

DELHI HIGH COURT

M. M. Kochar

Vs.

State. (Delhi)

Criminal Revn. Appln. No. 591-C of 1966.

(S. N. Andley, J.)

10.1.1968

ORDER

S. N. Andley, J.

1. This revision is directed against the order dated May 10, 1966, of the Additional Sessions Judge, Delhi, in Sessions Case No. 20 of 1965 by which he made an order for granting a pardon to Sardari Lal Sabharwal, one of the accused in the aforesaid Sessions case. The revision has been filed by the petitioner who was one of the other co-accused.

2. On September 13, 1959, a complaint was lodged with the Police that the petitioner, along with Durgadas Moondhra and the said Sabharwal had, in or about 1957, entered into a conspiracy as a result of which they forged documents and made unauthorised endorsements on import licences which had been issued to Messrs. E. M. Alloock and Mehta (Private) Ltd., Calcutta, of which the said Moondhra was the Finance Director and the said Sabharwal was the Import Assistant. It was alleged that the petitioner had worked as an Assistant Controller of Imports and Exports in the office of the Chief Controller of Imports and Exports, New Delhi, up to November 4, 1957, and was thereafter working in the cash branch of that office. The challan was filed in the Court of a Magistrate, First Class, Delhi, and commitment proceedings took place in the Court of Mr. J. C. Aggarwal, Magistrate, First Class, Delhi, who by his order dated July 3, 1961, discharged the said Moondhra and Sabharwal, but framed the charge against the petitioner for an offence under Section 467 of the Indian Penal Code and committed him to the Court of Session. The State filed revision petitions against the discharge of the said Moondhra and Sabharwal and the petitioner filed a revision

petition against the charge framed against him. The Sessions Judge, Delhi, by his order dated February 21, 1962, accepted the revisions filed by the State and ordered that the said Sabharwal and Moondhra be also committed to the Court of Session and dismissed the revision filed by the petitioner.

The petitioner, the said Sabharwal and the said Moondhra filed three separate revision petitions against the aforesaid orders dated February 21, 1962, of the Sessions Judge in the Punjab High Court, but these revision petitions were rejected by Khanna, J. by his order dated April 22, 1964, because it was found that there was *prima facie* material justifying the trial of the petitioner and the said Moondhra and Sabharwal. Thereafter, and on being committed, the aforesaid three accused appeared before the Additional Sessions Judge, Delhi, on November 15, 1965. It was then that, on December 1, 1965, the said Sabharwal applied to the District Magistrate, Delhi, under Section 337 of the Code of Criminal Procedure for a tender of pardon to him.

3. In the aforesaid application, Sabharwal stated *inter alia* that he was "prepared to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned in respect of which he had been committed to stand his trial before the Court of Session". He, therefore, prayed that "subject to the applicant remaining on existing bail" he may be granted pardon and thereafter examined as an approver in the case.

An endorsement was made on December 22, 1965 on this application by the Deputy Legal Adviser/P.P. or the Central Bureau of Investigation in these words:

"In the interest of justice, pardon may please be granted to the applicant accused, on the condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned in respect of which he has been committed to stand his trial before the Court of Session under Section 120-B, Indian Penal Code, read with Sections 467/420, Indian Penal Code, 467/471. Indian Penal Code"

Since the accused had been committed for trial, the District Magistrate forwarded this application to the District Judge "for action, if he deems fit, under Section 338, Criminal Procedure Code" and since the trial was being held in the Court of Mr. R. N. Aggarwal, Additional Sessions Judge, Delhi, this application came to be dealt with by him.

It appears that notice of this application was given to the other two accused who appeared and argued the matter to urge that pardon should not be granted to the said

Sabharwal. It further appears that, as directed by the learned Additional Sessions Judge by his impugned order, Mr. R. N. Malhotra, Magistrate, First Class, Delhi, on May 17, 1966, recorded the statement of the said Sabharwal after tendering pardon as directed by the learned Additional Sessions Judge.

4. It appears that the said Moondhra filed a criminal revision, being Criminal Revision No. 166-D of 1966, against the impugned order in the Punjab High Court which was dismissed *in limine* by R. P. Khosla J. on May 16, 1966, i.e., one day before the pardon was tendered to the said Sabharwal. It was then that on or about June 28, 1966, that is, about six weeks after the pardon had been tendered to the said Sabharwal, so the present petition was filed in the Punjab High Court. It came up for admission before the Punjab High Court and a notice was issued by an order dated June 29, 1966.

As stated in the order of admission, it appears that the correctness of the judgment of the Madras High Court reported in AIR 1948 Madras 232, *In re R. Akbar Sheriff* was challenged. I may state here that the said judgment of Rajamannar J. (as he then was) states that an order made under Section 337 of the Code of Criminal Procedure was not revisable by the High Court. The entire judgment is to this effect: -

"I do not think that the act of the Magistrate under Section 337, Criminal Procedure Code, namely, tendering pardon to a person is revisable by this Court. No authority has been placed before me to show that it is revisable. If there are any irregularities in the grant of the pardon, they can be urged by the accused at the trial. The petitions are dismissed."

5. The first question, therefore, which is to be determined is whether an order made under Section 337 read with Section 338 of the Code of Criminal Procedure is revisable in exercise of the powers of this Court under Section 435 of the Code of Criminal Procedure. Sections 337 and 338 of the Code of Criminal Procedure are as follows: -

"337. (1) In the case of any offence Tribal 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 61, 165, 165-A, 216-A, 369, 401, 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 enquiry 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 of the First Class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the enquiry 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 a 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.

(2-A) 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.

(2-B) In every case where the offence is punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been examined under sub-section (2), then, notwithstanding anything contained in sub-section (2-A), a Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the

evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender a pardon on the same condition to such person."

6. It is evident from sub-section (1) of Section 337 of the Code that a pardon can be tendered to an accomplice "at any stage of the investigation or enquiry into, or the trial of the offence" and the object of tendering a pardon is "with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence", but such tender is to be on condition of the accomplice "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....."

Sub-section (1-A) of this section requires that the Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing. Sub-section (2) of this section requires that every person accepting a tender of pardon shall be examined as a witness in the trial. Sub-section (2-A) provides that if a person has accepted a tender of pardon and has been examined under sub-section (2), he can still be committed for trial to the proper Court if the Court before whom the proceedings are pending is satisfied that there are reasonable grounds for believing that such person is guilty of an offence. Sub-section (3) of this section provides that a person who has accepted the tender of pardon shall, unless he is already on bail, be detained in custody until the termination of the trial.

7. The contention of Mr. A. S. Johar, learned counsel for the petitioner, is that there must be good reasons which have to be recorded as provided by Section 337 (1-A) of the Code before a tender of pardon is made and, therefore, such an order for the tender of a pardon would be revisable under Section 435 of the Code because under the latter section, the superior Court can examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself not only as to the correctness or legality but also as to the propriety of any finding, sentence or order of such inferior Court.

It is the contention of the petitioner that there is nothing either in Sections 337 and 338 or in Section 435 of the Code limiting the jurisdiction of the superior Court from examining the propriety of an order tendering a pardon. He further contends that the tender of pardon in this case would nullify the orders of the Additional Sessions Judge and of the High Court, referred to earlier, whereby the said Sabharwal had been

ordered to be tried; that the tender should not have been made to the said Sabharwal as he was the main accused and that since it was admittedly a case of circumstantial evidence, the tender of pardon after the expiry of a little more than five years after the institution of the challan in Court would gravely prejudice the other two co-accused as the said Sabharwal was likely to stretch his statement so as to implicate the other two co-accused.

8. The first case upon which the petitioner relies is reported in *Sheobhajan Ahir v. King Emperor*,¹ in which pardon was granted to a co-accused against whom the case was withdrawn under Section 495 of the Code of Criminal Procedure. The other co-accused were convicted. The matter came to be dealt with by the High Court and Jwala Prasad J. observed that the Magistrate exercised wrong discretion in permitting the case against the approver to be withdrawn. This case does not deal with the contention which has been raised before me and is, therefore, of no help in determining whether a revision is competent against an order made under Section 337 or Section 338 of the Code of Criminal Procedure.

9. The next case cited is a decision of the Judicial Commissioner, Vindhya Pradesh, and is reported in *Kartar Singh v. State of Vindhya Pradesh*.² This case also does not deal with the competency of a revision. It merely deals with the weight to be attached to the statement of the approver where the confession is recorded late.

10. The next case is a decision of the Judicial Commissioner Manipur, reported in *Angom Kala Singh v. Manipur State*,³ which again related to the weight to be attached to the evidence of an approver when considering the appeal of the co-accused against their conviction.

11. The last case cited is a decision of the Judicial Commissioner of Himachal Pradesh as reported in *Ram Chand v. The State*⁴ and this case also deals with the weight to be attached to the evidence of an accomplice. There are observations in this and the other cases cited earlier to the effect that the decision to tender pardon was a matter of discretion with the Court concerned.

12. The nature and conditions for the tender of a pardon have been dealt with in a decision of the Punjab High Court reported in *A. L. Mehra v. the State*,⁵ where it is stated :

".... The grant of pardon carries an imputation of guilt and an acceptance thereof a confession of it. A pardon has been defined as an act of grace which exempts

the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is in substance and effect a contract between the State on the one hand and the person whom it is granted on the other. As the greater includes the less, a general power to grant pardons carried with it the right to impose conditions limiting the operation of such pardon."

13. A pardon is said by Lord Coke to be a work of mercy whereby the King, "either before attainder, sentence or conviction or after, forgive the any crime, offence, punishment.." (3 Inst. 233) and the King's Coronation oath is "that he will cause justice to be executed in mercy". As has been observed by the Supreme Court in, *K. M. Nanavati v. the State of Bombay* ⁶ :-

"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."

This sovereign power to grant a pardon has been recognized in our Constitution in Articles 72 and 161 and also in Sections 401 and 402 of the Code of Criminal Procedure. These provisions relate to the grant of a pardon after sentence has been imposed and, in my view, the tender of pardon to an accomplice under certain conditions as contemplated by Sections 337 and 338 of the Code of Criminal Procedure is a variation of this very power. There is no doubt in my mind that the grant of pardon, whether it is under Article 161 or Article 72 of the Constitution or under Sections 337, 338, 401 and 402 of the Code of Criminal Procedure is the exercise of sovereign power.

A pardon, as has been observed by Marshall, C. J., in the case reported in), *United States v. George Wilson*, ⁷ "is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive Magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court."

14. By sub-section (1) of Section 337 power is given to the Dist. Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, or any Magistrate of the First Class to tender a pardon to any person at any stage of the investigation or enquiry into, or the trial of the offence. Even though such Magistrate is required by sub-section (1-A) of Section 337 to record his reasons for tendering a pardon, it cannot be argued that such tender would become revisable by the High Court under Section 435 of the Code of Criminal Procedure if it is made at the stage of investigation or enquiry. Nor can it

be suggested that the other persons against whom investigation or inquiry is going on in connection with the same offence can have any right to object to the making of a tender of pardon. Therefore, the mere fact that reasons have to be recorded cannot convert the tender of pardon into a judicial act revisable by the High Court under Section 435 of the Code of Criminal Procedure. The tender of a pardon and its acceptance by the person concerned is a matter entirely between the Court concerned and the person to whom it is made and if the tender of a pardon is accepted by the accomplice concerned, the only obligation placed upon the prosecution is to examine him as a witness in the case. He will then be subjected to cross-examination by the co-accused and it will be for the co-accused to show by such cross-examination that the statement that is made by the accomplice is a false statement.

15. The present case does not fall under Section 337 but under Section 338 of the Code of Criminal Procedure because the accused had been committed for trial to the Court of the Sessions Judge and Section 338 does not require the Sessions Judge to record his reasons for tendering a pardon. The only requirements of Section 338 are that the Sessions Judge should make an order for the tender of a pardon "with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence" and on the same condition namely, of the person to whom the tender is made 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. I am, therefore, of the opinion that the power exercised by the Sessions Judge under Section 338 is also an executive power and is not a judicial power which is revisable by the High Court under Section 435 of the Code of Criminal Procedure.

16. The fact that a pardon was tendered and accepted after a great deal of delay may be a relevant circumstance to determine the weight to be attached to the testimony of the accomplice. Likewise, the fact that the tender of pardon was accepted by the accomplice after he had been ordered by the High Court to be committed for trial will be a relevant circumstance to determine the weight to be attached to his testimony. But, it is difficult for me to accept the contention that the grant of the pardon in this case would nullify the orders of the Additional Sessions Judge and of the High Court, referred to earlier, ordering the accomplice to be committed for trial. No limit is placed on the stage of the trial, after which a tender of pardon may not be made because the words used in sub-section (1) of Section 337 say that such a tender may be made at any stage of the trial.

17. In the instant case, the petitioner has approached this Court after the tender and acceptance of the pardon and after the said Sabharwal had made what according to him is full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. The inevitable result of this fact is that the said Sabharwal has ceased to be an accused in this case.

If he has willfully concealed anything essential or has given false evidence or has not complied with the condition on which the tender was made, he can only be tried in separate proceedings, *inter alia*, for the offence in respect of which the pardon was tendered and this is so provided by Section 339 of the Code of Criminal Procedure. Therefore, even if the tender and acceptance of pardon is revisable by the High Court under Section 435 of the Code of Criminal Procedure, this is not a case in which such power is to be exercised.

18. In my view, therefore, the power of this Court as contemplated by Section 435 of the Code of Criminal Procedure cannot be invoked in the case of an order made either under Section 337 or Section 338 of the Code of Criminal Procedure. This revision is, therefore, rejected.

Petition dismissed.

Cases Referred.

1. AIR 1921 Patna 499,
2. AIR 1952 Vindh Pra 42,
3. AIR 1953 Manipur 2,
4. AIR 1952 Himachal Pradesh 57,
5. AIR 1958 Punjab 72,
6. AIR 1961 SC 112
7. (1833) 30-33 USSCR 149 : (8 Law Ed 640 : 7 Pet 150