

(1997) 12 MP CK 0017
In the Madhya Pradesh High Court
Case No : Criminal A.No. 122 of 1988

Gunwanta Bai @ Munnibai

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 03-12-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 308, 308(1), 308(4), 308(5)

Citation : (1998) ILR (MP) 972 : (1998) 2 MPLJ 469 : (1999) 1 RCR(Criminal) 71

Hon'ble Judges : Rajeev Gupta, J; D.P.S. Chauhan, J

Bench : Division Bench

Advocate : Dilip Naik, Dy. Advocate General, Prakash Gupta, for the Appellant;

Final Decision : Allowed

Judgement

The present appeal is at the behest of Mst. Gunwanta Bai alias Munnibai against her conviction in Sessions Trial No. 30/86 vide judgment and order dated 12th January, 1987 passed by the Sessions Judge, Balaghat. She was convicted for the commission of offence punishable u/s 302, Indian Penal Code with the aid of Section 34 and was sentenced to imprisonment for life as well as for commission of offence punishable u/s 392/397, Indian Penal Code and was sentenced to seven years" R. I. The sentences so awarded were made to run concurrently.

She was tried for committing the murder of Parwata Bai wife of Fattanlal whose murder took place at about 4.30 P.M. in the evening of 22-3-1985 in village Banna, P. S. Baihar, District Balaghat, in regard to which, the Crime No. 42/85 was registered.

In Sessions Trial No. 31/86, Jeevanlal was tried for charges punishable Under Sections 302, 302/34, 392/397, Indian Penal Code, wherein he was acquitted vide judgment and order dated 22-12-1986. Consequent upon the acquittal of Jeevanlal, the present appellant was put to trial in S. T. No. 30/86 wherein she has been convicted and sentenced as has already been stated hereinabove.

Heard the learned counsel for the appellant and the learned State Counsel.

Learned counsel for the appellant, has, at the outset, given challenge to the validity of the trial of the appellant after her having been granted pardon i.e. her having been made an approver. The objection is that the entire trial of Gunwanta Bai is vitiated, as the condition precedent as required u/s 308 of the Code of Criminal Procedure, 1973 (for brevity, hereinafter referred to as "the Code") regarding certification by the Public Prosecutor whether, such person, in his opinion, not complied with the condition on which tender was made either by wilfully concealing anything essential to the prosecution or by giving false evidence, has not been satisfied.

Learned State Counsel does not dispute the fact that the Public Prosecutor has not issued any certificate as required or envisaged u/s 308 of the Code, but he accepting the position of non-certification submits it would not be a lacuna so to vitiate the trial of the appellant. According to him the provision is directory.

So far as the position of an approver under the Code is concerned, he is a person who is made a witness to the occurrence, that he has been forced to participate in the crime and the granting of pardon in substance and in effect is a contract between the State on one hand and the person to whom it is granted on the other or it may be called an act of grace which is exercised to bestow mercy from the punishment which is inflicted on a criminal for a crime he has committed but it, in its character is conditional having object behind that with the aid of the evidence of such person, the offence could be brought home against the rest of the accused persons. Thus the person to whom the pardon is granted is under protective veil which could be lifted u/s 308 of the Code. The veil could be lifted by the Public Prosecutor by its certification that in his opinion such person has not complied with the conditions on which the tender was made i.e. he either wilfully concealed anything which was essential for prosecution or gave false evidence.

The question for consideration is regarding the nature of the provisions u/s 308 of the Code, which is as extracted below :-

"308(1) Where, in regard to a person who has accepted a tender of pardon made u/s 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 u/s 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."

The corresponding provisions in the Code of Criminal Procedure (hereinafter referred to as the "Old Code") contained in Section 339 and 339A, which are extracted below, also need to be noticed :-

"339. (1) Where a pardon has been tendered u/s 337 or Section 338 and the Public Prosecutor certifies that in his opinion any person who has accepted such tender 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 :

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court."

"339-A. (1) The Court trying u/s 339 a person who has accepted a tender of a pardon shall -

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused u/s 271, Sub-section (1), and

(b) if the Court 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 the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court, or the Magistrate, as the case may be, shall, before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code pass judgment of acquittal."

The provision u/s 308 of the Code is for safeguarding the right of the person who has been granted pardon i.e. has been made approver in any case as he is the person for helping the prosecution for bringing the offence to home in respect of other co-accused person and if such person is put to trial without any safeguard then the position may develop that the serious crimes may go unpunished. To ward off such a situation, as a measure of safeguard, legislature put the rider providing for certification by the Public Prosecutor as well as circumscribing the scope of certification which could be done only under the two circumstances, one that such person has wilfully concealed something essential to the prosecution or 2nd that he has given false evidence and the Public Prosecutor has to form opinion as to which is the circumstance in existence in a given case and in which regard the approver has violated the conditions, on which tender of pardon was made. After formation of such an opinion as is provided in Sub-section (3), such person is bestowed with a right for an opportunity to prove that he has complied with the condition i.e. he has given the requisite information to the Public Prosecutor as provided. Thus his prosecution is subjected to the formation of opinion by the public prosecutor and an opportunity is made available to the approver for proving non-satisfaction of condition precedent and whereon the Court to take decision. After such exercise, if the Court finds default on the part of approver, then the approver can be prosecuted for the crime as well as for making false statement, as the circumstances may be.

The controversy, as is involved in the present case, is not *res integra* except that no case is available under the Code. The cases on the point under the Old Code of 1898 are taken into consideration. In the case of *Emperor Vs. Maria Basappa*, , Court had the occasion to consider the provision of Section 339(1) of the Old Code and the Court observed as :

"The pardon that was given to the approver *prima facie* acts as a bar to any prosecution of the approver for the offence in respect of which the pardon was tendered, or in respect of any other offence of which he appears to be guilty in connection with the same matter, except so far as the legislature may authorize

a prosecution in such a case, and the effect of Sub-section (1) of Section 339, as it now stands, is clearly to make the certificate by the Public Prosecutor the sole basis of a prosecution of an approver. It is not suggested that there are other provisions, such as Chapter XXXV of the Criminal Procedure Code, under which a Sessions Judge's order directing a complaint can be justified and the general rule of construction applies, *expressio unius est exclusio alterius*. Therefore, it is only under the conditions specified in Sub-section (1) of Section 339 that the approver can be prosecuted, as the Sessions Judge proposes to prosecute him."

In this case the entire prosecution proceedings were held to be illegal.

The other case of *Ali v. The Crown* ILR 1924 Lah 379 is the case under the Old Code where conditional pardon u/s 337 was granted to appellant Ali who appeared as a witness of the incident of murder in respect of the co-accused person Mangal Singh. The District Magistrate recorded an order in which he held that Ali had forfeited his pardon and directed that he should be tried for the murder and on this basis he was tried by the Sessions Court and his conviction was recorded and was sentenced to death. A preliminary objection was raised in appeal before the Appellate Court that the provisions of Sections 339 and 339-A of the Criminal Procedure Code (old Code) as amended by the Amendment Act which came into force on the 1st September, 1923, have not been complied with and that the trial is, therefore, vitiated. In this case submission was that no certificate has been made by the Public Prosecutor as required u/s 339(1) to the effect that in his opinion, Ali has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender of pardon was made. There was no certificate on the record, and" none was ever given by the Public Prosecutor, and in its absence, Court found that the trial was vitiated.

Further in regard to Section 339-A it was laid down that the Court trying a person, who has accepted a tender of pardon, shall, if the Court is a Court of Session, before the charge is read out and explained to the accused, ask him whether he pleads that he has complied with the condition on which the tender of the pardon was made. The Court found that there was nothing on the record to show that the accused was asked, but the note of the Sessions Judge, recorded apparently before the trial commenced, was there and was to the effect that the accused pleads that he has not complied with the conditions on which the tender of pardon was made. The question put to the accused was "Did you fulfill the conditions on which the pardon was granted and gave true evidence" and his reply was in the negative. The Court found that this appears to have been taken as a plea that he was not raising his pardon as a bar to the trial. The accused should have been asked whether he pleaded that he had complied with the conditions on which the tender of pardon was made. The terms of the section should have been clearly explained to him, and it should have been made clear to him that he could plead the pardon as a bar to his trial and the Court held that there has not been a proper compliance within the terms of this section. The

appeal was accepted after setting aside the conviction and sentence as well as the trial, and accused was discharged leaving it open to the authorities to take such further action, if any, as they may deem necessary.

The third case, in the sequence as cited, is *Fatta v. Emperor* AIR 1947 All. 71 wherein the Court held as :

"It is clear from the language of Section 339 that the whole and sole basis of the prosecution of a person, to whom pardon has been tendered u/s 337, Criminal Procedure Code, for the offence in respect of which the pardon is tendered, is a certificate by the Public Prosecutor that in his opinion "any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made." Until this condition laid down by Section 339 is fulfilled, there can be no valid basis for the prosecution of a person to whom a pardon is tendered u/s 337, Criminal Procedure Code, for the offence in respect of which the pardon has been so tendered."

Here in this case Court quashed the committal proceedings.

The fourth case relied on is *State of Madhya Pradesh Vs. Dalchand Hardayal*, . In this case an approver renounced his pardon, and expressed his unwillingness to be examined as a prosecution witness and the Court interpreted the provision of Section 339 of the Criminal Procedure Code by saying that when an approver is guilty of breach of promise and gives either false evidence or wilfully conceals anything essential in the case, he shall forfeit his pardon and such a person can be tried in respect of the offence for which he was tendered pardon. This section does not expressly say as to how the approver is to be treated if he refuses to give evidence on behalf of prosecution, but impliedly, it is obvious that the holding back of his evidence amounts to wilfully concealing the facts which are essential for the prosecution.

In this case the Court under the unusual circumstance interpreted the scope of words "wilfully concealing the facts". The Court held that an approver where he gives false evidence or is unwilling to step in the witness-box on behalf of the prosecution forfeits his pardon and there is no doubt that he can be tried for the offence in respect of which he was tendered pardon. Section 339 requires that in cases where an approver has forfeited his pardon, the Public Prosecutor shall move the Court by a certificate.

In this case the Public Prosecutor did not give a certificate for the trial of Dalchand.

Learned State counsel cited the case of *Indar Pal v. Emperor* AIR 1936 Lah. 409. It is on different premises though the learned counsel has relied on paragraph 2 (at page 411) the following observation :

"The certificate cannot be said to be defective because it does not mention the particulars in regard to which the pardon was alleged to have been forfeited.

Section 339, Criminal Procedure Code, does not require that any such particulars shall be given in the certificate."

In the present case the controversy is different. An application was moved to the Additional Sessions Court, Balaghat purported to be u/s 308, Criminal Procedure Code by the Assistant Government Pleader, which was dated 22-12-1986. It is not necessary to go into the status of the Assistant Government Pleader in the present case. The question for consideration is whether this application satisfies the requirement of Sub-section (1) of Section 308 of the Criminal Procedure Code. Relevant portion of the application as relied on by the learned State counsel is as :

"That she did not comply with conditions of pardon. Therefore prosecution submits this application for the trial of S. T. No. 30/86 in the Hon"ble Court."

It is not a certificate by the Public Prosecutor satisfying the requirement of the law. The requirement is that the Public Prosecutor has to certify that in his opinion such person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which tender was made. It deals with two situations. First, when such person to whom a tender was made has wilfully concealed anything essential to the prosecution case and second thing is that the person has given false evidence. The person in the case of false evidence in addition to the trial for the offence for which the pardon was granted, he has to be tried for the offence of giving false evidence. In these circumstances the formation of the opinion by the Public Prosecutor requires that he has to form an opinion in regard to the default as to whether the person has wilfully concealed anything essential to the prosecution case or the person has given false evidence and the certificate has to be specific in the matter. In case he has given false evidence, then he has to be tried for commission of the offence of giving false evidence with the sanction of the High Court and it is the safeguard which the legislature has placed.

On the said application dated 22-12-1986 u/s 308 of the Criminal Procedure Code, the Court passed the following order the same day :-

"22-12-1986 :

State by Shri Siddiqui, A.P.P.

Accused Gunwanti Bai produced in custody.

Judgment in S. T. No. 31/86, State v. Jeewan Lal pronounced by which this Sessions Trial No. 30/86, State v. Gunwanti Bai has been ordered to be started.

Shri S. A. Siddiqui, A.P.P. filed an application u/s 308, Criminal Procedure Code for trial of this case. It is allowed.

For trial programme.

Accused be remanded back.

Put up on 1-1-1987."

Further safeguard to the person to whom tender of pardon was granted was provided in Sub-section (3) of Section 308 of the Criminal Procedure Code by making that the accused shall be entitled to plead that he has complied with the condition upon which such tender was made and if he pleads so then in that case the prosecution to prove that the condition has not been complied with. Under Sub-section (4) at such trial, the Court is required, if it is the Court of a Session, before the charge is read out and explained to the accused to ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made. It is by way of doubly safeguard. Under Sub-section (5) it is provided that if the accused does so plead that he has complied with the condition on which the tender of pardon was made, the Court shall proceed with the trial and it is required before passing judgment in the case to record finding 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.

All what has been stated above indicates that in such cases where a person has become approver i.e. tender of pardon was made, the legislature has taken full care of it, providing adequate safeguard, and these safeguards cannot be held directory so to defeat the very purpose and would not be the purpose oriented interpretation. Thus the requirements u/s 308 of the Code are held to be mandatory and the non-compliance thereof would vitiate the trial.

In the context it is relevant to cite the case of *Horilal v. Crown* (1939 NLJ 497 : ILR 1940 Nag 668). In this case the appellant Horilal was convicted of an offence punishable u/s 302, Indian Penal Code and sentenced to death. There the objection was raised regarding irregularity on account of failure to comply with the requirement of Section 339-A, Criminal Procedure Code and the Court held that the trial for the offence in respect of which the pardon was granted could not begin until the requirements of Section 339-A of the Criminal Procedure Code (Old) were carried out in limine, and the judgment of conviction could not be delivered unless the Court with the aid of assessors found that the accused had failed to comply with the conditions of the pardon. The Court said it was his duty to explain to the accused the terms of Section 339-A, Criminal Procedure Code and invite him to plead, record his plea and call upon the assessors to deliver their opinion on that plea and then to record his own finding. The failure to perform that duty vitiates the trial. Under the proviso to Sub-section (1) of Section 339 the accused is entitled to plead, before he is tried for the offence in respect of which the pardon was tendered, that he has complied with the conditions of his pardon, in which case the onus lies on the prosecution to prove that such conditions have not been complied with. The Court quashed the conviction and the sentence and directed that the appellant shall be again tried according to law with advertence to the remarks made.

In view of above, the position thus comes to that the requirements of Section

308 of the Code are mandatory. In the present case non-compliance of requirement of Sub-sections (1), (4) and (5) of Section 308, Criminal Procedure Code is writ large and we consider it a proper case for setting aside the conviction of the appellant on account of the fact that the trial is vitiated on account of non-compliance of the mandatory provisions of Section 308, Criminal Procedure Code.

We, therefore, accept the appeal and set aside the conviction of the appellant Under Sections 302/34 and 392/397, Indian Penal Code whereunder she was sentenced to imprisonment for life and seven years rigorous imprisonment, respectively as well as the trial, and discharge the accused, but we leave it open to the authorities to take such further action if any as they may deem necessary at this distance of time involved in the present case.

The appellant is in custody. She shall be released forthwith unless wanted in some other case.