1 commenced on 02.01.2023. By the time the impugned order was

passed, three witnesses were examined by the prosecution. On 19.04.2023, in the midst of recording of the evidence of prosecution witnesses the approver filed a purnis and contended that she has not committed the crime. She has further stated that the application made by her to become an approver was due to ignorance of law and on the advice of the advocate. She further contended that she was withdrawing her application, made to become an approver.

9 On 26.04.2023, one Advocate Mr More appeared for the approver and made an application at Exh. 67. He made a prayer to allow him to obtain the signature of the approver on Vakalatnama and to appear for her. Learned Special Public Prosecutor then made an application Exh. 69 and prayed for rejection of the vakalatnama filed by Advocate Mr More and to shift approver Madhuri Gote to Central Jail, Akola. In this application, learned Special Public Prosecutor stated that the pardon tendered by the Court, on terms and conditions, to the approver cannot be allowed to be withdrawn in this manner. For the purpose of withdrawal of the pardon the

procedure provided under Section 308 of the Code of Criminal Procedure, 1973 (For short 'the Cr.P.C.') has to be followed. It was stated in the application that vakalatnama filed by the Advocate for the approver was not in accordance with law.

10 This application at Exh.69 was opposed by the Advocate for the accused. It was contended that the application made to become an approver was not pressed by the approver and therefore, she was relegated to her original position as an accused.

11 Learned Additional Sessions Judge by order dated 18.05.2023 rejected the application made by the prosecutor. Against this order the state has filed this writ petition. The approver is represented by Advocate Mr S. S. Das.

12 I have heard learned Additional Public Prosecutor Mrs Mayuri Deshmukh and learned Advocate Mr S. S. Das for the respondent/approver. Perused the record and proceedings.

13 In view of the facts, circumstances and the provisions of law, the only point that falls for consideration is as to whether the approver can be allowed to not press the application made to become an approver before the evidence of the approver is recorded and the procedure provided under Section 308 of the Cr.P.C. is followed ?

14 In my view, the answer to this question has to be emphatic 'No'. Learned Additional Sessions Judge relying upon a case of *State of Maharashtra .v/s. Abu Salem Abdul Kayyum Ansari and Ors.*¹ observed that in view of the application made by the approver, not pressing her request to become an approver, she was relegated to the position of an accused. In my view, the learned Judge has not properly applied this decision to the facts of the case. He has also not properly appreciated the provisions of Cr.P.C. The scheme of the Chapter XXIV and particularly Sections 306 to 308 of the Cr.P.C. is relevant for this purpose. Section 306 provides for tender of pardon to accomplice. Section 306 *inter alia* provides for

1 (2010) 10 SCC 179

tender of pardon by the Magistrate at any stage of the investigation or inquiry or the trial of the offence. Section 307 provides for the power of the Court to direct the tender of pardon after commitment of a case but before the judgment is passed in the case. The only difference between these two provisions is that when the pardon is tendered by the Magistrate under Section 306 Cr.P.C. the statement of the approver must necessarily be recorded by the Magistrate. In case of tender of pardon under Section 307 by the Court after commitment of a case such recording of statement is not necessary. This is settled position in law. In the case of *Narayan Chetanram Chaudhary and Another .v/s. State of Maharashtra*² it is held that while granting pardon under Section 307 of the Cr.P.C., the trial Court is obliged to comply with the requirements of Section 306 (1) and not with the requirements of Section 306 (4) of Cr.P.C.

15 It is to be noted that before tender of the pardon to the accused the inquiry is made by the Court. The main object of tender of a pardon is to obtain at the trial the evidence of any person

² (2000)8 SCC 457

supposed to have been directly or indirectly concerned or privy to any offence. The pardon is always tendered subject to the condition of his or her making full and true disclosure of the whole circumstances within his knowledge related to the offence and to every other person concerned, whether as a principal or abettor in the commission of crime. Once the pardon is tendered on such conditions and the conditions are accepted by the accused then the said accused under law gets discharged from the case. The accused then becomes approver/witness for the prosecution. The approver at the stage of trial may support or may not support the case of the prosecution. However, once the pardon is tendered the approver has no choice than to give evidence before the Court as an approver. It needs to be stated that once the approver steps into witness box the approver has prerogative to depose according to his or her wish. In this manner, nobody can compel the approver to give a particular evidence before the Court.

16 Section 308 of the Cr.P.C. is important provision which provides for trial of person not complying with conditions of

pardon. Perusal of Section 308 of the Cr.P.C would show that save and except the compliance of Section 308 (1), the approver cannot be relegated to his or her original position as an accused. Perusal of Section 308(1) Cr.P.C. would show that after acceptance of pardon in view of the scheme of Sections 306 to 308 the approver has no choice or option or a right to not press or withdraw the application made to become an approver. The mechanism in this regard has been provided in Section 308 and the said mechanism has to be strictly complied with to relegate the approver to the position of an accused. Section 308 in its entirety is relevant for the purpose of this order. It is therefore extracted below:

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 sub-section (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.”

17 In terms of sub section (1) of Section 308 in order to relegate the approver to the position of the accused the public prosecutor must certify that in his opinion the approver has, either by wilfully concealing anything essential or by giving false evidence,

has not complied with the conditions on which the tender was made. Only after such certificate being given by the public prosecutor, the pardon tendered to the approver can be withdrawn and such person then can be tried for the offence in respect of which the pardon was tendered and/or for any other offence of which he or she appears to have been guilty in connection with the same matter and also for the offence of giving false evidence. Further mandate of Section 308 provides that on withdrawal of the pardon such person shall not be tried jointly with any of the other accused. The trial of the person whose pardon is withdrawn is required to be tried separately for the main offence as well as for the offence of giving false evidence. Sub Sections 2, 3, 4 and 5 of Section 308 of the Cr.P.C. provides the procedure for trial of the approver on withdrawing the pardon. It is therefore apparent that there is no provision under the Cr.P.C. which empowers or enables the person on acceptance of pardon on terms and conditions to make an application of this kind and to pray for withdrawal of that application made to become an approver. It is to be noted that on acceptance of tender of a pardon the accused gets discharged from

the case. The said person then becomes the witness for the prosecution. The said person therefore without following the procedure under Section 308 (1) of the Cr.P.C. cannot be relegated to the position of the accused. It appears that the learned Additional Sessions Judge has not properly considered the provisions of law.

18 Learned Additional Sessions Judge in Para 9 of the order has considered the judgment of the Hon'ble Supreme Court in the case of *State (Delhi Administration) .v/s. Jagjit Singh*³. In this case it is held that once the pardon is granted to the accused, without examining him as a prosecution witness and without certificate of a prosecutor the pardon cannot be withdrawn. Learned Judge however, on the basis of decision in the case of *Abu Salem (supra)* held that the choice is with the approver, whether to continue or not to continue as an approver. Learned Judge has observed that this position is supported by decision in the case of *Abu Salem (supra)*. In my view, the learned Additional Sessions Judge has not properly considered the facts in the case of Abu Salem. In the case of Abu Salem, the co-accused Riyaz Siddique

³ AIR 1989 SC 598

was an approver. At the time of his examination-in-chief, the learned Prosecutor found that he was not obeying the conditions of pardon and not disclosing the true and correct facts related to the crime. Learned Special Prosecutor therefore issued a certificate in terms of Section 308 of the Cr.P.C. and stated that the approver has not complied with the conditions on which the pardon was tendered to him and prayed that the pardon be withdrawn and he be tried separately. The pardon was therefore withdrawn/fortified. Learned Special TADA Court Judge ordered him to be tried separately.

19 In the case of *Abu Salem (supra)* after withdrawing the pardon the Advocate for the accused Abu Salem made a request to the Court to allow him to cross examine the approver. Learned Judge of the TADA Court granted this request and allowed the Advocate to cross examine the approver after withdrawing his pardon. The matter was carried to the Supreme Court. The Hon'ble Supreme Court after considering the facts of the case and the law held that after withdrawal of the pardon on certificate of public prosecutor such person is liable to be tried as an accused.

Such person cannot be further examined by the prosecution. He ceases to be the approver and the witness for the prosecutor. On withdrawal of the pardon, he is relegated to his original position of an accused. He has to be therefore tried separately for the original offences for which he was prosecuted and for the offence of giving false evidence.

20 In my view, in order to relegate the approver to the position of an accused the stage and the conditions as contemplated under Section 308 (1) of the Cr.P.C. must be established in a given case. In this case, respondent/ approver did not step into the witness box. Before stepping into the witness box she made this application to withdraw her application to become an approver. Learned Judge in this case has completely missed very essence and substance of the provisions of law. The decision in the case of Salem is not applicable in this case, In order to rely and apply the decision in the case of Salem the strict compliance of Section 308 (1) of the Cr.P.C. must be ensured by the Court. It is needless to say that whether to give evidence or not to give any evidence after stepping

into the witness box on the oath would be the prerogative of the witness. Witness cannot be compelled to make a particular statement. It needs to be stated that if the approver fails to comply the conditions of a pardon then the consequences provided under law have to be considered. The approver therefore cannot be tried with the remaining accused. The trial of the approver has to be separate. The object is in-built in the provision. The main object is to get the first hand account of the incident through the mouth of the approver, who in every case happens to be a guilty partner with the co-accused. In my view, therefore, learned Judge has not properly appreciated the facts, law and the decisions in the case of *Abu Salem (supra)*. Learned Judge has completely misdirected himself in addressing the question. Therefore, the order is required to be quashed and set aside. Accordingly, the writ petition is allowed.

21 The order dated 18.05.2023 passed by the learned Additional Sessions judge, Washim is quashed and set aside.

22 Learned Additional Sessions Judge consistent with the pardon tendered to the approver and accepted by the approver on terms and conditions shall examine the approver as and when she is presented before him as a witness.

23 As far as the application made by the prosecution to transfer the approver from Washim Central Prison to Akola Central Prison is concerned learned Additional Sessions Judge shall decide it in accordance with law, keeping in mind the facts and circumstances obtained on record.

24 The writ petition Stands **disposed of**. Rule made absolute in the above terms.

(G. A. SANAP, J.)

Namrata