
(2016) 04 BOM CK 0231
In the Bombay High Court
Case No : Writ Petition No. 237 of 2015.

The State of Maharashtra

APPELLANT

Vs

Narendra G. Goel and Others

RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 306(4)

Citation : (2016) 2 AIRBomRCri 398 : (2016) ALLMRCri 3275 : (2016) 2 BomCR(Cri) 709 : (2016) 4 CriCC 774 : (2016) CriLJ 4227 : (2017) 1 Crimes 342 : (2016) 5 MhLJCrI 468

Hon'ble Judges : V.M. Kanade;Revati Mohite Dere, JJ.

Bench : Division Bench

Advocate : Raja B. Thakare, Special Public Prosecutor, for the Appellant; Amit Jajoo a/w Mukesh Vats and Victor Basu i/b PKA Advocates and Naima Shaikh i/b Khan Abdul Waheb, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Revati Mohite Dere, J. - The short question which arises for consideration in this petition is:-

"Whether an accused has a right to cross examine the approver, who is examined under Section 306(4) of the Code of Criminal Procedure by the Magistrate, at the pre-committal stage?"

2. At the outset, we may note, that by a separate order, we have dismissed Criminal Writ Petition No.3919 of 2014, preferred by the respondent no.1 herein, challenging (i) the order dated 10th January, 2006, passed by the learned Additional Metropolitan Magistrate, 37th Court, Esplanade, Mumbai in C.C.No.525/PW/2005, granting pardon to Pradeep Parab and (ii) the order dated 22nd September, 2014, dismissing the petitioner's application seeking compliance of the order dated 15th February, 2013, passed by the High Court in Writ Petition No.1309 of 2012.

3. Few facts as are germane for deciding the present petition are as follows;

On 23rd August, 2003 Dr.Asha Goel, a Canadian National of Indian origin was found murdered in a flat belonging to her brother ? Suresh Agarwal, at Malabar Hill, Mumbai. Pursuant thereto, at the behest of Suresh Agarwal, the brother of the deceased, the Malabar Hill Police Station, registered C.R.No.93 of 2003 against unknown persons, alleging offences punishable under Sections 302, 397, 452 r/w 34 and 120B of the Indian Penal Code. As there was no progress in the investigation, the case was transferred to the DCB, CID, Unit ? II, Mumbai. Thereafter, accused came to be arrested and on completion of the investigation, charge-sheet came to be filed. Before the case was committed to the Court of Sessions, original accused no.1 i.e. respondent no.3 herein gave his confession, which was recorded by the learned Metropolitan Magistrate on 26th and 27th September, 2005. On 28th December, 2005, cognizance was taken and process was issued against the accused persons, copies were supplied under Section 207 of Code of Criminal Procedure and the matter was adjourned for committal of the case under Section 209 of the Code of Criminal Procedure. On 9th January, 2006 the prosecution preferred an application under Section 306 of the Cr.PC for grant of tender of pardon to respondent no.3 ? Pradeep Parab. On 10th January, 2006, the learned Metropolitan Magistrate, accepted the tender of pardon on the ground, that respondent no.3 makes full and true disclosure of the whole of the circumstances within his knowledge, relating to the offence and with regard to every person concerned with the same. Thereafter, the case was committed to the Court of Sessions, and numbered as Sessions Case No.100 of 2006.

When the case came up before the learned Sessions Judge, for framing of charge, the Respondent No.1 preferred an application seeking his discharge from the said case. The learned Sessions Judge rejected the said application vide order dated 29th February, 2012. Aggrieved by the said order rejecting his application for discharge, the respondent no.1 preferred Criminal Writ Petition No.1309 of 2012, in this Court. When the said petition came up before the learned Single Judge of this Court, it was contended by the learned counsel for respondent no.1 that the provisions of Section 306(4)(a) were not complied with. It appears that the Special Public Prosecutor appearing for the State sought time, to examine the grievance made by the counsel for the respondent no.1, as to whether there was compliance with the provisions of Section 306(4)(a) or not, and accordingly the matter was adjourned by three weeks. Realising that the respondent no.3 was not examined as a witness before the learned Magistrate, as contemplated under Section 306(4)(a) of Code of Criminal Procedure, the prosecution preferred an application before the learned Sessions Judge, seeking to rectify the said defect. The learned Sessions Judge was pleased to reject the said application, vide order 21st June, 2012, pursuant to which, the said order was challenged by the State in this Court, in Criminal Writ Petition No.2421 of 2012. Both, the Writ Petition preferred by the State as well as the Writ Petition preferred by the respondent no.1, came up before the learned Single Judge of this Court. The learned Single Judge vide order dated 15th February, 2013 was

pleased to allow the petition preferred by the State and accordingly the matter was remitted to the Court of the learned Magistrate, for complying with the requirement of Section 306(4)(a) of Code of Criminal Procedure. In view of the said order, the petition preferred by the respondent no.1 (Original Accused No.4) did not survive and was disposed of accordingly.

After remitting the matter, the respondent no.3 was examined by the learned Metropolitan Magistrate as contemplated under Section 306(4)(a) of the Cr.P.C. After the approver was examined, the respondent no.1 herein, preferred an application seeking permission to cross examine the approver. The said application was resisted by the prosecution, essentially on the premise, that in pre-committal proceedings the accused did not have the right to cross examine the approver.

The learned Metropolitan Magistrate, Esplanade, Mumbai, after hearing the parties vide the impugned order dated 2nd December, 2014, granted permission to the respondent no.1, to cross examine the approver, before committing the case to the Court of Sessions. The State of Maharashtra being aggrieved by the said order, has challenged the same by this petition.

4. Mr. Thakare, learned Special Public Prosecutor appearing on behalf of the petitioner ? State has assailed the order, on several counts. He contended that the approver was examined by the Court on solemn affirmation and as such, the same was not an examination conducted by the prosecution. He submitted that the examination contemplated under Section 306(4) of the Code is more or less akin to the examination of the complainant and witnesses by a Magistrate, while processing the complaint under Section 200 of the Cr.P.C., before issuance of process. He submitted that a Sessions trial commences only after charge is framed under Section 228 of the Cr.P.C and hence the question of "examination of witnesses" arises only thereafter, and that too before the Court of Sessions. According to him, there is no express provision in the Code, more particularly under Section 306(4) of the Cr.P.C which permits the accused to cross examine an approver, before committing the case to the Court of Sessions, inasmuch as, the Magistrate is not empowered to appreciate the evidence, in a Sessions triable case. He relied on several judgments, in support of his submission.

5. Per Contra, Mr.Amit Jajoo, learned counsel appearing for the respondent no.1, submitted that the right to examine an approver is inherent under Section 306(4) of the Cr.P.C. He submitted that under Section 138 of the Evidence Act, the term "examination" includes examination-in-chief, cross examination and re-examination and therefore the term "examination" used in Section 306(4) will have to be read as "examination" as contemplated under Section 138 of the Evidence Act. He relied on the judgment in the cases of CBI v. Ashok Kumar Aggarwal and Another (2013) STPL (Web) 950 SC, State of Kerala v. Monu D. Surendran and Another (1988) Cri.LJ 812 (Kerala); Milind s/o Atmaram Pawar and Another v. State of Maharashtra (2003) Vol.105(3) Bom.LR.778 to bring home his point. Learned Counsel appearing for the other respondent ? accused

supported the submissions canvassed by Mr.Jajoo.

6. Heard learned counsel for the parties at length. Considering the issue raised in this petition, it is not necessary to dwell in detail into the facts of the present case. Suffice it to say, that the accused have been charged with the offences punishable under Sections 302, 397, 452 r/w 32 and 120B of the Indian Penal Code and that the said offences are sessions triable offences. Before we proceed to discuss, whether or not, an accused has a right to cross examine an approver, at the pre-committal stage i.e. before the case is committed to the Court of Sessions, it will be appropriate to reproduce Section 306 of the Code of Criminal Procedure :-

Section 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.

(emphasis supplied)

7. In the present case, we are essentially concerned with subsection (4)(a) of Section 306 of the Code of Criminal Procedure, which deals with examination of the approver, as a witness. Can the term "examination" used in Section 306(4) (a), be interpreted to mean "examination" as contemplated under Section 138 of the Evidence Act, so as to give an accused the right to cross-examine the approver, at the pre committal stage? The answer is an emphatic "No" and we are in our conclusion supported by the Judgment of the Apex Court in this regard.

8. In "Ranadhir Basu v. State of West Bengal"(2000) 3 SCC 161 the Apex Court has held, that the proceeding before the Magistrate is neither an investigation nor a trial and hence an accused does not have a right to cross examine the approver. Para 7 of the said Judgment, reads thus:-

"It was contended by Mr. Muralidhar, learned counsel appearing for the appellant that Sudipa was not "examined as a witness" as contemplated by Section 306(4) Cr.P.C. He submitted that Sudipa was examined by the Magistrate in his chamber and not in the open Court and at that time the accused were not kept present. Her evidence was subjected to cross-examination. In support of his submission he relied upon the decision of this Court in Suresh Chandra Bahri v. State of Bihar 2004(1) ALT(Cri) 507. In that case this Court after pointing out the object and purpose of enacting Section 306(4) Cr.P.C. had held that since the provision had been made for the benefit of the accused it must be regarded as mandatory. It had observed therein that :(SCC p. 101, para.30).

"The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused in as much as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing Court itself at the very threshold....".

From this observation it does not follow that the person who is granted pardon must be examined in the presence of the accused and that the accused has a right to appear and cross-examine him at that stage also. As pointed out by this

Court in that case the object is to provide an opportunity to the accused to show to the Court that the approver's evidence at the trial is untrustworthy in view of the contradictions or improvements made by him during his evidence at the trial. Considering the object and purpose of examining the person accepting tender of pardon as a witness is thus limited. The proceedings which takes place before the Magistrate at that stage is neither an inquiry nor a trial. Therefore, the submission of the learned counsel that Sudipa should have been examined as a witness in open Court and not in the chamber and that while she was examined the Magistrate should have kept the accused present and afforded to them an opportunity to cross-examine Sudipa cannot be accepted. The phrase "examination of a witness" does not necessarily mean examination and cross-examination of that witness. What type of examination of a witness is contemplated would depend upon the object and purpose of that provision. Section 202 Cr.P.C. also contemplates examination of witness yet it has been held, considering the object and purpose of that provision, that the accused has no locus standi at that stage ?...".

9. The Madras High Court in the case of "State by Assistant Commissioner of Police, Crime Record Bureau, Inspector of Police v. Saravanan, Prakash and Vijay alias Vijayakumar 2004 (1) ALT (Cri) 507 " faced with a similar issue, i.e. whether or not an accused can be permitted to cross-examine an approver, at the pre-committal stage? placing reliance on Ranadhir Basu v. State of West Bengal (supra) held in Para 6 as under:

"6. On a reading of the above observation, it is clear that the ratio decided by the Supreme Court is that the committal proceeding which takes place before the committal court at that stage is neither an enquiry nor a trial. Therefore, the contention that the accused must be given opportunity to cross-examine in the committal court when the approver is examined cannot be accepted. The phrase "examination of witness" does not mean examination and cross-examination of that witness. Therefore, it is clear that the accused cannot claim as a right to cross-examination."

10. Reliance placed by the learned counsel for the Respondents on State of Kerala v. Monu Surendran (supra) is completely misplaced as the same was overruled by the Full Bench of the Kerala High Court in "L.S. Asokan v. State of Kerala" 2005(3) ILR (Ker) 567. The relevant para is as follows:

"20. In the light of the decisions of the Apex Court adverted to above, we are of the considered view that Monu Surendran has not been correctly decided and with due respect we overrule the same and hold that In re Chief Judicial Magistrate (Supra) and Kurian v. State of Kerala were correctly decided. There is no dispute that those appellants/accused who had cross-examined the approver during his examination under Section 306(4)(a) Cr.P.C. was pursuant to the direction given to the Chief Judicial Magistrate in Monu Surendran's case wherein it was the State which sought for the direction to examine the approver giving opportunity to the accused to cross-examine him. Thus, cross-examination was

virtually thrust upon the appellants/ accused without their asking for it. In such situation, the cross-examination conducted by them cannot be said to be as of right."

11. Reliance placed by the learned counsel for the respondent on *Sitaram Sao alias Mungeri v. State of Jharkhand*, reported in (2007) 12 SCC 630 is also completely misplaced. The issue involved in this case, was whether the evidence given by the accomplice is admissible, without any corroboration to the same, and if the procedure adopted by the CJM was illegal. Reliance placed on para 34 of the said Judgment, is out of context and has no bearing to the issue before us.

12. The Judgments relied upon by the learned counsel for the respondent are clearly distinguishable and as such have no application to the facts of the present case. We may note here, that in none of the Judgments relied upon by the learned counsel for the respondent, the Courts were required to deal with the specific question raised before us; i.e. "whether the accused has a right to cross examine the approver at the pre-committal stage".

13. The examination which is contemplated under Section 306(4) of the Code, cannot be equated with the "examination" of a witness under Section 138 of the Evidence Act. If what is contended by the learned counsel for the respondent is to be accepted, and the accused is given a right to cross examine an approver at the pre-committal stage, the same would not only be contrary to law, but would lead to hazardous consequences, as a Magistrate would be required to deal with and decide the admissibility of any question raised in the examination/cross examination by the accused, in a case exclusively triable by the Court of Sessions. Under Section 306 of Code of Criminal Procedure, what cannot be lost sight of is, that when an approver is being examined by a Magistrate, he is merely recording his statement, after grant of pardon and as such, he merely acts as a post office by recording the statement under Section 306(4) and thereafter, forwards it to the Court of Sessions, which is the Court competent to try the case. Thus, the term "examination" used in Section 306(4) of the Code, cannot be construed to mean an examination, contemplated under Section 138 of the Evidence Act. The accused will get an opportunity to cross examine the approver, only after the case is committed to the Court of Sessions, when the approver is examined as a prosecution witness, after which the accused will have a right to cross examine the approver and bring out the contradictions or improvements made by him during his evidence at the trial.

14. In conclusion, we may note that under Section 306 of the Cr.P.C, the Magistrate is only empowered to examine the approver, as at this stage, the proceeding before the concerned Magistrate is neither an inquiry nor a trial, and therefore the accused has no right to cross-examine the approver. The Magistrate does not have the jurisdiction and discretion to "appreciate the evidence" which will be adduced before the Sessions Court and give any findings on the merits of the case. His duty is only to record the examination under Section 306(4)(a) and forward it to the Court of Sessions, whilst committing the case. The examination

of the approver as contemplated under Section 306(4)(a) cannot in any circumstance, be equated with the examination contemplated under Section 138 of the Evidence Act. In fact, the examination is more or less akin to an examination contemplated under Section 200 of the Code of Criminal Procedure. Hence, an accused has no right to cross examine an approver at the pre-committal stage.

15. In view of the aforesaid, the Petition is allowed and the impugned order dated 2nd December, 2014, permitting the respondent-accused to cross examine the approver, being contrary to law, is quashed and set aside.

16. All concerned to act on the authenticated copy of this order.