

(1971) 07 KAR CK 0006
In the Karnataka High Court

State of Mysore

APPELLANT

Vs

H. Gundappa Honnappa Gowda and Others

RESPONDENT

Date of Decision : 01-07-1971

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 337, 338, 339, 339 (1), 438
Penal Code, 1860 (IPC) — Section 203, 34

Citation : (1972) CriLJ 191

Hon'ble Judges : M. Santhosh, J;K. Bhimiah, J

Bench : Division Bench

Judgement

1. This is a reference made by the learned Sessions Judge, Chikmagalur u/s 438 Criminal P- C. in Sessions Case No. 18 of 1970.

2. A charge-sheet was filed against accused 1 to 5 who are respondents before this Court, by the Circle Inspector of Police. Koppa Circle in the court of the Judicial Magistrate First Class, Narasimharajapur alleging that they had committed offences under Sections 302 323, 120-B (1), 201 read with Sections 34 and 203 I. P. C. In the course of the enquiry, the Assistant Public Prosecutor made an application before the learned Magistrate on 26-10-1970 u/s 337 Criminal P. C. praying that pardon may be tendered to accused-3 (respondent-3) and he may be allowed to give evidence on behalf of the prosecution. The said application was allowed by the learned Magistrate by his order dated 12-11-1970 and permission was granted to treat accused-3 as an approver on 20-11-1970 and he has been examined on behalf of the prosecution as P. W. 1. Then charges were framed against all the five accused including the approver (accused-3) under Sections 302, 120-B, 201, 202 read with Section 34 I. P. C. by the learned Magistrate, and he recorded the plea of all the accused including the approver (accused-3). Thereafter the learned Magistrate, by his order dated 19th December 1970 committed all the five accused including approver (accused-3) to stand their trial before the Court of Session, Chikmagalur.

3. Before the trial started in the Court of Session, Chikmagalur, the learned

public prosecutor filed an application, pointing out the illegality committed by the learned Magistrate in committing the approver (accused-3) for trial and prayed that the Sessions Court should not act u/s 438 Criminal P.C. and recommend to the High Court that the order of committal of the approver (accused-3) to the Court of Session should be quashed. The learned Sessions Judge, thereafter by his order dated 22nd Feb. 1971 made this reference u/s 438 Criminal P. C, recommending that the order committing the approver (accused-3) made by the learned Magistrate should be quashed,

4. The learned Government pleader appearing on behalf of the State has supported this reference. Shri Deshpande learned Counsel appearing on behalf of respondent-2 (accused-2) has also supported the reference.

5. It is clear from what has been stated above, pardon was granted by the learned Magistrate by his order dated 12-11-1970. It is also clear from the records that respondent-3 (accused-3) was examined as P. W. 1 in the committal proceedings. The learned Sessions Judge has also pointed out that it is not the case of the prosecution that the approver" did not give a true account of the case and that at any stage of the enquiry pardon was forfeited by the order of the Court. It is also clear that the Public Prosecutor did not grant any certificate as required u/s 339 Criminal P. C. as respondent-3 in his opinion who had accepted the tendering of pardon had given wilfully false evidence.

6. Section 337 Criminal P. C. reads as follows:

Section 337. Tender of pardon to accomplice. In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to seven years or any offence under any of the following sections of the Indian Penal Code, namely, Sections 161, 165, 165-A, 216-A, 369, 404, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, 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;

Provided that, where the offence is under inquiry or trial no Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1-A) Every Magistrate who tenders pardon under Sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record;

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

According to Sub-section (2-A) of the above said section, in every case where a person has accepted a tender of pardon and has been examined under Sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence commit him for trial to the Court of Session or High Court as the case may be.

7. In the instant case, the learned Magistrate was perhaps under the impression that Sub-section (2-A) authorises him to commit the accused to the Court of Session and committed respondent No. 3 along with other accused for trial before the Court of Session. In State Vs. Mali Jaso Bhoja, when dealing with the provisions of Sub-section (2-A) of Section 337 Criminal P. C. the court observed as follows:

Now it is fairly clear that a person, who is an accused, cannot be examined at the same time retaining his capacity of an accused, as a witness for the prosecution in the same proceedings- It is therefore, amply clear that, in Sub-section (2-A), the word "person" in the sentence "in every case where a person has accepted a tender of pardon", refers to persons who are accused other than the approver, for by the pardon the approver ceases to be an "accused", till the pardon remains in force. In other words, it is not competent to the learned Magistrate to commit a person who has been tendered a pardon and who has been examined as a witness to Sessions under the provisions of Sub-section (2-A).

8. Apart from this, " it may be pointed out that Section 339 Criminal P. C. clearly lays down that an approver who has been tendered pardon can be tried for the same offence only if the Public Prosecutor certifies in his opinions that the approver who had accepted the tender of pardon has wilfully given false evidence. Proviso to the above sub-section also points out that the approver cannot be tried jointly with the other accused. Section 339 Criminal P. C. reads as follows:

Section 339 (1). When 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.

9. We have already pointed out that it is not the prosecution case that respondent-3 the approver in this case has not given a true account of facts and that at any stage of the enquiry the pardon granted has been forfeited by the order of the court, We have also pointed out that no certificate has been given by the learned Public Prosecutor as per Section 339 Criminal P. C. Apart from this, it is needless to point out that in the same enquiry or trial, a person cannot figure both as an accused and a witness,

10. From what has been stated above it is clear that the order of the learned Magistrate framing charges against respondent-3 and committing him for trial to the Court of Session is clearly illegal and has to be set aside.

11. In the result, for the reasons stated above, we accept the reference and quash the charges framed by the learned Magistrate, Narasirharajapura against respondent-3 (accused-3 Bullegowda). We also quash the committal order made by the same learned Magistrate committing respondent-3 (accused-3 Bullegowda) for trial to the Court of Session,