

Andhra High Court

Konajeti Rajababu vs State Of A.P. And Anr. on 2 January, 2002

Equivalent citations: 2002 (1) ALD Cri 367, 2002 (1) ALT Cri 403, 2002 CriLJ 2990

Author: T C Rao

Bench: T C Rao

ORDER T. Ch. Surya Rao, J.

1. The revision petitioner assails the order dated 12-6-2000 passed by the learned III Additional District and Sessions Judge, Krishna at Vijayawada, in CrI. M. P. No. 286 of 2000 in S.C. No. 159 of 1999.

2. The revision petitioner is A. 1 in the said case and has been facing trial for the charge under Section 302 of the Indian Penal Code. The first respondent herein laid the charge sheet against four accused before the III Metropolitan Magistrate, Vijayawda, for the offence punishable under Section 302 read with 34 of the Indian Penal Code. It is alleged, inter alia, in the charge sheet that on 13-7-1997 at 22.30 hours when the deceased by name Naveenram along with Boena Sivarama-krishna alias Nani reached the house of the deceased on a scooter, A. 1 to A.4 surrounded the deceased and the said Nani. A.I after having enquired with the said Nani as to who among them was Naveenram and on being informed by Nani that the deceased was the said person, took out a knife from the Scooter and stabbed the deceased above the stomach, when A.2 all of a sudden caught hold of the deceased from behind, and A.3 and A.4 beat Nani (L.W. 4) with hands hereby caused the death of the deceased with common intention to kill him as he was teasing the daughter of A. 1, and thereby did commit the offence of murder punishable under Section 302 of the Indian Penal Code. The case against A. 1 to A.4 was duly committed to the Sessions Court by the III Metropolitan Magistrate, Vijayawada, and the same was made over to III Additional District and Sessions Judge, Krishna at Vijayawada.

3. When the case was pending trial, A.3 in the case filed a petition under Section 307 read with 306 of Code of Criminal Procedure ('the Code' for brevity) requesting the Court to tender pardon to him by promising to reveal and disclose the whole truth and give evidence on behalf of the prosecution in support of the charge framed against him and other accused in the crime. In that application CrI. M. P. No. 286 of 2000 notice was given to the Additional Public Prosecutor on behalf of the State and after having heard the Additional Public Prosecutor, the learned Judge allowed the petition by tendering a conditional pardon to him and A.3 was directed ultimately to be discharged from the array of the accused and further directed to be shown as first witness for the prosecution. A. 1, the prime accused in the case, assails that order, as aforesaid.

4. Sri T. Bal Reddy, learned senior counsel appearing for the revision petitioner-A1, contends that no reasons whatsoever have been given by the learned Judge for tendering a conditional pardon and, therefore, the impugned order is not legal, proper and correct. The learned senior counsel further contends that the propriety of the impugned order shall be seen, particularly when there is an eye-witness on the side of the prosecution in having tendered a conditional pardon to A.3 three years after the alleged crime.

5. Sri C. Padmanabha Reddy, learned senior counsel appearing for the second respondent herein A.3 contends that the revision petition itself is not maintainable inasmuch as the impugned order is in the nature of an administrative order.

6. The crime in this case was occurred on 13-7-1997 wherein one person was murdered and the other was beaten. In connection with the said crime, A.3 was arrested on 22-7-1997. After completing the investigation, the Investigating officer laid the charge sheet on 15-10-1997. As can be seen from the facts, when the deceased and another person were coming on Scooter in front of the house of the deceased they were surrounded by A.I to A.4. After having ascertained from the other person about the identity of the deceased, the deceased was done to death. Obviously, therefore, the second person is an eye-witnesses to the occurrence. His statement under Section 164 of the Code has been recorded by a competent Magistrate. At the stage of investigation, the investigating agency did not file any person requesting the Court to tender pardon to A.3 in the crime. Perhaps, the Investigating Officer might have rest content with the type of evidence gathered by him in support of the charge as having been sufficient. It is only on his own volition A. 3 filed a petition requesting the Court to tender pardon to him in Crl. M. P. No. 286 of 2000 annexing therewith his affidavit duly sworn in before an Advocate. Inter alia, in his affidavit, he made a clean breast of the case implicating himself while implicating the other accused in the crime. The affidavit filed in Telugu by A.3 does contain the facts relating to the offence and the manner in which the offence has been perpetrated. Evidently, the Additional Public Prosecutor was heard by the III Additional District and Sessions Judge before passing the impugned order. In fact, at the request of the learned Additional Public Prosecutor, an adjournment was granted for hearing to enable the Additional Public Prosecutor to address the arguments. Under the impugned order, the learned Judge expressed his satisfaction that A. 3 was intending to make a full, disclosure of the facts and circumstances known to him, should pardon be tendered to him and having been further satisfied that A.3 had been directly concerned with the offence and, therefore, it was a fit case where conditional pardon could be granted so as to obtain the evidence at the trial, after having gone through the case record and the affidavit filed by A.3, allowed the petition ultimately.

7. In this backdrop, it is to be seen as to whether the impugned order suffers from any vice of illegality as contended by the learned senior counsel appearing for the revision petitioner-A.I?

8. It is expedient at the outset to have a glance at the relevant provisions in the Code before proceeding to adjudicate the present revision case. Although Section 307 of the Code is the relevant Section under which the pardon in this case was granted, Section 306 of the Code being the main Section should also be considered for better understanding of the matter. Both the provisions may be extracted hereunder thus:

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, of 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 this 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 witness in the Court of the Magistrate taking cognisance of the offence and in the subsequent trial, if any,

(b) shall, unless he is already on bail, be detained in the 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 cognisance 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 cognisance 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.

9. While Section 306 of the Code enables the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or enquiry into, or the trial of, the offence, the tender of pardon to a person with a view to obtaining the evidence of that person supposed to have been directly or indirectly concerned in the offence, Section 307 of the Code empowers the Court after commitment of a case to it, to tender pardon with a view to obtaining at the trial the evidence of that person supposed to have been directly or indirectly concerned in the offence. The primary object under both these Sections is to obtain the evidence of an accomplice so as to facilitate conviction of others. A perusal of both the provisions leaves no room for any doubt that a wide power has been conferred upon the Court to tender a conditional pardon to a particular person with a view to obtaining the evidence of that person in support of the charge against the accused therein. Under Sub-section (3) of Section 306, the Court is expected to record its reasons for tendering such pardon and should further record the factum of acceptance of the person to whom it was made. No other conditions have been engrafted under the said Section conditioning the power of the Court to grant such a pardon. The other conditions enjoined under Sub-section (4) thereof are not the conditions engrafted on the power of the Court to grant pardon but they are procedural in nature inasmuch they ordain that the Court should examine the person to whom pardon has been tendered as a witness before taking cognizance of the offence, and should detain him in the custody until termination of the trial unless he has already been enlarged on bail. Obviously, the power of tendering pardon under these Sections hinges upon only one prerequisite, namely, obtaining of the evidence from the person to whom pardon is to be granted in connection with the offence being tried.

10. Then the question arises as to whether such a request for tendering pardon should emanate from the prosecution or it could be from the accused also. The learned senior counsel appearing for the revision petitioner, in this context, seeks to place reliance upon a judgment of the Apex Court in *Lt. Commander Pascal Fernandes v. State of Maharashtra*. A three Judge Bench of the Apex Court held that there was nothing in the provision to show that the Court should be moved by the prosecution and it might consider an offer by an accused. That was a case where a pardon was tendered by the Special Court under Section 8(2) of the Criminal Law Amendment Act, 1952. When the trial in the case was fixed for various charges of conspiracy, cheating and criminal misconduct, one of the accused by name Jagasia made an application to the Court praying that he should be tendered pardon, made an approver and examined as prosecution witness. The reason given by him was that he had full and complete knowledge of the incident that had taken place between the accused inter se; and that he was in a position to disclose as to how the conspiracy was formed and several offences committed, and that he was making this offer in order to unburden the mental tension and in order to help the cause of justice. That application was vehemently opposed by the other accused in the case on the premise that it was essential for the prosecution to consider in the first instance to ask that a particular accused may be tendered pardon and on the further ground that granting pardon to him would be highly prejudicial to the defence of the other accused. The Special Judge

tendered a conditional pardon to Jagasia, one of the accused. In the Revision before the High Court, the prosecution stated before the High Court that it had no objection to grant of pardon, and that it even welcomes the opportunity of having the evidence of an approver. The High Court having regard to the same dismissed the revision case. The Supreme Court in para 12 of its judgment held that there could 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 and that person must necessarily be arraigned as accused before the Court. The Supreme Court further held that it might be possible to tender pardon to a person not so arraigned and that there is nothing in the language of the Section to show that the Special Judge must be moved by the prosecution and he might consider an offer by an accused. While so holding, the Supreme Court struck a note of caution and laid down the procedure for the guidance of the Court. In para 15 of its judgment, it was held thus:

To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will. 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 Judge 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.

Sri T. Bal Reddy, learned senior counsel, invited my attention to the observations made by the Apex Court in para 14 of the said judgment, which may be extracted herein below thus:

The next question is whether the Special Judge acted with due propriety in his jurisdiction. Here the interests of the accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider.

Ultimately, the Apex Court considering the fact that the Public Prosecutor appearing in the High Court submitted that the prosecution also considers favourably the tender of pardon to Jagasia dismissed the appeal while striking a note of caution for the benefit of the Courts.

11. The Apex Court in *Jasbir Singh v. Vipin Kumar Jaggi* placing reliance upon its earlier judgment in *Pascal Fernandes case (1968 Cri LJ 550) (SC)* (referred to supra) reiterated the same principle and held in para 18 thus:

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.

That was a case where the request of the prosecution to tender a pardon to the respondent-Vipin Kumar Jaggi was rejected by the Sessions Judge under Section 307 of the Code. However, under Section 64 of the Narcotic Drugs and Psychotropic Substances Act, the Central Government granted him immunity from prosecution. When that was challenged before the High Court, it ended in dismissal. The Sessions Judge while rejecting the request of the prosecution under Section 307 of the Code was of the view that no purpose would be served at all in granting pardon to the first respondent as his evidence was weak while holding that such an approach on the part of the Sessions Court was not correct as at that stage it was not within its purview to assess the evidence. Ultimately, the Supreme Court upheld the order of the High Court.

12. A three Judge Bench of the Apex Court in *Harshad S. Mehta v. State of Maharashtra* had an occasion to consider again the provisions of Sections 306 and 307 of the Code qua Section 9(2) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. The relevant provisions in the Code and the said Act are akin. In para 37 of its judgment, the Apex Court discussed its earlier judgment in *Pascal Fernandes case (1968 Cri LJ 550)* (referred to supra). That was a case where before the Special Court two of the accused filed petitions praying the Court for grant of burden. Those applications were supported by C.B.I. Earlier both the accused made statements under Section 164 of the Code making full disclosure of their participation in the offences and the participation of other accused in commission of the offence. The Special Court allowed both the applications by tendering conditional pardon, which was accepted by both the accused. The other accused in the crime sought revocation of that order. The main ground urged before the Court was that the Special Court had no jurisdiction to tender pardon in the absence of any express provision therefor in the Act. Inasmuch as the procedure envisaged in the Code applies to the cases before the Special Court also in the absence of any express provision therefore in the Act, that contention was repelled by the Apex Court. The second contention raised was non-compliance of the provisions of Sub-sections (4) and (5) of Section 306 of the Code. The Apex Court held while following the Full Bench judgment of the Calcutta High Court in *Abdul Majid v. Emperor ILR (1993) 60 Cal 652* that the power to tender pardon stands alone and the other provisions are matter of procedure. In such situation, the matters of procedure are not applicable and it would not negate the power to grant pardon. The Apex Court held that all powers under Sections 306 to 308 of the Code to the extent applicable were available to the Special Court under the Act. Ultimately, the order granting pardon was upheld.

13. From the foregoing discussion with reference to the relevant provisions in the Code and the law laid down by the Apex Court, it can be summarised thus:

(1) The power to grant pardon enjoined under Sections 306 and 307 of the Code is a substantive power and it rests on the judicial discretion of the Court, (2) The power of the Court is not circumscribed by any condition except the one, namely, that the action must be with a view to obtaining the evidence of any person who is supposed to have been directly or indirectly concerned

in, or privy to, an offence.

(3) The Court has to proceed with great caution and on sufficient grounds recognising the risk which the grant of pardon involved of allowing an offender to escape just punishment at the expense of the other accused.

(4) The secrecy of the crime and paucity of evidence, solely for the apprehension of the other offenders, recovery of the incriminating objects and production of the evidence otherwise unobtainable might afford reasonable grounds for exercising the power.

(5) The disclosure of the person seeking pardon must be complete.

(6) While tendering pardon, the Court should make an offer to the one least guilty among the

(7) The reasons for tendering pardon must be recorded and also about the factum of accepting

14. Ordinarily, it is for the prosecution to ask that a particular accused out of several may be tendered pardon. It is because the State may not desire that any accused be tendered pardon as it does not need approver's testimony, or it may not also like the tendering of pardon to a particular accused because he may be the brain behind the crime or the worst offender. After all, the Court shall not be oblivious of the fact that the power which it exercises is not on its own behalf but on behalf of the prosecuting agency. Therefore, the power shall be exercised only when the prosecution joins in the request. This does not, however, preclude the accused from directly applying to the Court. When the accused directly applies to the Court, the Court must first refer the request of the accused to the prosecuting agency and ask for a statement from the prosecution on the request of the accused. If the prosecution thinks that the tender of pardon will be in the interests of successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it would indubitably agree to the tender of pardon, The Court should, therefore, embark upon such a procedure in the interests of justice.

15. Turning to the facts in the instant case, although no statement of the accused was recorded by the investigating agency during the course of investigation, a duly sworn affidavit containing full disclosure of the facts of the case has been annexed by the second respondent herein-A. 3 to his petition in Crl. M.P. No. 286 of 2000. The learned III Additional District and Sessions Judge directed a notice to be given to the Additional Public Prosecutor and after hearing him alone, he passed the impugned order. The learned Judge has also recorded his satisfaction about the necessity of the evidence and accepting of the pardon by the accused tendered to him.

16. At this juncture, the learned senior counsel appearing for the revision petitioner contends that the prosecution has already gathered the evidence of an eye-witnesses to the occurrence, therefore, there is no need or necessity to tender pardon to one of the accused. So as to buttress his contention, the learned senior counsel seeks to place reliance upon a Judgment of the Punjab and Haryana High

Court in *Bhup Singh v. The State of Haryana* (1986) 1 Crimes 432. The Court held in the said judgment that the power to grant pardon to an accomplice to become an approver should be exercised only in exceptional cases and one such case could be that but for the evidence of the accomplice it would otherwise not be possible to bring to guilt home to the other accused. That was a case where the prosecution was relying upon three eye-witnesses out of which two of them were the injured witnesses. At the stage of trial, one of the six accused by name Tulsi Ram applied to the trial Judge for grant of pardon under Section 307 of the Code. Although initially when the application for grant of pardon filed by the accomplice had come up for consideration, the State did not oppose but at the stage of hearing the Revision Case filed impugning the order granting pardon to the accomplice, the State chose not to support the application. The main contention in the Revision Case was that the trial Judge did not exercise its discretion in a sound manner inasmuch as there was no necessity to grant pardon as three eye-witnesses were already examined by the prosecution. In those circumstances, the Court held that the discretion to grant pardon should be exercised in exceptional cases and one such exceptional case would be that but for the evidence of accomplice it would otherwise be not possible to bring the guilt home to the other accused. The necessity to examine an accomplice depends upon the facts of each case and no hard and fast rule can be prescribed therefor. Adequacy or otherwise of the evidence to bring home the guilt to the accused affords a reasonable ground so as to conclude whether the discretion conferred on the Court can be exercised or not, or affords a reason to support a judicious exercise of the discretion but the number of eye-witnesses cannot be the criterion. Here, in the instant case, the case of the prosecution mainly hinges upon a sole eye-witness whose statement had been recorded under Section 164 of the Code. Although there is no legal bar to base a conviction on the sole testimony of the witness, but before doing so the testimony shall be found to be credible and pass the test of judicial scrutiny. Even a semblance of reasonable doubt might warrant a benefit of doubt to be given in the case. Under such circumstances, it cannot legitimately be concluded that the evidence gathered on the side of the prosecution so far is quite adequate. Therefore, in view of the peculiar facts in the instant case, it cannot legitimately be concluded that the discretion in this case has not been exercised in a judicious manner.

17. The learned senior counsel appearing for the second respondent herein A. 3 contends that the revision petition itself is not maintainable inasmuch as the impugned order being an order passed on administrative side. In support of his contention, the learned senior counsel seeks to place reliance upon a judgment of the Delhi High Court in *M. M. Kochar v. The State*. The Delhi High Court was of the view that the grant of pardon either under the provisions of the Constitution of India or under the provisions of the Code of Criminal Procedure is the exercise of sovereign power and is nothing but an act of mercy and, therefore, even though under the provisions of Sub-section (1-A) of Section 337 of the old Code the Court is expected to record its reasons, it could not be argued that such tender would become revisable by the High Court under Section 435(old Code). The grant of pardon under the provisions of Articles 72 and 161 of the Constitution of India is certainly a prerogative of the sovereign power. The pardon can be granted even after the conviction of the accused. The consideration therefor at that stage is power of mercy. Unlike the same, tendering pardon to an accomplice under the provisions of Sections 306 and 307 of the Code is discretionary but that discretion is to be exercised judiciously basing upon some intelligible differentia. The Court is expected to give reasons in support of such discretion. Whether the



jurisdiction vested in the Court to grant such pardon has been exercised judiciously or not can always be the subject matter of scrutiny by the Revisional Court. I am afraid, I cannot concur with the reasoning given by the learned Judge of the Delhi High Court with due respect. Otherwise, if the discretion is exercised arbitrarily by the Court and it is not amenable to the supervisory power of the High Court that might lead to disastrous consequences.

18. I, therefore, see no illegality or any irregularity in the impugned order and cannot therefore be said as not correct, legal, and proper.

19. For the foregoing reasons, the Criminal Revision Case fails and is dismissed.