

(2004) 05 JH CK 0038
In the Jharkhand High Court
Case No : Criminal Revision No. 123 of 2004

Deepak Chandak

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 306

Citation : (2004) 2 BLJR 1546

Hon'ble Judges : P.K. Balasubramanyan, C.J

Bench : Single Bench

Advocate : Prakash Kumar Sahay, for the Appellant; Rajesh Kumar, Amrita Sarkar and D.K. Bharti, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, C.J.—This criminal revision was not in the list on 5.3.2004. It had already been directed to be posted before me in view of the fact that the learned Single Judge before whom it was listed in the normal course, directed it to be listed before the Chief Justice to assign it to another appropriate bench and had also suggested that if possible it may be listed on 5.3.2004, It was directed to be listed next week. But on the request of senior counsel from Delhi that the matter be heard, especially since I was sitting single that day and he had come all the way from Delhi to argue it, the matter was called up for hearing since the prosecutor appearing for the Central Bureau of Investigation also submitted that he was ready to get on with the case. It was thus that the case was called up and taken up and both sides were heard.

2. The accused is the revision petitioner. He challenges the order passed by the Special Judge-II, CBI (AHD), Ranchi. On 20.1.2004 in RC 54/[A]/96-Pat by which the Special Judge dismissed a petition filed by the accused, the petitioner before me, seeking his removal from the array of the accused and to desist from framing any charge against him in the particular prosecution. According to the revision petitioner, the present case was one of the several cases registered in

respect of fraudulent withdrawal of money from the Treasuries in Bihar on the strength of forged and fabricated allotment letters for making payments to suppliers for non-existent supplies of feed/fodder, medicines and other equipments, called fodder scam cases.

3. According to the revision petitioner, since he had been accepted as an approver in certain other fodder scam cases, including in one before the same Special Court, he could not be arrayed as an accused in the case on hand and since the prosecution has also agreed to treat him as an approver in the present case also, the Court was bound to treat him as an approver and remove him from the array of the accused. He contended that the evidence given by him in cases in which he had been treated as an approver, would be adversely affected if he is not made an approver in the present case also and that since the prosecution has agreed to treat him as an approver in the present case as well, the Court was obliged to drop him from the array of the accused and treat him as an approver, subject, of course, to the conditions in that behalf. The prosecution supported this plea of the revision petitioner, the accused. But the learned Special Judge took the view that he was one of the prime accused in the particular case and it would not be appropriate to treat him as an approver and that he had to be retained in the array of the accused. The Special Judge thus dismissed the application made by the accused and proceeded to frame charges against him. This revision challenges the order dismissing the applications of the accused to treat him as an approver in the present prosecution also.

4. Before me, the prosecutor appearing for the Central Bureau of Investigation (CBI) proceeded to support the arguments of learned counsel for the revision petitioner that the Court below was in error in rejecting the application of the accused to be treated as an approver and retaining him in the array of the accused. The has compelled the Court to make an investigation of its own on some of the aspects arising for decision and the result of that investigation is also reflected in this judgment.

5. Learned counsel for the revision petitioner submitted that the petitioner was treated as an approver by the very Court in another case and he had also been treated as approver in four other cases which were all part of the fodder scam cases and in that situation, the revision petitioner should have been treated as an approver in the present case also, notwithstanding the fact that he has been charged with misappropriation of a substantial part of the amount allegedly misappropriated in the present case. He also submitted that the treating of an accused as an approver was a matter of agreement between the accused and the prosecution, on the approver fulfilling his obligations u/s 306 of the Code of Criminal Procedure and when the prosecution has agreed to treat the revision petitioner as an approver, it was not open to the Court of Sessions or the Special Judge, to refuse to treat the revision petitioner as an approver. He went to the extent of arguing that there was no discretion in the Court in that regard and the Court was bound to affix its stamp of approval on the agreement between the

prosecution and one of the accused who is willing to turn approver. Learned counsel referred to the decision of the Supreme Court in *Lt. Commander Pascal Fernandes Vs. The State of Maharashtra and Others*, , with particular reference to paragraph 15 thereof, Therein Mr. Justice M. Hidayatullah, as he then was, speaking for the Supreme Court stated thus :--

"15. In this case the Special Judge made no effort to find out what Jagasia had to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to offer no evidence and permit his acquittal, or (d) to enter a nolle prosequi. In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. Section 8(2) of the Criminal Law Amendment Act is enabling. Without recourse to it, an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interests of justice, the Special Judge must have material before him to show what the nature of that testimony will be. 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 Judges, 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 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 interest is 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. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case.

6. It was the submission of counsel in the light of the passage quoted above that when the prosecution has identified the revision petitioner as an approver by tendering him pardon in the interests of a successful prosecution of others, the Special Judge had only to agree with the prosecution and the Court did not have any discretion to reject the prayer of the accused supported by the prosecution in that behalf. On a careful reading of the above passage, I do not understand the Supreme Court as having laid down that when the prosecution and one of the accused strike a deal, the Court had no option but to accept it and treat the concerned accused as an approver. No doubt, this decision clearly shows that the Court has no role either in seeking approver evidence or in identifying an approver so as to enable the prosecution to make a successful prosecution. This position also emerges from the passage in *Jasbir Singh Vs. Vipin Kumar Jaggi and Others*, , wherein it was observed that although the power to actually grant

pardon was vested in the Court obviously, the Court can have no interest whatsoever in the outcome; nor can it decide whether a particular evidence is required or not to ensure conviction. Counsel for the revision- petitioner relied on the above decision also to contend that the choice of to prosecution in selecting an approver or a decision taken by it in that regard could not be disturbed by the Court and on the basis of the prayer of the prosecution, the Court was bound to grant pardon to the approver. This again, in my view, does not exclude the jurisdiction of the Court in taking a decision whether pardon should be granted to one of the accused as proposed by the prosecution, though it may not be for the Court to choose which one of the accused should be made an approver in a particular prosecution. But what we are concerned with here is the question whether in no circumstance, the Court could reject a request made by the accused and supported by the prosecution that an accused be treated as an approver. State (Govt. of NCT of Delhi) Vs. Prem Raj, , was relied on by counsel to argue that the power of pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the Sovereign, wherever the sovereignty might lie. The grant of pardon to an accomplice under certain conditions as contemplated by Section 306 of the Code of Criminal Procedure, was a variation of that particular power of pardon and the granting of pardon u/s 306 of the Code was also in exercise of sovereign power. From this it was argued by counsel that it was the prosecutor who had the right, in exercise of that sovereign power, to recommend pardon by treating the accused as an approver and the Court could not go into the question whether that was justified or not. Counsel also relied on the decision in 2002 CLJ 2375, Senthamaria v. S. Krishnaraj, in which the Madras High Court held that the very basis of Section 306 of the Code of Criminal Procedure was that a person who applies for pardon under the provisions of Sections 306 and 307 of the Code of Criminal Procedure, can be assumed to be directly or indirectly concerned in the offence and he may be assumed to be a privy to the offence. This decision, according to me, does not touch on the question whether the Court has the discretion or jurisdiction to negative a prayer for treating one of the accused as an approver. But it does have an impact when we take note of the fact that in this case, the petitioner has already pleaded not guilty to the charge framed against him.

7. Section 306 of the Code of Criminal Procedure, 1973 shows that it is for the Magistrate to tender pardon to a person directly or indirectly concerned in an offence on the conditions mentioned therein. Therefore, on the plain words of Section 306 of the Code of Criminal Procedure an argument that the Magistrate or the Court does not have any role in the matter of treating a person involved in an offence as an approver, cannot be accepted. The contention of counsel was that this was a case to which Section 307 of the Code applied and the Court to which commitment is made with a view to obtain, at the trial, the evidence of any person supposed to have been directly or indirectly concerned in it, to tender a pardon on the same conditions to such a person and case coming within the purview of Section 307 of the Code was different from the one to which Section

306 of the Code was attracted. According to me, whether it be a situation contemplated by Section 306 of the Code or by Section 307 of the Code, it is the Court which has the right to decide ultimately whether pardon must be granted to one of the persons allegedly involved in the crime. Section 307 of the Code actually empowers the Court to which commitment is made to tender pardon before the judgment is passed. On the wording of the section I am not in a position to accept the argument of learned counsel for the revision-petitioner that the Court had no role to play in the matter of treating the revision-petitioner as an approver and that it is merely a contract between the prosecutor and one of the persons arrayed as an accused, which the Court was bound to accept and approve.

8. In AIR 1938 266 (Privy Council) the Privy Council noticed the difference between Section 337 of the Code of 1898 (present Section 306) and Section 494 (present Section 321) in the following words :--

"The proceedings so taken u/s 337 are different in character from the course which would be taken u/s 494. The former section deals with the action of judicial, the latter with that of an executive officer."

As I understand it, the distinction was that in a case coming u/s 306 of the Code it was for the Magistrate to take the decision, whereas u/s 321 of the Code it was for the prosecutor to take the decision to withdraw from the prosecution.

9. It also appears to me that the observations in Lt. Commander Pascal Fernandes Vs. The State of Maharashtra and Others, , relied on by the learned counsel for the petitioner have to be understood in the context of that case. That was the case where the accused had directly applied to the Court for tender of a pardon. So a question arose whether the Court could grant it or the request was liable to be referred to the prosecution before it was granted or refused. In that context, their Lordships stated that where an accused directly applies to the Court for tender of a pardon, the Court must refer the request to the prosecution as it was not for the Court to tender the pardon as a veritable director or prosecution. It was also observed that it was the matter of an agreement between the prosecution and the person who has been granted the pardon. This decision, in my view cannot be said to support a proposition that the agreement to treat a person arrayed as an accused as an approver and the grant of pardon to him is purely a matter of contract between the prosecution and the person concerned and that the Court had no role to play in it. In State (Delhi Administration) v. Jagjit Singh 1989 (2) SCC 770, the argument that it was merely a matter of contract between the State granting the pardon and the person accepting it, was not accepted by the Supreme Court. Their Lordships observed :-- .

"It has been next contended that the grant of pardon is in the nature of a contract between the State granting pardon on the one hand and the person accepting the pardon on the other hand. As the State has the power to revoke

the pardon at any time, the approver has also got the reciprocal right to cast away the pardon granted to him this submission is also not tenable."

It may be noted that even in the decision in *Jasbir Singh Vs. Vipin Kumar Jaggi and Others*, relied on by the counsel for the revision-petitioner, the Supreme Court has categorically recognized that the power to actually grant pardon is vested in the Court. When the power to grant pardon is vested in the Court, it necessarily follows that a right to refuse it is also in the Court. It is, therefore, difficult to accept an argument that the Court has no power at all and that it is a mere rubber stamp when the prosecution and one accused agreed that, that particular accused will be treated as an approver.

10. The argument that the revision-petitioner having been treated as an approver in other cases including in one case before the same Court, it was obligatory on the Court to treat him as an approver in the present case also, cannot be accepted. In the *State (Delhi Administration) v. Jaggit Singh* referred to earlier, pardon was granted in respect of one offence whereas that person figured as an accused in four other cases. An argument was raised that since he was an accused in four other cases he could not be examined as an approver in the case in which he was recognised as such. It must be noted that; that was a case of joint trial, whereas there is no joint trial in the present case or in any other fodder scam cases. In spite of it being a joint trial, the Supreme Court rejected the contention that the approver could not be examined as an approver in one case since he has been arrayed as an accused in the other cases. Therefore, this argument also cannot persuade this Court to interfere with the orders of the Sessions Court. Once the position is reached that the Court itself has discretion in the matter of acceding to a request to treat one of the accused as an approver and it was not merely a matter of contract between the prosecution and one of the accused, it cannot be said that the order passed by the Court below in the present case is one without jurisdiction. Then the only question is whether the Court below has acted unreasonably in exercising its discretion in not permitting the revision-petitioner to be treated as an approver. On going through the order of the Court below I find that the Court below was justified in adopting the stand it did, in the circumstances of the case. As observed by the Supreme Court in *State of U.P. Vs. Kailash Nath Agarwal and Others*, , an order granting pardon may be open to revision. But, whether the Court whose powers are invoked for that purpose will interfere or not is a matter depending upon the circumstances of each case. Incidentally, it may be noticed that the above decision also indicates that the tender of pardon is a proceeding of a criminal Court amenable to revisional jurisdiction indicating thereby that it is not merely a matter of contract between the prosecution and the accused. Good reasons are given by the Special Judge for refusing to accede to the prayer of the accused to treat him as an approver and in my view, the said reasons cannot be said to be unsound or untenable, calling for interference by this Court in revision.

11. There is yet another aspect. Immediately after rejecting the application made

by the approver which is challenged in this revision, the Special Court framed a charge against the revision- petitioner as an accused. The revision-petitioner, as an accused pleaded "not guilty" to that charge. After entering a plea of "not guilty", it appears to me that it is not open to the revision-petitioner to pursue his claim to be treated as an approver. In any event, it appears to me, that in view of the plea of "not guilty" entered by the accused to the charge framed against him, the scope for interference by this Court in revision has become considerably less even if it has not vanished altogether.

12. Since I am in agreement with the order of the Court below in the circumstances of the case and in the view I have taken as above, I find no reason to interfere. I dismiss the revision.