State Of Himachal Pradesh vs Surinder Mohan And Others on 7 February, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1862, 2000 (2) SCC 396, 2000 AIR SCW 527, 2000 (1) UJ (SC) 478, (2000) 1 JT 593 (SC), 2000 UJ(SC) 1 478, 2000 CRILR(SC&MP) 328, 2000 (1) SCALE 450, 2000 (4) LRI 665, 2000 CRIAPPR(SC) 242, 2000 SCC(CRI) 400, 2000 (1) JT 593, 2000 CALCRILR 391, 2000 (2) SRJ 456, 2000 CRILR(SC MAH GUJ) 328, (2000) 18 OCR 457, (2000) 1 CHANDCRIC 107, (2000) 1 ALLCRILR 678, (2000) SC CR R 609, (2000) 2 EASTCRIC 485, (2000) MAD LJ(CRI) 441, (2000) 2 RAJ LW 253, (2000) 1 RECCRIR 618, (2000) 1 SCJ 663, (2000) 1 SUPREME 466, (2000) 27 ALLCRIR 482, (2000) 1 SCALE 450, (2000) 40 ALLCRIC 534, (2000) 1 CRIMES 218

Bench: M.B.Shah, K.T.Thomas

PETITIONER:
STATE OF HIMACHAL PRADESH

Vs.

RESPONDENT:
SURINDER MOHAN AND OTHERS

DATE OF JUDGMENT: 07/02/2000

BENCH:
M.B.Shah, K.T.Thomas

JUDGMENT:

Shah, J.

Leave granted.

The respondents were tried for offences punishable under Sections 302, 380, 457,120-B read with Section 34 IPC by the Additional Sessions Judge (I), Kangara at Dharamshala in Sessions case No. 8 of 1988 and were acquitted for the said offences by order dated 8th May, 1990. The State preferred Criminal Appeal No.460 of 1990 before the High Court of Himachal Pradesh. The appeal was dismissed by judgment and order dated 2.1.1998 solely on the ground that the Chief Judicial Magistrate had failed to comply with the mandatory directions contained in clause (a) of sub-section (4) of Section 306 Cr.P.C. as no statement of approver was recorded by the Chief Judicial Magistrate

during the committal proceedings, which vitiates the committal of the accused persons to Court of Session and consequently the trial by the Sessions Judge.

Before dealing with the question of law arising in this appeal, we would state in nutshell the prosecution version. It is the say of the prosecution that Dr. Kewal Krishan was a medical practitioner having roaring practice in village Gummer. Accused Surinder Mohan was resident of the same village and was posted as a compounder in civil dispensary, Jawalamukhi. Besides his official duties he was also engaged in private medical practice at his village and was assisted by his wife. Because of the roaring practice of Dr. Kewal Krishan, Surinder Mohan was having malice and he wanted to do away with the life of Dr. Kewal Krishan. It is also the case of the prosecution that Surinder Mohan gave threats to Dr. Kewal Krishan to do away with his life and for this letter was sent through his sisters son Ravinder Kumar (PW14). It is further say of the prosecution that on 24th March 1988 at 10 p.m. Sandeep Kumar (PW 29) accused who later turned as an approver was going to attend Jagrata at Biru Chaudharys residence at village Dehrian. When he could reach near the government dispensary, Gummer, he came across Surinder Mohan and Biru Ram and at that time Surinder Mohan was having his scooter. Surinder Mohan asked Sandeep Kumar as to where he was going; Sandeep Kumar apprised him about his going to attend the Jagrata; Accused Surinder Mohan told him that he had gone to attend one Nirmala Devi who was seriously ill and unfortunately the medicines which were required for her treatment were not with him. He therefore requested Sandeep Kumar that he should call Dr. Kewal Krishan as the required medicines were available with him. For this purpose accused Surinder Mohan repeatedly requested and stated that life of Nirmala Devi was at peril and therefore he should help. As Sandeep Kumar agreed, Surinder Mohan took him on his scooter and alighted him near shop of Kedar Nath (PW16). Sandeep Kumar thereafter called upon Dr. Kewal Krishan and requested him to accompany for giving treatment to Nirmala Devi. Hardly, Sandeep Kumar and Dr. Kewal Krishan could cover the distance of 300 yards, Surinder Mohan met them along with the accused Biru Ram. It is further alleged that when they could cover distance of 100 yards further, other accused Shashi Paul and Amar Singh also met them. Thereafter when they reached near the government dispensary, Ghummer, accused Surinder Mohan and Biru Ram pounced upon Dr. Kewal Krishan. Surinder Mohan gagged the mouth of Dr. Kewal Krishan with a piece of cloth and tried to push him towards the nearby Nallah. Accused Amar Singh and Shashi Pal came from behind and thereafter Dr. Kewal Krishan was dragged about 10 steps downwards. At that stage, Biru Ram attacked with knife (chhura) and on receiving the stab injury, Dr. fell on the ground. Subsequently, accused Surinder Mohan asked Sandeep Kumar as to who other person was in the room of doctor. After stating that Vijay Kumar was in the room and he was knowing everything, Sandeep Kumar cursed Surinder Kumar as to why he was cheating and stated that he would reveal the entire episode to his father. Surinder Mohan assured him to pay Rs.5000/-, but he did not submit to his wishes and went on shouting. Then Surinder Mohan attacked Sandeep Kumar with a knife, but with great difficulty he ran away from the spot. At that stage also, accused persons and Biru Ram attacked upon him with knife which hit him on his back. With great difficulty he reached his house and after cleaning the blood from his person he silently went to his room and did not disclose anything regarding the incident to anybody. It is his further say that on the next morning when he went to answer the call of nature near the Nallah, he noticed the red colour of water and also the dead body of Dr. Kewal Krishan in the bushes.

It is also the prosecution version that on the next morning PW 11 Vipin Kumar made a report to the police that the shop of Piare Chand and the residence of Dr. Kewal Krishan where doctor and his room mate Vijay Kumar used to sleep were lying open and no one was seen at their respective cots and that the dead body of Vijay Kumar was lying in the nearby pasture land. On receiving this information FIR for offence punishable under Section 302 was registered. On the same day, dead body of Dr. Kewal Krishan was found. After investigation, Sandeep Kumar was arrested on 26th March 1988, accused Biru Ram, Amar Singh, Shashi Paul were arrested on 27th March 1988 while accused Surinder Mohan was arrested on 28th March 1988. On 8th June 1988 Sandeep Kumar moved an application from the jail expressing his intention to make a true disclosure of the facts in relation to the murder of Dr. Kewal Krishan and Vijay Kumar as he was burdened with guilt. After completing the formalities and recording the statement, the Chief Judicial Magistrate granted pardon to Sandeep Kumar. The case was committed to the Court of Session on 4th August, 1988.

P.W.33, Sh. J.M. Barowalia, Chief Judicial Magistrate has deposed before the Court that on 9.6.1988 he received application from Sandeep Kumar undertrial through Superintendent Jail. On that application, notice was issued to PP as well as SHO, Jawalamukhi and the date was fixed on 13.6.1988. Sandeep Kumar was produced before him and he was explained by him that he was under no obligation to make any statement and if he makes the statement, it can be used against him. The matter was adjourned to 15.6.1988 and thereafter on 15.6.88 in presence of APP, RS Sharma, his statement was recorded after giving him further half-an-hour to think what statement he wanted to make. Sandeep Kumar was further given time of one hour and thereafter at 3.30 p.m. after recording his statement, he tendered pardon on the condition of his making full and true disclosure of the circumstances within his knowledge relating to the offence. The statement of Sandeep Kumar is also produced on record at Ext.PW/2.

It was the contention of the learned counsel for the accused before the High Court that the statement of approver Sandeep Kumar was recorded by the Chief Judicial Magistrate on 15.6.1988 after granting him pardon on the condition that he would make true disclosure of the incident. But, on that date, challan was not filed before the CJM and other accused were also not summoned to enable them to cross examine Sandeep Kumar, and therefore, statement of the approver cannot be treated as statement recorded by the committal court under Section 306 (4) Cr.P.C. The High Court held that the prosecution has to examine the approver before the committal court as provided under sub-Section (4) of Section 306 Cr.P.C. which will be his examination-in-chief and the accused person would have a right to cross- examine him. Therefore, statement recorded by the Chief Judicial Magistrate before filing of the challan in his court without summoning the accused person was not statement recorded under Section 306 (4) Cr.P.C. As the statement of approver was not recorded accordingly by the Chief Judicial Magistrate during the committal proceedings, it vitiates the committal of the accused persons to the Court of Session and consequently their trial by the Sessions Judge. The High Court further observed that had the said defect been pointed out during the course of trial, the Court would have remanded the matter to the Chief Judicial Magistrate for holding committal proceedings afresh by recording statement of Sandeep Kumar as provided under section 306(4). This course cannot be adopted since the offence was committed on 24th March, 1988 and the respondents were acquitted on 8th May, 1990 and therefore retrial afresh will not be in the interest of justice and fair play. In view the aforesaid findings, the Court has not considered

the other evidence led by the prosecution. In this appeal, learned counsel for the State submitted that:

> (1) Section 306 (4) Cr.P.C. nowhere provides that (a) approvers evidence cannot be recorded on the date or prior to submission of the charge sheet;
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> (b) the accused is required to be summoned before recording the statement of the approver; and
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> (c) that accused should be permitted to cross-examine the approver.
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> (2) In any case under Section 465 Cr.P.C., after trial accused ought not to have been permitted to raise the contention that there was such an omission in recording the statement of approver.

The learned counsel next contended that the decision in A.Devendran v.State of Tamil Nadu [(1997) 11 SCC 720] nowhere lays down that while recording the evidence of the approver, if some irregularity is committed it would vitiate the trial. For the decision in Suresh Chandra Bahri v. State of Bihar [(1995) Suppl 1 SCC 80] it is pointed out that error of not recording the evidence of the approver was rectified by the Sessions Court by remitting it before trial to the Magistrate for recording the evidence of the approver and hence, the Court has held that trial was not vitiated. It is, therefore, submitted that some of the observations made therein are obiter. As against this, learned counsel for the respondents submitted that this Court has repeatedly interpreted section 306(4) Cr.P.C. and held it to be mandatory and therefore its non-compliance vitiates the committal order as well as the trial. For this purpose, he placed reliance on the decision of this Court in A. Devendran vs. State of Tamil Nadu [(1997) 11 SCC 720].

For considering the rival contentions raised by learned counsel for the parties, we would first refer to the relevant part of Sections 306 and 307 which is as under: -

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 relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(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)

307. Power to direct tender of pardon.At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

From the aforesaid Section 306 it can be stated that-

(1) the purpose of the Section is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence during investigation, inquiry or trial; (2) the Chief Judicial Magistrate or Metropolitan Magistrate is empowered to tender a pardon to such person at any stage of investigation or inquiry into or the trial of the offence; (3) the condition for tender of such pardon is that the person is to make a full and true disclosure of the whole circumstances within his knowledge relating to the offence; (4) a person accepting pardon under sub-section (1) is to be examined as a witness in the court of Magistrate taking cognizance of the offence and in subsequent trial, if any. (5) Further, if the case is committed for trial to the Court of Sessions, Section 307 empowers the Sessions Court trying the case to tender a pardon on the same conditions to such person before the judgment is passed.

From the aforesaid ingredients, it is abundantly clear that at the stage of investigation, inquiry or trial of the offence, the person to whom pardon is to be granted, is to be examined for collecting the evidence of a person who is directly or indirectly concerned in or privy to an offence. At the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right to cross-examination would arise only at the time of trial. During the course of investigation by the Police, question of cross-examination by the accused does not arise. Similarly, under Section 200 Cr.P.C. when the Magistrate before taking cognizance of the offence, that is, before issuing process holds the inquiry, accused has no right to be heard, and therefore, the question of cross- examination does not arise. Further, the person to whom pardon is granted, is examined but is not offered for cross-examination and thereafter during trial if he is examined and cross-examined then there is no question of any prejudice caused to the accused. In such cases, at the most accused may lose the chance to cross-examine the approver twice, that is to say, once before committal and the other at the time of trial On the question of examination different views are expressed by the High Courts. The High Court of Andhra Pradesh in Uravakonda Vijayaraj Paul v. The State and others {1986 Crl. L. J. 2104} had held that mere recording of the statement of an approver does not amount to examination as a witness unless the accused are given an opportunity to cross-examine the approver and that the provision of Section 306(4) of the Cr.P.C. is mandatory. The Court relied upon the decision of Gujarat High Court in Kalu Khoda v. State {AIR 1962 Guj. 283}, wherein the Court interpreted Section 337 of the (Old) Cr.P.C. which is analogous to Section 306(4) of Cr.P.C. As against this, Kerala High Court in Chief Judicial Magistrate, Trivandrum {1988 Crl.L.J. 812} has observed that examination under Section 306(4) would be even before issuing process and at that stage no inquiry is involved and accused will be no where in picture, therefore, there is no question of accused being permitted to cross-examine the approver at that stage and he has no right to participate in that examination.

In the present case, the High Court has relied upon the decision in Sanjay Gandhi v. Union of India {AIR 1978 SC 514}. In the said case a contention was raised that accused wishes to cross-examine the witnesses for the prosecution and to argue that no prima facie case has been admittedly made out for commitment. It was submitted that to cross-examine the approver, the accused was required to pursue, scan and scrutinise the papers produced by the police and, therefore, committal proceedings be stayed. In that context the Court in the opening part of the judgment observed: -

No party to a criminal trial has a vested right in slow motion justice since the soul of social justice in this area of law is prompt trial followed by verdict of innocence or sentence. Since a fair trial is not a limping hearing, we view with grave concern any judicial insoucience which lengthens litigation to limits of exasperation The Court further held that the scope of committal proceedings is limited to merely ascertaining whether the case, as disclosed in the police report involves an offence triable exclusively by the Court of Session. The Court thereafter observed: -

We have heard counsel on both sides and proceed to elucidate certain clear propositions under the new Code bearing upon the committal of cases where the offence is triable exclusively by the Court of Session. The Committing Magistrate in such cases has no power to discharge the accused. Nor has he power to take oral evidence save where a specific provision like S.306 enjoins. From this it follows that the argument that the accused has to cross-examine is out of bounds for the Magistrate, save in the case of approvers. No examination-in-chief, no cross-examination. In A. Devendrans case (Supra) this Court considered the question as to whether non-compliance of Sec. 306(4)(a) of the Code on account of non- examination of an approver as a witness after granting him pardon would vitiate the entire proceeding. In that case, it was contended that the object and purpose engrafted in clause (a) of Sub-section (4) of Section 306 is to provide a safeguard to the accused who can cross-examine even at the preliminary stage on knowing the evidence of the approver against him and can impeach the said testimony when the approver is examined in court during trial. This Court, dealing with the said contention, held that a combined reading of sub-section (4) of Section 306 and Section 307 would make it clear that in a case exclusively triable by the Sessions Court if pardon is tendered to an accused and he is taken as an approver before commitment then compliance of sub-section (4) of Section 306 is mandatory. The corollary is that non-compliance of such mandatory requirements would vitiate the proceedings. But the provisions of sub- section (4) of Section 306 are not attracted to a case falling under the purview of Section 307 of the Code. The Court thereafter considered the provision of Section 465 Cr.P.C. and observed that the said provision cannot be attracted in a situation where a court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code. The said provision cannot be applied to a patent defect of jurisdiction. In that case, Chief Judicial Magistrate had tendered pardon to the accused after the case was committed to the Sessions Court and, therefore, the Court held that it was a case of total lack of jurisdiction. But, after excluding the evidence of approver the court appreciated the other evidence which was produced on record for finding out whether the accused was guilty of the offence charged. Further, the court did not hold that the trial of the accused was illegal. In the said case, the Court did not consider the effect of irregularities committed by the Magistrate taking cognizance of the offence in not asking the accused to cross-examine the approver. That was a case where after the case was committed to the Sessions court, the Chief Judicial Magistrate granted pardon to one of the accused. In that set of

circumstances, the Court held that there was total lack of jurisdiction with the Chief Judicial Magistrate which is not curable. The court excluded the evidence of the approver on the ground that pardon could not have been tendered by the Chief Judicial Magistrate after committal of the proceedings to the Court of Sessions. It is apparent that as per Section 307 Cr.P.C. the Court of Session before whom the trial is pending alone would have jurisdiction to grant pardon to the accused of that case and hence if the Chief Judicial Magistrate tenders pardon his action is not curable within the ambit of clause (g) of Section 460 of the Cr.P.C.

In Suresh Chandra Bahris case (supra) this Court considered the provisions of sub-section (4) of Section 306 and observed that the object and purpose of enacting the provision is obviously intended to provide a safeguard to the accused inasmuch 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 the approver before the committing court itself at the very threshold so that he may take steps to show that the approvers evidence at the trial was untrustworthy, in case there are any contradictions or improvements made by him during his evidence at the trial. Learned Judges pointed out the utility of examination of the approver at two stages. While holding that the provision is mandatory, the Court said that since the defect was rectified in that case the non-compliance of it cannot be held to have vitiated the proceedings. Their Lordships did not consider the situation as in the case where the approver was examined and the case went to the trial court where the approver was cross-examined without raising any demur regarding the omission to cross-examine him at the pre-committal stage. After considering the provisions of Section 306, the Court held that if the defect of not examining the approver at the committal stage by the committing Magistrate is rectified later, no prejudice can be said to be caused to an accused person and, therefore, the trial cannot be said to be vitiated on that account.

The Court held that when the case was committed to the Sessions Court, the defect that approver was not examined as witness in the Court of Magistrate taking cognizance of an offence was noticed by the Sessions Court, therefore, matter was remanded to the court of Chief Judicial Magistrate with a direction to record the statement of the approver. After recording the statement, the case was committed for trial to the Sessions Court. Hence, it was held that as the defect was rectified, the argument that the trial was vitiated could not be accepted.

In the present appeal, there is no question of total lack of jurisdiction with the Magistrate and it is not the case that approver is not examined by the trial court before granting pardon. Approver Sandeep Kumar was arrested on 26.3.1988. While in custody, he submitted an application through Superintendent of Jail to CJM, Dharamshala on 8.6.1988 expressing his intention to make a true disclosure of the facts regarding the incident. The application was taken up by CJM on 9.6.1988 and noticed was issued to prosecution for 13.6.1988. On that day, accused was produced before the CJM. It was explained to the approver that his statement could be used against him also and with a view to give time to accused before becoming approver, the case was adjourned to 15.6.1988 and on that day he was examined and pardon was granted to him. But at that stage the remaining accused were not asked to cross-examine him. Formal challan was submitted before the Magistrate by the Investigating Officer on 22.6.1988. After complying with the objections, the case was committed to

the Court of Session on 4.8.1988. During the trial, the approver was examined as PW29 on 5.4.1989 and on the same day he was cross-examined by the counsel for the accused. Witnesses for the defence were examined and completed on 15.11.1989. Between 15.11.1989 and 8.5.1990, learned Sessions Judge, Dharamshala heard arguments, visited the spot with a view to appreciate the evidence on record and thereafter the learned Sessions Judge passed his judgment and order. It was during the arguments in the Sessions Court that the contention was raised for the first time that procedure prescribed under Section 306(4)(a) Cr.P.C. was not complied with and, therefore, trial was vitiated. Till then none of the accused raised such an objection and they never felt the need to raise it. Acceptance of this objection would only promote technical plea which would adversely affect dispensation of justice. In such circumstances, we are of the view that provisions of Section 465 Cr.P.C. would come into operation. The said provision inter alia provides that no order passed by a Court of competent jurisdiction shall be reversed on account of any error, omission or irregularity in order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code, unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby. Section 465(2) Cr.P.C. further provides that in determining whether any error, omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. We again point out that before or after the case was committed to the Sessions Court, accused have not raised any objection that they were not permitted to cross-examine the approver, nor did they contend so when the approver was examined and cross-examined during the trial. Therefore, at the stage of final arguments, accused cannot raise the said contention. Further after cross-examining the approver in detail, there is no question of failure of justice nor any prejudice being caused to the accused on account of that omission.

The learned counsel for the accused submitted that Section 306(4)(a) is couched in mandatory term by using the word shall which indicates that if there is breach of the said mandatory provision further trial would be vitiated. In our view, this submission is without any substance. We have pointed out earlier that by not examining the approver, the trial would not get vitiated. Such evidence may have to be scrutinised with greater circumspection. If in such scrutiny the evidence is found reliable the Court cannot be inhibited from using the evidence.

In the result, the appeal is allowed and the impugned judgment of the High Court is set aside. The appeal filed in the High Court is remitted to the High Court for disposal afresh in accordance with law.