

(2024) 11 MP CK 1294

In the Madhya Pradesh High Court, Indore Bench

Case No : Miscellaneous Criminal Case No. 43304 of 2024

Ashik Patel

APPELLANT

Vs

The State Of Madhya Pradesh

RESPONDENT

Date of Decision : 25-11-2024

Acts Referred:

Bharatiya Nagarik Suraksha Sanhita, 2023 — Section 528

Code of Criminal Procedure 1973 — Section 306

Indian Penal Code 1860 — Section 34, 120B, 201, 307, 336, 341, 419, 420

Arms Act 1959 — Section 25, 27, 29

Citation : (2024) 11 MP CK 1294

Hon'ble Judges : Vijay Kumar Shukla, J

Bench : Single Bench

Advocate : Ajay Bagadia, Chirag Singh Chouhan, Ajay Kumar Mishra, Ritvik Mishra, Rakesh Arora, Shrey Raj Saxena

Final Decision : Allowed

Judgement

Vijay Kumar Shukla, J

The present petition is filed u/S.528 of BNSS 2023 challenging the order dated 5.9.2024 passed by I Additional Sessions Judge, Neemuch in Case No.1436/2024 whereby the application filed by the petitioner u/S.306 of Cr.P.C (343 of BNSS 2023) has been rejected.

2. As per prosecution on 04.02.2024, around 04:30, Ashok s/o late Kashmiri Lal Ji Arora, a businessman was going from one place to another in the city of Neemuch in his Volvo car no. DD-02-G-1100. The complainant and few more persons were following Ashok in his black Scorpio, for the purpose of giving Ashok protection. It is further alleged that as soon as both the cars reached City light Furniture, a black Creta car bearing registration number MP-44-CB-2430 came speeding towards them from the wrong side and parked itself in front of the Volvo car. It is further alleged that four people got out of it and tried to kill Ashok (who was travelling in his Volvo car) by indiscriminately firing at the Volvo

car, as a result of which Ashok got seriously injured by a bullet fired on him. Thus, complainants retaliated with their licensed guns in self-defense due to which three accused fired at them, took weapons and ran away leaving the vehicle on the spot, leaving one injured person behind and this whole incident was witnessed by the people present there. The incident was reported to the police and a crime for the commission of offence u/Ss. section 307, 341, 34 IPC along with Section 25, 27 of the Arms Act has been registered against the accused persons. The petitioner has been arrayed on the basis of the memo of the co-accused and arrested on 16.02.2024 and sent to jail. After completion of the investigation, the prosecution filed the charge sheet against the accused persons for the offences u/Ss. 341, 307, 419, 420, 336, 120B, 201, 34 IPC and 25, 27 and 29 of Arms Act before the learned court below, a copy of which was provided to the counsel for the petitioner.

3. The petitioner/accused filed an application u/S.306 Cr.P.C before the trial court seeking permission to become an approver. The said application has been rejected by the impugned order mainly on the ground that an application for permission to become approver/power to tender pardon could not have been filed by the accused.

4. Counsel for petitioner argued that the rejection order is contrary to the provisions of Sec.306 and 307 of Cr.P.C and also the law laid down by the Apex Court in the case of Lt.Commander Pascal Fernandes Vs. State of Maharashtra & others AIR 1968 SC 594: (1968) 1 SCR 695. He referred para 12 of the said judgment in support of his submission that there is nothing in the language of the Section to show that trial Court must be moved by the prosecution. He may consider an offer by an accused in this case.

5. Per contra, learned counsel for respondents and Objector submitted that from reading the provision of Section 306, the application for approver/to tender pardon is vested with the prosecution and the accused cannot move such an application. He further relied on the said judgment of Lt.Commander Pascal Fernandes (supra) and referred para 15 of the judgment. He also relied on the judgment passed by a Single Judge of Mumbai High Court in the matter of Al-Saleha Beig Vs. State & Ors 2008(3)Mh.LJ 724 in which it has been held that power to tender pardon u/Ss.306 and 307 has to be exercised on behalf of the prosecuting agency. It is for the prosecution to ask that a particular accused, out of several may be tendered pardon, if the prosecution thinks that tender of pardon will be in the interests of a successful prosecution of the other accused whose conviction is not easy without approver's testimony - Although the power to actually grant pardon is vested in the court, it is a prosecution's job to see whether particular evidence is required or not to ensure the conviction of the accused.

6. After hearing learned counsel for parties and on going through the impugned order passed by the trial court, the question which crops up for consideration is that "whether the trial court could have declined to entertain the application u/

S.306 Cr.P.C for tender of pardon to accomplice on the ground that the same was not tenable at the instance of the accused."

7. To appreciate the aforesaid issue, it is apposite to refer the provisions of Sec.306 and 307 of Cr.P.C which reads as under:-

"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, 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.

(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 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.

(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 cognizance 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 cognizance 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."

8. From reading the aforesaid provisions of Sec.306 and 307, it is pellucid that "ordinarily" it is the prosecution to ask that a particular accused out of several may be tendered pardon but there is no legal bar to the accused to apply for approver and for tender of pardon. In the case of Lt. Commander Pascal Fernandes (supra) also the Apex Court in para 15 held that ordinarily it is for the prosecution to apply for tender pardon but even where the accused directly applies to the Special Judge, he must ordinarily refer the request to the prosecution agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution (emphasis supplied).

9. Thus, from the aforesaid provisions of law and the judgment passed by the Apex Court in the case of Lt. Commander Pascal Fernandes (supra), the issue is answered that there is no legal bar for the trial court to entertain an application of an accomplice to tender pardon. The word "ordinarily" connotes that the normal course is that the prosecution should apply for tender pardon, but there is no legal bar to the accused to file an application u/S.306 Cr.P.C. If the accused directly applies to the trial court, the proper course is to refer the request to the prosecuting agency and thereafter to pass an order as per the provisions of Sub Section 3 of Section 306 Cr.P.C.

10. On going through the impugned order, this court finds that there is no material to indicate that before deciding the application filed by the petitioner/accused, the same was referred to the prosecution.

11. In view of the aforesaid, the impugned order dated 5.9.2024 is quashed. The trial court is directed to decide the application filed by the petitioner/accused u/ S.306 Cr.P.C afresh after affording opportunity of hearing to all the parties and addressing to all the issues raised in this regard. It is made clear that this court has not expressed any opinion on the merits of the matter.

12. The petition is accordingly allowed.