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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

Criminal Revision No.12454 of 2022.

Muhammad Asif versus The State, etc.

JUDGMENT

DATE OF HEARING:	<u>22.02.2024</u>
PETITIONER BY:	Ch. Awais Arif, Advocate.
STATE BY:	Miss Maida Sobia, Deputy Prosecutor General and Rana Muhammad Shafique, Deputy District Public Prosecutor.
RESPONDENT BY:	Mr. Jahanzeb Khan, Advocate.

MUHAMMAD AMJAD RAFIQ, J:- Through this Criminal Revision under Sections 435 & 439 of Cr.P.C., petitioner Muhammad Asif, being accused of case FIR bearing No.166 dated 24.02.2020 registered under section 302 PPC at Police Station Badami Bagh, Lahore has challenged the vires of order dated 01.02.2022 passed by learned Additional Sessions Judge, Lahore whereby Muhammad Awais, co-accused was tendered pardon under section 338 of Cr.P.C. to become approver against his co-accused Muhammad Asif (present petitioner).

2. Learned counsel for the petitioner contends that only Officer Incharge of prosecution in the district is authorized to tender pardon to the accused whereas in the present case he has not been taken on board. Further states that Muhammad Awais, co-accused has also not volunteered to become approver nor he accepted pardon offered to him by the learned Additional Sessions Judge, therefore, until and unless the said process is completed under the law, such order could not have been passed. His arguments on another legal plane were that even Muhammad Awais, co-accused was not under

the allegation of murder or abetment in initial investigation who was primarily a witness whose statement was recorded under section 161 of Cr.P.C. However, he was later indicted during second investigation when found involved in the occurrence as abettor, therefore, his transposition as an accused is a question still lurking in the process.

3. On the other hand, learned Prosecutors opposed the above contention with the ground that section 338 Cr.P.C. authorizes even to the Court to tender pardon to the accused at any stage of the proceedings before pronouncement of judgment, yet conceded that prosecution must have been taken into process; in support of contention reliance was placed on case reported as "Mst. RABIA BIBI versus ADDITIONAL SESSIONS JUDGE and 3 others" (**PLD 2020 Lahore 690**).

4. Contentions heard. Record perused.

5. Record of learned trial Court was requisitioned, examination whereof reflects that complainant has filed an application on 09.07.2021 under section 337/338 of Cr.P.C. for tendering pardon to Muhammad Awais, co-accused for recording his evidence as an approver, which application remained pending without obtaining any consent of Awais to become approver and one day learned judge declared him as an approver through impugned order dated 01.02.2022 without recording any cogent reason or observing the legal formalities. For clarity of concept, sections 337/338 of Cr.P.C. are reproduced as under: -

337. Tender of pardon to accomplice. (1) "In the case of any offence triable exclusively by the High Court or Court of Sessions, or any offence punishable with the imprisonment which may extend to ten years, or any offence punishable under Section 211 of the Pakistan Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Pakistan Penal Code, namely, Sections 216-A, 369, 401, 435 and 477-A, [officer-incharge of the prosecution in the District] 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 no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or, as the case may be, of the heirs of the victim.]

(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 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 Sessions or High Court, as the case may be.

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

338. Power to grant or tender of pardon: At any time before the judgment is passed, the High Court or the Court of Session trying the case 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 [officer incharge of the prosecution in the District] to tender, a pardon on the same condition to such person.]

[Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or, as the base may be, of the heirs of the victim.]”

The above sections deal separately with the situations of tendering pardon by the Officer Incharge of the prosecution as well as the Court. Section 337 of Cr.P.C. deals with the situation when the case is in the investigation or inquiry or pending trial before a Magistrate, whereas section 338 of Cr.P.C. meets the situation when the trial is pending before the Court of Session or High Court. Section 337 Cr.P.C. talks about the condition and recording of reasons for tendering pardon to the accused. Sub-section (1) of section 337 Cr.P.C. enumerates the condition as follows;

“.....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;”

And subsection (1-A) of such section makes it mandatory by using the word “shall” for the Magistrate to record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record.

6. Primarily, an offer to tender pardon to the accused during the investigation is the function of police as mentioned in Rule 25.29 of the Police Rules, 1934 but they could not offer it except as mentioned in sub-rule (2) of above Rule, which is as follows;

(a) No police officer may offer a pardon. An accused person desirous of making a statement with a view to obtaining a pardon, shall be told that no promise whatsoever can be made, but that, if a statement is made and verified and found to be of sufficient importance to merit such action, the facts will be reported to a magistrate, who has power to offer a pardon. No steps may be taken in this connection by subordinate police officers without the previous sanction in writing of a gazetted police officer.

It was the practice that once it is decided to offer a pardon to the accused, he must had been taken to the Magistrate in order to tender the same and Magistrate under sub-rule 2(c) of above Rule could make enquiries as to the circumstances leading up to the confession, and police officers shall invariably furnish, so far as is in their power, information required of them in this respect. Later by virtue of amendment in section 337 Cr.P.C. through Ordinance XXXVII of 2001, the power was switched over to officer incharge of the prosecution in the district. Thus, on the same analogy, as per section 337 of Cr.P.C. he is required to observe the condition and record the reasons for so doing. After promulgation of Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, a Code of conduct for prosecutors was issued under section 17 of the Act ibid; Para No. 14 of said Code of conduct refers the functions of District Public Prosecutor in this respect as follows;

Tender of Pardon

- 14.1 A pardon should only be considered by a Prosecutor where the offence is of a serious nature, there are overwhelming reasons for the prosecution to go ahead and there is a great need for and high value attached to the approver's evidence
- 14.2 A prosecutor may initiate the process of grant of tender of pardon on his own or on the request of the concerned police officer or on the order of the court.
- 14.3 An offer of pardon must contain the specific actions required on the part of the accomplice to whom the offer is being made.

14.4 A tender of pardon must be in writing and signed by the District Public Prosecutor.

During the course of investigation if the accused accepts the offer, his status from an accused is transposed to that of a witness and he shall be brought before the Magistrate for recording of his statement (not the confession) on oath u/s 164 of Cr.P.C., and copy of such statement shall be supplied to co-accused under section 241-A or 265-C Cr.P.C. as the case may be before the commencement of trial. If such a power is exercised at the stage when trial is pending, then after fulfilling the condition and recording of reasons, if the accused accepts the offer, Magistrate shall examine him as a witness during the trial but before that he shall be taken into custody till the conclusion of trial as required by sub-section (3) of Section 337 Cr.P.C.; sub-rule 2 (f) of Rule 25.29 of Police Rules, 1934 and Rule-8 of Chapter 14 of High Court Rules & Orders, Volume-III.

7. The proposition in this case relates to a stage as enumerated in section 338 of Cr.P.C., therefore, not only the officer incharge of the prosecution but the Court can tender pardon to the accused at any stage of the trial before the judgment is passed with a view to obtaining evidence and in this case it has been done by the learned Additional Sessions Judge but before that it was essential that accused should have volunteered to become approver in response to a request made by the complainant or the Court. Though application of the complainant states that Muhammad Awais, co-accused is ready to become approver but his consent in black and white is not available in the record. Similar is the situation when Court has also not taken his consent before tendering him pardon. In this view of the matter, order dated 01.02.2022 passed by learned Additional Sessions Judge one-sidedly considering that Awais would be a useful witness as an approver is opposed to Constitutional protection as ordained under Article 13 of the Constitution of the Islamic republic of Pakistan, 1973 which says that:

No person—

“(a); or

(b) shall, when accused of an offence, be compelled to be a witness against himself.”

Likewise, section 338 of Cr.P.C requires that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or, as the case may be, of the heirs of the victim. The present case is of qatl but Court has not obtained consent of legal heirs of the deceased before tendering pardon to the accused Awais; therefore, order is also liable to be set aside on this legal premise as well.

8. It is also the requirement of law that when an accused is tendered pardon, he must be kept in custody until the trial is concluded and Officer Incharge of prosecution certifies that accused has made full and true disclosure of the whole of the circumstances so as to prevent his trial as an accused under section 339/339A of Cr.P.C., but in this case Awais accused was not taken into custody which action is in violation of sub-section (3) of Section 337 Cr.P.C.; sub-rule 2 (f) of Rule 25.29 of Police Rules, 1934 and Rule-8 of Chapter 14 of High Court Rules & Orders, Volume-III; therefore, order impugned is bereft of legal sanctity. Reliance is also placed on case reported as “QAMAR-UZ-ZAMAN AND ANOTHER versus THE STATE” (**1981 PLD Lahore 543**)

9. The most important of all considerations is the logic applied by the Court to use an accused as approver, at the altar of absolving him of his criminal liability against the sentiments of aggrieved party, for procuring conviction in order to dispense justice. Thus, reasons must be outlined by the Court before frame of mind to tender pardon to an accused as held in cases reported as “MUHAMMAD SALEEM versus THE STATE” (**1989 P Cr. L J 1262**). Act of Court by granting a pardon orally was declared unwarranted in a case reported as “QAMAR-UZ-ZAMAN AND ANOTHER versus THE STATE” (**1981 PLD Lahore 543**). Supreme Court of India has also held in a Case reported as “Santosh Kumar Satishbhushan Bariyar Versus State of

Maharashtra" (2009 (2) SCC (Cri) 1150) that it is essential to record reasons and to further whether pardon was or was not accepted by the person to whom it was made. Similar is the requirement of Rule-3, Chapter-14 of High Court Rules and Orders, Volume-III which is reproduced for reference;

3. Reasons for tendering pardon should be recorded and extent of pardon explained to the intended approver.--*[...]** In all cases in which a pardon is tendered. [the reasons for tendering the pardon must be recorded and] the intended approver should always be made carefully to understand the extent of the pardon offered to him: it should be explained to him that he is being tendered a pardon and not be prosecuted in respect of such and such a case and no others.

10. In this case Court has not taken the prosecution on board before tendering the pardon to the accused which is an illegality because though Court has power to tender pardon to any person but the Court can have no interest whatsoever in the outcome nor to decide for prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. It has been held in a case reported as "Lt. Commander Pascal Fernandes Versus State of Maharashtra" (AIR 1968 Supreme Court 594) as under;

"..... 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 Judge 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 own behalf but on behalf of 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 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 prisoner. If the prosecution thinks that that tender of pardon will be in the interest 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.

The above judgment has also been cited in a case reported as "Jasbir Singh Verus Vipin Kumar Jaggi" (2001 AIR (SC) 2734) and "Mst.

RABIA BIBI versus ADDITIONAL SESSIONS JUDGE and 3 others”
(PLD 2020 Lahore 690).

11. While acting with due propriety in jurisdiction Court must bear in the mind that interests of accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider. Judge must know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and degree of his culpability in relation to the offence and in relation to co-accused. Case reported as “Jasbir Singh Verus Vipin Kumar Jaggi” (**2001 AIR (SC) 2734**) is referred in this respect. Even it is possible that in a case more than one person turns approver or the prosecution wants to use them, then according to sub-rule 2 (g) of Rule 25.29 of Police Rules, 1934, their confessions shall, if possible, be recorded by different magistrates and they shall not be allowed to meet one another till their evidence has been recorded in Court.

12. In view of above for what has been discussed, order dated 01.02.2022 (impugned herein), passed by learned Additional Sessions Judge, Lahore is set aside. Record of learned trial Court may be returned immediately. Appreciation to Mr. Muhammad Afzil, Civil Judge/research officer who worked well to collect required case law on the directed lines.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Approved for reporting

Judge

This judgment was pronounced
on 22.02.2024, however after
dictation and preparation was
signed on 11.03.2024

M. Azhar*