

# State Of Maharashtra vs Abu Salem Abdul Kayyum Ansari & Ors on 5 October, 2010

**Author: R.M. Lodha**

**Bench: P. Sathasivam, R.M. Lodha**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1925 OF 2008

State of Maharashtra

... Appellant

Vs.

Abu Salem Abdul Kayyum Ansari & Ors.

... Respondents

## JUDGMENT

R.M. LODHA, J.

The question which this Court has to arrive at a conclusion in this criminal appeal preferred by the State of Maharashtra under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ( for short 'TADA Act'), is whether, the accused has a right to cross examine an accomplice who has been tendered in evidence by the prosecution as approver but later on pardon tendered to him was withdrawn on a certificate of the Public Prosecutor under Section 308 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') and he (approver) has not been further examined by the prosecution as its witness.

2. The aforesaid question arises in this way. A certain Pradeep Jain (builder) was allegedly eliminated by hired gangsters on March 7, 1995 and his brother Sunil Jain was attempted to be killed on that day for not succumbing to the pressure of parting with their landed property situate in Mumbai A crime being CR No. 145 of 1995 was registered with D.N. Nagar Police Station, Mumbai. After completion of investigation, initially few persons were arrested and they were charge sheeted and tried for the offences punishable under Sections 302, 307, 120B, 23, 114 IPC, Sections 3, 25(1B)(a), 5, 27 of the Arms Act and Sections 3(2)(i), 3(2)(ii), 3(3), 3(5), 5, 6 of TADA Act by the Judge, Designated Court, Mumbai. The present respondents could not be tried as they were

absconding. The Judge, Designated Court, vide judgment dated August 5, 1997 acquitted the accused who were tried. The State of Maharashtra carried appeal in the matter before this Court and vide judgment dated July 11, 2001, this Court partly set aside the judgment of the Judge, Designated Court, Mumbai and convicted some of the accused who were tried.

3. On September 18, 2002 Abu Salem Abdul Kayyum Ansari (respondent No. 1) and one Monika Bedi were arrested in Portugal. They were extradited and brought to India. The extradition was granted for respondent no. 1 in respect of Pradeep Jain murder case, Bombay Bomb Blast case and Ajit Diwani murder case. On November 11, 2005, as soon as the respondent no. 1 was brought to India, he was arrested by Central Bureau of Investigation (CBI) in Bombay Bomb Blast case and later on he was taken into custody by Anti Terrorist Squad, Mumbai in connection with Pradeep Jain murder case. The respondent no.1 was charged along with Mohd. Naeem Abdul Rahim Khan (respondent no. 2), Riyaz Ahmed Siddique (respondent no. 3), Mohd. Hassan Mehendi Hassan (respondent no. 4) and Virendrakumar Biharilal Jhamb (respondent no. 5), having conspired in Dubai with few others to murder Pradeep Jain and that in pursuance of this conspiracy, Pradeep Jain was murdered on March 7, 1995. On April 28, 2006, the police submitted charge sheet against the present respondent nos. 1 to 5 and accordingly TADA Special Case No. 1 of 2006 began before the Court of Designated Bombay Blast Cases, Greater Mumbai (for short, 'Designated Court').

4. On July 3, 2006, the respondent no. 3 (Riyaz Ahmed Siddique) addressed a letter to Assistant Commissioner of Police, Anti Terrorist Squad (I.O.) expressing his desire to disclose truly and fully the facts pertaining to conspiracy which had taken place at Dubai in connection with the murder of Pradeep Jain.

5. On July 7, 2006 the Investigating Officer made an application under Section 307 Cr.P.C. before the Designated Court that the respondent no. 3 may be tendered pardon on his readiness and willingness to disclose true and correct facts about the conspiracy hatched by them for the murder of Pradeep Jain.

6. On July 18, 2006 the Designated Court tendered pardon to the respondent no. 3 under Section 307 Cr.P.C. and permitted the prosecution to examine him as witness in the trial. In that order, the Designated Court noted that the approver is supposed to depose true and correct facts pertaining to the crime and that he (approver) has accepted the pardon with that condition.

7. On September 18, 2008, the respondent no. 3 (approver) was called as witness for the prosecution; he went into the witness box to give evidence but after some time, he requested the Court to adjourn the matter as he was observing Ramzan fast and feeling weak. The next day i.e. September 19, 2008, further deposition of approver began but the Special Public Prosecutor realized that witness was not desirous of telling the Court about conspiracy that led to the murder of Pradeep Jain. The Special Public Prosecutor put a specific question to the approver as to whether he wanted to tell the Court about the conspiracy of Pradeep Jain murder to which his answer was in the negative. Immediately, the Special Public Prosecutor issued a certificate under Section 308 Cr.P.C. that the approver has not complied with the condition on which pardon was tendered to him and, therefore, he may be tried separately. The order dated September 19, 2008 to the extent it is

relevant reads as follows:

" ..... The Id Spl. PP files certificate u/sec. 308 of Cr.P.C. conveying that the approver witness Riyaz Ahmed has committed breach of conditions of the Pardon and the Pardon may be withdrawn and will be tried for same offence separately . . . .  
..."

The matter was then adjourned to September 23, 2008.

8. On September 23, 2008, the Designated Court passed the following order:

"..... Mr. Sudeep Pasbola requests the court to allow him to cross examine the approver who is certified by the Id. Spl. PP to have committed breach of conditions of Pardon.

The Id. Spl. PP opposes the said request on the ground that once the PP forfeits the pardon the witness relegates back to the status of accused to be tried separately for the same offence and as such loses his status as witness of the prosecution, therefore, his entire evidence though till be on record but cannot be used for any purpose and as such the question of cross examining such hostile witness by other accused does not arise.

Mr. Pasbola submits that merely withdrawal of pardon by the Id. Spl. PP is not sufficient to transpose approver as an accused and his evidence so far recorded cannot be taken away from record. It is not law that if the witness does not support the prosecution he is always telling lies. The witness may not support the prosecution in the very language it wants and therefore, the evidence recorded by the Court in the proceedings cannot be wiped out.

Adv. Shri Pasbola has relied on 1978 Cr.L.J. NOC 126 Andhra Pradesh wherein the Hon'ble Court has observed that accused are entitled to cross examine the approver with regard to his statement u/sec. 162 of Cr.P.C.

In the present case, the statement of approver i.e. Riyaz Ahmed Siddiqui is not recorded after grant of Pardon as Pardon is granted u/sec. 307 of Cr.P.C. by a Sessions Judge and therefore, no question of recording any evidence in Committal Court did arise. However, the confessional statement of said witness u/sec. 15 of TADA Act was also recorded after his arrest while his statement u/sec. 161 of Cr.P.C. was also recorded. In ordinary course if the witness becomes hostile the prosecution and the defence both are entitled to cross examine him. The evidence of hostile witness cannot be thrown away out right. The court can use it in favour of prosecution or defence to the extent it supports them and after weighing it can accept it partially in favour of any of the parties to the trial. Thus if the law says that the entire evidence of hostile witness can not be ignored and still can be used there is no

reason to block the defence from cross examining such witness who in view of prosecution is of no value for it since he declines to support the prosecution. Once the person enters into the witness box as a witness the record of his deposition remains to be recorded of evidence of witness and as such accused is entitled to exercise his rights conferred on him by virtue of Sec. 162 of Cr.P.C. to contradict him with his previous statements. While the prosecution can not do so even if its witness turns hostile. The prosecution has only choice to bring supporting material through the cross examination by Id. Public Prosecutor. What action is to be taken against the approver who commits breach of condition of Pardon is to be decided later on as Sec. 308 of Cr.P.C. says that such person may be either tried for offence in respect of which the pardon was so tendered or for any other offence which appears to have been committed by him and also for giving false evidence. So the stage to decide which mode is to be adopted against such an approver is yet to come. However, simply because prosecution disowned its witness he does not lose a status of witness unless prosecuted separately in view of provisions of Section 308 of Cr.P.C. and as such accused has every right to cross examine such a witness. The question of probative value of his evidence is distinct one. However, in my opinion the defence has statutory right to cross examine the hostile witness or approver and as such accused in this case are entitled to exercise the right by cross examining the witness Riyaz Ahmed Siddiqui ."

9. The State of Maharashtra is aggrieved by the above order whereby permission has been granted to the defence to cross examine the respondent no. 3.

10. Section 306 of Cr.P.C. makes a provision for tender of pardon to accomplice. It reads as follows:-

"S.-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."

11. Section 307 Cr.P.C. provides that 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.

12. Section 308 provides for the trial of the approver who has accepted tender of pardon but fails to comply with the condition of pardon. The said provision reads as under:-

"S. 308.- Trial of person not complying with conditions of pardon.

(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by willfully 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, and also for the offence of giving false evidence:

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial the court shall-

(a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b) if it is the court of a Magistrate before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) if the accused does so plead, the court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall notwithstanding anything contained in this Code, pass judgment of acquittal."

13. The salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the

rest. Section 306 Cr.P.C. empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. The Magistrate of the first class, under Section 306, is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 vests the court to which the commitment is made, with power to tender a pardon to an accomplice. The expression, 'on the same condition' occurring in Section 307, obviously refers to the condition indicated in sub-section (1) of Section 306, namely, on the accused 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. An accomplice who has been granted pardon under Section 306 or 307 Cr.P.C. gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under Section 308 Cr.P.C. to that effect, the protection given to him is lifted.

14. In *A.J. Peiris v. State of Madras*<sup>1</sup>, a 3 - Judge Bench of this Court stated that the moment a pardon is tendered to the accused he must be presumed to have been discharged, whereupon he ceases to be an accused and becomes a witness.

15. In *State v. Hiralal Girdharilal Kothari*<sup>2</sup>, with reference to Sections 337 and 339 of the Code of Criminal Procedure, 1898 (now Sections 306, 307 and 308 Cr.P.C.), this Court stated that a pardon tendered under Section 337 is a protection from prosecution; failure to comply with the condition on which the pardon is tendered removes that protection.

16. In *State (Delhi Administration) v. Jagjit Singh*<sup>3</sup>, this Court held as under:-

"8. ....The power to grant pardon carries with it the right to impose a condition limiting the operation of such a pardon. Hence a pardoning power can attach any condition, precedent or subsequent so long as it is not illegal, immoral or impossible of performance. Section 306 clearly enjoins that the approver who was granted pardon had to comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other concerned whether as principal or abettor, in the commission thereof. It is because of this mandate, the State cannot withdraw the pardon from the approver nor the approver can .AIR 1954 SC 616 AIR 1960 SC 360 1989 Supp (2) SCC 770 cast away the pardon granted to him till he is examined as a witness by the prosecution both in the Committing Court as well as in the trial court. The approver may have resiled from the statement made before the Magistrate in the Committing Court and

may not have complied with the condition on which pardon was granted to him, still the prosecution has to examine him as a witness in the trial court. It is only when the Public Prosecutor certifies that the approver has not complied with the conditions on which the tender was made by wilfully concealing anything essential or by giving false evidence, he may be tried under Section 308 of the Code of Criminal Procedure not only for the offence in respect of which pardon was granted but also in respect of other offences.....".

17. The above statement of law in Jagjit Singh<sup>3</sup> cannot be understood as laying down that an accomplice who has been tendered pardon and called as a witness for prosecution must be continued to be examined as a prosecution witness although he has failed to comply with the condition on which the tender of pardon was made and a Public Prosecutor certifies that he has not complied with the condition on which the tender was made. As a matter of fact, in Jagjit Singh's<sup>3</sup> case no certificate was given by the Public Prosecutor. The legal position that flows from the provisions contained in Sections 306, 307 and 308 Cr.P.C. is that once an accomplice is granted pardon, he stands discharged as an accused and becomes witness for the prosecution. As a necessary corollary, once the pardon is withdrawn or forfeited on the certificate given by the Public Prosecutor that such person has failed to comply with the condition on which the tender was made, he is reverted to the position of an accused and liable to be tried separately and the evidence given by him, if any, has to be ignored in toto and does not remain legal evidence for consideration in the trial against the co-accused, albeit such evidence may be used against him in the separate trial where he gets an opportunity to show that he complied with the condition of pardon. As a matter of fact, it is for this reason that a specific statement was made by the counsel for the State of Maharashtra before us - a similar statement was made before the Designated Court as well - that the evidence of respondent no. 3 so far recorded shall not be used by the prosecution in the present trial.

18. Section 114, illustration (b) of the Indian Evidence Act, 1872 (for short, 'Evidence Act') provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

19. Section 132 of the Evidence Act reads as follows:

"132. Witness not excused from answering on ground that answer will criminate - A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso - Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."



20. Section 133 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

21. Section 154 of the Evidence Act is as under:

"S.-154. Question by party to his own witness.- (1) The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party.

2. Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness."

22. Section 315 of Cr.P.C. makes an accused person a competent witness for the defence and he may voluntarily give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. The said provision reads as follows:

"S.-315. Accused person to be competent witness -

(1) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that-

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject or any comment by any of the parties or the court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."

In other words, Section 315 clearly lays down that an accused cannot be compelled to give evidence except on his own request in writing.

23. Article 20(3) of the Constitution protects an accused from being called or compelled to be witness against himself.

24. We have referred to the aforesaid provisions of the Evidence Act, Cr.P.C. and Constitution to indicate that none of these provisions militates against the proposition that a pardon granted to an accomplice under Section 306 or 307 Cr.P.C. protects him from prosecution and he becomes witness for prosecution but on forfeiture of such pardon, he is relegated to the position of an accused and his evidence is rendered useless for the purposes of the trial of the co- accused. He cannot be compelled to be a witness. There is no question of such person being further examined for the prosecution and, therefore, no occasion arises for the defence to cross examine him. The Designated Court seriously erred in treating the respondent no. 3 (Riyaz Ahmed Siddique) hostile witness; it failed to consider that the pardon granted and accepted by him was conditional pardon inasmuch as it was on the condition of his making a true and full disclosure of all the facts concerning the commission of crime and once the pardon granted to him stood forfeited, on the certificate issued by the Special Public Prosecutor, he was relegated to the position of an accused and did not remain a witness. In the circumstances, there was no justification to permit the defence to cross examine the respondent no. 3 and to that extent the impugned order cannot be sustained.

25. The appeal is allowed as indicated above.

.....J. (P. Sathasivam) .....

....J. (R.M. Lodha) OCTOBER 5 , 2010.

NEW DELHI.