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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 3rd June, 2020

Pronounced on: 8th June, 2020

\+ CRL.M.C. 1477/2020 & CRL.M.A. 6491/2020, CRL.M.A. 7117/2020

DIRECTORATE OF ENFORCEMENT ... Petitioner

Through: Mr. Aman Lekhi, ASG with Mr. Zoheb Hossain, Spl. Counsel for Directorate of Enforcement

versus

RAJIV SAXENA ... Respondent

Through: Mr. R.K. Handoo, Adv. with Mr. Rajat Manchanda, Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. An interesting issue, involving the interplay between Section 306, and Section 308, of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr PC", or "the 1973 Cr PC"), arises for consideration in the present case.

Facts, and the impugned Order

2. The Central Bureau of Investigation (CBI) registered RC No. 217-2013A-0003, against the respondent, on 12th March, 2013, alleging commission of offences, by him, punishable under Section 420, read with Section 120B of the Indian Penal Code, 1860 (IPC) and Sections 7, 8, 9, 12 and 13(1)(d), read with Section 13(2) of the Prevention of Corruption Act, 1988. Inasmuch as the allegations, against the respondent (and others arraigned with him) indicated commission of offences under the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the PMLA"), ECIR No. 15/DLZO/2014 was also registered against, *inter alia*, the respondent, on 3rd July, 2014, by the Directorate of Enforcement (the petitioner herein).

3. Given the limited controversy before me, which is purely legal in nature and turns on the interpretation of Sections 306 and 308 of the Cr PC, it is not necessary to allude, to the allegations against the respondent, in any detail. Suffice it to state that an application was filed, by the respondent, under Section 306, Cr PC, for grant of pardon. The said application was allowed, by the learned Special Judge, CBI (hereinafter referred to as "the learned Special Judge"), *vide* a detailed order, dated 25th March, 2019, the operative para 21, whereof, reads thus:

> " In view of my aforesaid discussion, I thus allow the application moved by accused/applicant Rajiv Saxena seeking pardon and to make him an approver subject to his making full and true disclosure of whole of the circumstances as are within his knowledge relating to the offence and to every

other person concerned whether as an abettor or principal in the commission of offences being tried over here."

4. Sections 306 and 308 of the Cr PC read 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 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."

"**308. Trial of person not complying with the 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 wilfully 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."

5. On or around 18th October, 2019, the petitioner moved an application, before the learned Special Judge, praying that the tender of pardon, granted to the respondent on 25th March, 2019, by the learned Special Judge, be revoked. Mr. R K. Handoo, learned counsel appearing for the respondent, sought to submit that, as the application had been preferred under Section 306, Cr PC, and not under Section 308 thereof, it was not maintainable[1]. Mr. Aman Lekhi, learned Additional Solicitor General (ASG), submitted that the application was actually relatable to Section 308 of the Cr PC, and not Section 306 thereof. Inasmuch as the position, in law, is well settled, that reference, to a wrong provision of law, in the title of an application or petition, is inconsequential, so long as the application, or petition, is otherwise maintainable, I am not inclined to countenance the objection, of Mr. Handoo. Mr. Handoo has also disputed the maintainability of the aforesaid application, filed by the petitioner before the learned Special Judge, on the ground that the law does not recognise any concept of "revocation of pardon". I shall deal with the said submission later in the course of this judgment.

6. Annexed, to the said application, was a "Certificate for revocation of pardon", by the learned Special Counsel appearing for the petitioner, which merits reproduction, *in extenso*, thus:

> "I, Davinder Pal Singh, aged about 51 years, S/o Sh. Dewan Singh, Special Counsel, Directorate of Enforcement, Office at R-1 Nehru enclave, New Delhi-110019, do hereby certify as under:

[1] **Pruthvirajsinh Nodhubha Jadeja v. Jayeshkumar Chhakkadas Shah, (2019) 9 SCC 533**

> 1. That the Applications seeking revocation of tender of pardon granted to Rajiv Saxena has been moved by the ED. The same may be read as a part and parcel of the instant certificate and are not repeated herein for the sake of brevity.
>
> 2. That I have perused the statement(s) of Rajiv Saxena and also perused the evidence on record.
>
> 3. That in my opinion, after due appreciation of the evidence and the perusal of the records of the case, it is clear beyond doubt that Rajiv Saxena has breached the terms of the tender of pardon granted vide order dated 25.03.2019.
>
> 4. That Rajiv Saxena has failed to disclose the full and true set of facts/circumstances in his knowledge and has wilfully concealed the true facts of the case. He has further given false evidence to hide his culpability in the case and also made selective disclosures to shield other Accused. He is also in touch with other Accused persons to derail the investigation.
>
> 5. That in light of the said facts and circumstances of the case, the tender of pardon granted to Rajiv Saxena be revoked by this Hon'ble Court and he may be tried in accordance with law."

7. As the afore-extracted certificate, of the learned Special Counsel seeks to incorporate, therein, by reference, the grounds for revocation of the tender of pardon extended to the respondent, it becomes necessary to advert to the said grounds, as contained in the body of the application. The application, of the petitioner, sought revocation, of the pardon extended to him, on the ground that

> (i) the respondent had failed to provide, during investigation, various crucial documents, which were

believed to be in his possession, or had provided incomplete documents, and

(ii) that the respondent had "wilfully concealed essential information during the course of investigation", and had deleted data present in laptops, provided by the respondent, before handing over, of the laptops, to the petitioner.

In the circumstances, the application contended that the respondent had exhibited bad faith, and had demurred from making a full and true disclosure of the facts and circumstances of the case, which was one of the essential conditions, subject to which pardon had been granted to him, by the learned Special Judge. The pardon was, therefore, it was contended, liable to be revoked, and it was prayed accordingly.

8. The impugned order, dated 5th March, 2020, of the learned Special Judge, disposes of the aforesaid application, preferred by the petitioner before him, seeking revocation of the pardon granted to the respondent. The *raison d' etre*, for the decision of the learned Special Judge, is to be found in paras 23 to 25 of the impugned order, which, consequently, merit reproduction *in extenso*, thus:

"23. From the perusal of Section 306 & 308 Cr PC and aforesaid judgment it is clear that once the accused is granted pardon by the Court and is made approver, the status of the accused changes from accused to witness/approver. However, if the approver, fails to comply with the conditions of order granting him pardon, he makes him liable to be tried as accused subject to the conditions as laid down in Section

308 Cr PC. In the judgment "State Vs Jagjit Singh"[2] , it is observed that revocation of pardon can only be as per the procedure provided U/s 308 Cr PC *which mandates that approver be examined in the Court before revoking the pardon. Thus it is clear that breach of the conditions of the order granting pardon has to be looked into after the approver is examined by the Session Court/Trial Court and Ld. PP files Certificate that approver has committed breach of the conditions on basis of which he was granted pardon*. Section 308 Cr PC also lays down that opportunity has to be granted to the accused to defend himself that he has complied with the conditions on which he was granted pardon. Therefore, .

24. The contention of Ld. Counsel for ED that this Court can revoke the pardon granted to any person, at any stage, *even before the approver is examined before Session Court/Trial Court*, is without any merit.

25. The application filed by ED is *premature* and is liable to be dismissed. The Enforcement Directorate may move appropriate application for revocation of pardon granted to respondent Rajiv Saxena, if so needed, at appropriate stage."

(Emphasis supplied)

9. The present petition, at the instance of the Directorate of Enforcement (hereinafter referred to as "Enforcement Directorate"), seeks quashing of the aforesaid order, dated 5th March, 2020, passed by the learned Special Judge.

10. As the issue involved is purely one of law, I had, *vide* my order dated 18th May, 2020, directed fixing of the present petition, for final disposal, without requiring any counter-affidavit, rejoinder, to be filed. Learned Counsel were requested to file brief written

[2] **State v. Jagjit Singh, 1989 Supp (2) SCC 770**

submissions, in support of the respective stances. Written submissions have, accordingly, been filed and Mr. Aman Lekhi, learned ASG, for the petitioner, and Mr. R. K. Handoo, learned counsel for the respondent, have been heard at considerable length.

Rival Submissions

11. Mr. Lekhi, the learned ASG, endeavoured to submit that the learned Special Judge had completely misconstrued the scheme of Sections 306 and 308 of the Cr PC. By taking me through Section 308, the learned ASG sought to point out that the statute did not permit judicial review, by the learned Special Judge, of the certificate of the prosecutor, submitted under Section 308 (1). In the learned ASG's submission, once the learned Public Prosecutor filed a certificate, under Section 308 (1), the inexorable and inevitable consequence would be that the approver would cease to be an approver, and would become an accused, albeit in respect of the offence for which he had been granted pardon. The learned ASG submits that the approver-turned-accused could never be regarded as a witness for the prosecution in the main trial. His trial would be separated from the main trial, and the approver-turned-accused would be tried only in respect of the offence, for which he had been granted tender of pardon. Learned ASG sought to point out, further, that, by seeking revocation of pardon, on the ground that the approver had failed to abide by the conditions on which pardon had been granted, the prosecution ran a grave risk, as the scheme of sub-sections (4) to (5) of Section 308 permitted the accused, in the first instance, to

demonstrate that he had not, in fact, violated the said conditions. If he succeeded in doing so, the accused was, necessarily, required to be acquitted. Where the accused could not satisfactorily demonstrate that he had complied with the conditions, subject to which pardon had been granted, the learned Trial Court was required, first, to decide this aspect of the matter. As such, submits the learned ASG, sufficient protection, for the approver, was available in the various sub-sections of Section 308 of the Cr PC.

12. Learned ASG submits, further, that the learned Special Judge erred, and fundamentally, in holding that the statement of the approver was required to be recorded, before deciding on the issue of revocation of the pardon extended to him. No such requirement, submits the learned ASG, is to be found in Section 308 of the Cr PC, and it was not permissible, therefore, for the learned Special Judge to engraft, by judicial fiat, a requirement which the statute did not contain. The learned Special Judge, in treating the application, of the petitioner, as "premature", on the premise that, prior to seeking revocation of pardon, the statement of the approver, to whom pardon had been extended, was required to be recorded has, therefore, in the submission of the learned ASG, gone wrong on facts as well as in law.

13. The view of the learned Special Judge, as expressed in the impugned order, if accepted, would, learned ASG would seek to submit, do complete violence to Section 306 of the Cr PC, and would also reduce the certificate of the Public Prosecutor, to which Section 308 (1) accords pre-eminence, to a dead letter.

14. Learned ASG also sought to submit that the certificate, dated 18th October, 2019, of the learned Special Counsel (who, by virtue of Section 46 of the PMLA, is deemed to be a "public prosecutor") could not be faulted for being unreasoned. I do not deem it necessary to enter into this issue, as the said certificate – as reproduced hereinabove – invokes, by reference, the contents of the application preferred, by the petitioner, before the learned Special Judge for revocation of the pardon granted to the respondent, and the reasons, for seeking certain revocation, are set out, in exhaustive detail, in the application. It cannot, therefore, in my view, be sought to be contended that the certificate, dated 18th October, 2019, was not reasoned.

15. Responding to the submissions of the learned ASG, Mr. Handoo submitted, at the first instance, that the application, of the petitioner, before the learned Special Judge, was itself not maintainable, as the Cr PC does not contemplate "revocation" of pardon, once tendered to an accused. Pardon, once granted, submits Mr. Handoo, cannot be revoked, cancelled or withdrawn.

16. Mr. Handoo also disputes the submission, of the learned ASG, that certificate, of the Public Prosecutor, tendered under Section 308 (1) of the Cr PC, is immune to judicial review, by the learned Special Judge. No such immunity, he submits, flows from the statute, and extending, to the application, of the Public Prosecutor, immunity from judicial review, where the prayer, in the application, is to revoke pardon, granted by a judicial order, would, in his submission, be *ex*

facie incongruous. Besides, submits Mr. Handoo, the certificate, of the Public Prosecutor, under Section 308 (1), has necessarily to allege that the approver has "wilfully concealed anything essential or given false evidence". Absent such averment, submits Mr. Handoo, the certificate is no certificate at all. Non-cooperation with the investigative process, particularly, is not one of the grounds on which revocation of the pardon, extended to the respondent, could have been sought – assuming such revocation could have been sought at all.

17. Drawing attention to sub-section (4) of Section 306, Mr. Handoo submits that the recording of the statement of the approver, consequent to grant of pardon under sub-section (1), is mandatory. No such statement, he points out, was ever recorded, from his client, after the grant of pardon, to him, on 25th March, 2019. The recording of such statement, submits Mr. Handoo, has necessarily to precede the issuance of certificate by the Public Prosecutor under Section 308 (1), and the certificate, itself, had necessarily to be based on the statement recorded under Section 306 (4). In other words, the "concealment" of something "essential", or the tendering of "false evidence", according to Mr. Handoo, has to be relatable to the statement of the approver, recorded under Section 306 (4), and not independent thereof. The stipulation, of the Public Prosecutor, being the person, designated to issue certificate under Section 308 (1), Mr. Handoo submits, underscores this position, as the Public prosecutor has nothing to do with the investigative process, and his role stands limited to the proceedings before the Court. If, therefore, the Public Prosecutor certifies that the approver has wilfully concealed any essential fact, or

tendered false evidence, that, Mr. Handoo submits, would have to be during the course of proceedings in the Court, and not during the investigative process. The Public Prosecutor cannot, submits Mr. Handoo, "peep into" the investigation, and relies, for the purpose, on ***R. Sarala v. T. S. Velu***[3]**.** The observation, of the learned Special Judge, in para 29 of the impugned order, to the effect that recording of the statement of the approver had necessarily to *precede* the application for revocation of pardon is, therefore, Mr. Handoo submits, unexceptionable, and, in fact, in accordance with the scheme of Sections 306 and 308 of the Cr PC. This position, submits Mr. Handoo, stands recognised in ***Jagjit Singh***[2], as well as in ***State of Maharashtra v. Abu Salem Abdul Kayyum Ansari***[4] and ***Suresh Chandra Bahri v. State of Bihar***[5].

18. Arguing in rejoinder, the learned ASG submits that the learned Special Judge erred in picking out a solitary sentence out of the decision in ***Jagjit Singh***[2], contrary to the fundamental principles of precedent. Every case, he submits, is decided on its own facts, and the facts, in ***Jagjit Singh***[2], are distinct, and different, from those obtaining in the present case. ***Jagjit Singh***[2], the learned ASG points out, involved a situation in which the approver, who had been granted pardon, resiled from the conditions, whereunder the pardon was granted. The prosecution sought to contend, before the Supreme Court, that, by so resiling, the approver had, by his own act, converted his status to that of an accused. The Supreme Court negatived the

[3] **(2000) 4 SCC 459**
[4] **(2010) 10 SCC 179**
[5] **1995 Supp (1) SCC 80**

submission, holding that mere resiling, by the approver, did not make him an accused, in the absence of the certificate, statutorily required to be tendered, by the Public Prosecutor under Section 308 (1) of the Cr PC. The observations in ***Jagjit Singh***[2], therefore, submits the learned ASG, were made in the context of a situation in which there was no certificate, by the Public Prosecutor, under Section 308 (1). *Per contra*, he points out, in the present case, such a certificate exists. The learned ASG submits that there is no prescribed format for the certificate, and that, therefore, the attempt, of Mr. Handoo, to berate the certificate as unreasoned, has no legs to stand on. The learned ASG invited my attention to various paras of ***Jagjit Singh***[2], in order to demonstrate that, in fact, the said decision supported the case of the petitioner, and not that of the respondent. He also places especial reliance on the judgment of the High Court of Madras in ***In re. Arusami Goundan***[6], which, in his submission, stood approved in ***Jagjit Singh***[2]**.**

19. The learned ASG submitted, further, that ***Abu Salem Abdul Kayyum Ansari***[4] clearly decided the issue in controversy in the favour of the petitioner. He points out that, in the said case, the order of the High Court, allowing the respondents to continue as a witness, was set aside by the Supreme Court. Proceeding therefrom, the learned ASG submits that, once the Public Prosecutor certified, under Section 308 (1) of the Cr PC, that the accused was giving false information, it would be incongruous to allow him to continue as a witness for the prosecution. He points out that, in para 21 of the report in ***Abu Salem***

[6] **AIR 1959 Mad 274**

Abdul Kayyum Ansari[4], ***Jagjit Singh***[2] stood explained and clarified. The learned ASG also invited my attention to para 17 of the report in ***Abu Salem Abdul Kayyum Ansari***[4], and submits that the reference, in the said para, to the calling of the respondent as a witness, was because, in the facts of that case, the respondent had, in fact, been called as a witness. The Supreme Court did not, in the said para, according to the learned ASG, hold, as a principle of law, that the wilful concealment of essential facts, or giving false evidence, by the approver, had necessarily to be during the course of recording of his statement under Section 306 (4), after he had been granted pardon under Section 306 (1). In fact, submits the learned ASG, Section 306 was entirely irrelevant in the present case, which involved, essentially, the interpretation of Section 308. He contrasts the two provisions by pointing out that the primary role, in Section 306, was ascribed to the Court, whereas the main actor, in Section 308, was the Public Prosecutor. He submits that the learned Special Judge erred in ignoring the use of the words "if any", in Section 306 (4) which, in his submission, are critical. The learned ASG also contrasted, in this connection, Section 308 with Section 321 of the Cr PC. In fine, the learned ASG submitted that it was not open to the learned Special Judge to doubt the certificate of the learned Public Prosecutor, submitted under Section 308 (1), which was sacrosanct.

Analysis

Statutory scheme of Sections 306 and 308, Cr PC

20. Sections 306, 307 and 308, Cr PC, form, in my opinion, a clear, cohesive and coherent scheme, unmistakable in its progression. Section 306 (1) empowers the Chief Judicial Magistrate, the Metropolitan Magistrate, or the Magistrate of the First Class, to tender pardon, to any person supposed to have been directly or indirectly concerned in, or privy to, an offence to which the Section applies, subject to the person 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 in the commission thereof. The Magistrate, tendering pardon under Section 306 (1) is required, by Section 306 (3), to record his reasons. Section 306 (4) mandates – as is apparent from the use of the word "shall", as well as from various judicial authorities, which have pronounced on the point, to which of which I would presently allude – the examination, as a witness, of the person accepting pardon (who becomes, thereby, an "approver"), in the Court of the Magistrate taking cognizance of the offence, as well as in the subsequent trial, if any. Thereafter, the Magistrate taking cognizance is required, under Section 306 (5), to commit the offence for trial, to the jurisdictional Court, or to the Chief Judicial Magistrate, as the case may be. Section 307 empowers the Court, to which the offence is committed under Section 306 (5) to, during the course of trial, tender pardon to any person, supposed to have been directly or indirectly concerned in, or privy to, the offence being tried, so as to

obtain the evidence of such person. Admittedly, Section 307 does not impact the issue before me. Section 308 deals with non-compliance with the conditions, subject to which pardon is granted under Section 306 (1). Section 308 (1) empowers the Public Prosecutor to certify that, in his opinion, an approver – i.e., an accused to whom pardon has been extended under Section 306 or Section 307 – has wilfully concealed something essential, or given false evidence and has, thereby, failed to comply with the condition, subject to which pardon was granted to him. On such certificate being issued by the Public Prosecutor, the approver concerned becomes liable to be tried for the offence in respect of which he had, earlier, been granted pardon, as well as for any other offence, of which he appears to have been guilty, and for giving false evidence (with leave of the High Court), albeit separately from the other accused. At such trial, the approver-turned-accused shall be entitled to plead compliance, on his part, with the conditions of pardon. Any such plea, if advanced by the approver-turned-accused, would shift the onus, to the prosecution, to prove infraction, by the approver-turned-accused, of the conditions of pardon. In such a case, the Court trying the approver-turned-accused shall, before passing judgment, determine, in the first instance, whether the approver-turned-accused complied with the conditions of pardon. In case he did so, the approver-turned-accused is entitled to acquittal.

21. As the scheme, aforesaid, reveals itself, therefore, examination of the approver, under Section 306 (4) is, *ex-facie*, mandatory. *Thereafter*, the proceeding may follow one of two paths. Absent any

infraction, by the approver, of the conditions of pardon, the trial of the main offence continues, and the approver is liable to be arraigned as a prosecution witness therein. If, however, the approver breaches the conditions of pardon, by concealing material facts or tendering false evidence, the Public Prosecutor is empowered to so certify, in which case the approver becomes an accused, in respect of the offence for which pardon had been tendered to him, and becomes liable to be tried for the said offence. Such trial, however, has to proceed separately, from the trial of the main offence.

Analysis

22. That the proceeding has to traverse the above, inexorable, path, stands authoritatively held, by the Supreme Court, over half a century ago, in ***Bipin Behari Sarkar v. State of West Bengal***[7], albeit in the context of Section 337 to 339 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the 1898 Cr PC") which, to all intents and purposes, are *in pari materia* with Sections 306 and 308 of the 1973 Cr PC. For ready reference, Sections 337 to 339 of the 1898 Cr PC, may be reproduced thus:

> **"337. Tender of pardon to accomplice. –**
>
> (1) In the case of any offence triable 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 161, 165, 165A, 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency

[7] **AIR 1959 SC 13**

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 inquiry 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.

(1A) 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.

(2A) In every case where a person has accepted a tender or 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.

(2B) In every case where the offence is punishable under Section. 161 or Section 165 or S. 165A of the Indian Penal Code, 1860 or sub-section (2) of Section. 5 of the Prevention of Corruption Act, 1947, and where a person has accepted tender of pardon and has been examined under sub-section (2) then, notwithstanding anything contained in sub-section (2A), 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 (26 of 1952).

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

338. Power to direct tender of pardon.

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

339. Commitment of person to whom pardon has been tendered:

(1) Where a pardon has been tendered under section 337 or section 338 and the Public prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully 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:

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court."

23. A comparative study of Sections 337 to 339 of the 1898 Cr PC, vis-à-vis Sections 306 to 308 of the 1973 Cr PC, reveal that they are, in all relevant respects, in *pari materia*. That the law, as enunciated in the context of Sections 337 to 339 of the 1898 Cr PC would also apply, *mutatis mutandis*, to Sections 306 to 308 of the 1973 Cr PC,

also stands recognized in ***Jagjit Singh***[2] and ***Abu Salem Abdul Kayyum Ansari***[4].

24. ***Bipin Behari Sarkar***[7], subjecting Sections 337 to 339 of the 1898 Cr PC to a close and searching scrutiny, holds thus (in para 7 of the report):

> "Section 339(1) of the Code provides that "where a pardon has been tendered under Section 337 or Section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully 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". The proviso to this sub-section prohibits the trial of such person jointly with any of the other accused and that such person shall be entitled to plead at such trial that he had complied with the condition upon which such tender was made. The provisions of this section clearly pre-suppose that the pardon which had been tendered to a person had been accepted by him and that thereafter that person had wilfully concealed anything essential or had given false evidence and therefore had not complied with the condition on which the tender was made to him. Section 337 of the Code, under which a pardon is tendered, shows that such tender is made on the condition that the person to whom it is tendered makes 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 a principal or an abettor to the commission thereof. Sub-section (2) of this section requires that every person who has accepted a tender shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. It is clear, therefore, that a mere tender of pardon does not attract the provisions of Section 339. There must be an acceptance of it *and the person who has accepted the pardon must be examined as a witness. It is only thereafter that the provisions of Section 339 come into play and the person who accepted the pardon may be tried for the offence in respect of*

> *which the pardon was tendered, if the Public Prosecutor certifies that in his opinion he has, either wilfully concealed anything essential or had given false evidence and had not complied with the condition on which the tender was made.*"
>
> (Italics and underscoring supplied)

The italicised and underscored words, from the afore-extracted passage from ***Bipin Behari Sarkar***[7] clearly indicate that, in the scheme of Sections 337 to 339 of the 1898 Cr PC, it was only after the accused-turned-approver (consequent to his having been granted tender of pardon) was examined as a witness under Section 337 (2), that the Public Prosecutor could certify, under Section 339 (1), that he had concealed material facts, or given false evidence. Extrapolating the ratio to the 1973 Cr PC, it would appear that it is only after the accused-turned-approver is examined as a witness, under Section 306 (4), that the Public Prosecutor could certify, under Section 308 (1), that he had concealed material facts, or given false evidence. *Per* corollary, it would be premature to seek for revocation, of the pardon extended to the approver, before his statement was recorded under Section 306 (4), Cr PC – which is what the impugned order holds.

25. Various High Courts, in the context of the 1898 Cr PC, in fact, adopted the same view. As far back as in 1943, a learned Division Bench of the High Court of Sindh ruled, in ***Emperor v. Pir Imamshah***[8], thus:

> "In our view, then, the tender of pardon having once been made by the District Magistrate and accepted by the accused, the tender of pardon could not be withdrawn as the District

[8] **AIR 1944 Sindh 184**

Magistrate withdrew it. *The accused should be examined as a witness in accordance with the provisions of Section 337 (2), Cr PC, and it will be for the Public Prosecutor thereafter to consider whether the accused should or should not be prosecuted in accordance with the provisions of Section 339, Cr PC*."

(Emphasis supplied)

26. ***In re. Arusami Goundan***[6], on which both learned Counsel before me rely, specifically holds, in para 17, thus:

"Let us examine the reason of the matter. Occasionally when grave offences are committed the law finds it necessary to enlist the assistance of some of the offenders in order that the rest may be brought to justice. This happens when one of several persons who have committed a crime makes a confession which is believed to be true and which It is considered would help to secure a conviction of the rest.

The Procedure Code now insists that accomplices who have been tendered a pardon must be examined both in the committing court and in the court of Session. This provision is inserted in the interests of justice and is not intended for the benefit of the approver. *Its purpose is to ensure that all the evidence obtained from the accomplice is placed before the court so that justice may be done as between the State and the persons placed in their trial.* It is not an ordeal through which an approver has to pass before he can win to safety.

So far as the approver is concerned, he is given a pardon "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." The condition of the pardon is that he must make a full and true disclosure, and, if, he wilfully conceals anything essential or gives false evidence, he would have failed to comply with the conditions on which the pardon was granted to him.

The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter; it may be in the committing

> *court, or, it may be in the sessions court.* But, the obligation to make a full and true disclosure rests on the approver at every stage *at which he can be lawfully required to give evidence*. If at any stage he either wilfully conceals material particulars or gives false evidence he would have failed to comply with the conditions' on which the pardon was tendered to him and thereby incurred its forfeiture.
>
> Neither as a matter of reason or logic, nor as a matter of statutory interpretation can it be said that Section 339 (1) is dependent on or connected with Section 337(2) in the sense that the approver must be examined both in the committing court and the Sessions Court before it can be held that he has forfeited his pardon. *It is sufficient if he fails to conform to the conditions on which the pardon has Been granted to him at either stage*. As explained in the earliest of the cases we have referred to where a pardon has been tendered and accepted, the utmost good faith must be kept on both sides."
>
> (Italics and underscoring supplied)

A reading of the above passages, from ***Arusami Goundan***[6] seems to reveal some degree of ambivalence, on the issue of whether it is necessary to examine the approver twice, first in the committing Court and, thereafter, in the Sessions Court. On the aspect that the obligation, to make full and true disclosure, could be cast on the approver only when he is lawfully called to tender evidence in court, be it before the committing court, or the Sessions Court, however, the decision appears to be clear and categorical. In fact, the Court clarifies that the very purpose of requiring examination, of the approver, to whom pardon has been tendered, is to examine whether he is conforming to the conditions of pardon, or not.

27. The same view stands reflected, in the context of the 1973 Cr PC, in the following passages, from the judgment of the High Court of Kerala in ***In re: Chief Judicial Magistrate***[9] (in which, significantly, the Court was concerned with the propriety of the Magistrate examining the accused at the time of granting tender of pardon):

> "8. Such examination of questioning is not the one contemplated in Section 306 (4). *Examination under Section 306(4) is mandatory.* What the sub-section says is that every person accepting a tender of pardon shall be examined as a witness in the Court of the Magistrate taking cognizance and in the subsequent trial. *The object of such examination is to ascertain whether he has resiled from his former position and his broken the conditions of his pardon. It has to be remembered that the prosecution is not bound to examine an approver in the subsequent trial if he has resiled from his position and broken the conditions while examined before the Magistrate under Section 306(4). Examination under Section 306(4) is therefore compulsory and the examination or questioning at the time of tendering pardon is not a substitute for it. Where a person has been made an approver the principal task before the court is to see whether his evidence is corroborated by that of other witnesses and consequently, at the trial the approver must be examined first or at the earliest even though non-compliance cannot be relied on if no prejudice resulted. Such examination of the approver at the trial will depend upon whether he resiled from his position or not in the committing court. That is one of the reasons why his examination under Section 306(4) in the Court of the Magistrate; taking cognizance is made compulsory.*
>
> *****
>
> 12. *Examination of the approver under Section 306(4) before the Magistrate taking cognizance and his subsequent examination at the trial are entirely for different purposes. His examination before the Magistrate is not to treat it as evidence to consider the guilt of innocence of the accused, but*

[9] **1988 Cri LJ 812 : 1987 (2) Crimes 647 (Ker.)**

> *only for the purpose I have mentioned earlier*. Such examination will be even before process is issued to the accused. At that stage no enquiry even is involved and further the accused will be nowhere in the picture. There is no question of the accused being permitted to cross-examine the approver at that stage. Accused has no right to participate in that examination. But his examination in the subsequent trial is for the evidence in the case. Necessarily and naturally the accused has a right to cross-examine him at that stage because without cross-examining and challenging his veracity the evidence cannot be used against the accused."
>
> (Italics and underscoring supplied)

28. The authorities, cited hereinabove, all indicate that examination, of the approver, under Section 306 (4) of the 1973 Cr PC [or Section 337 (2) of the 1898 Cr PC], is mandatory, has to precede issuance of certificate, by the Public Prosecutor under Section 308 (1) of the 1973 Cr PC [or Section 339 (1) of the 1898 Cr PC], and is intended to ascertain whether the approver has complied with the conditions of pardon, or has resorted to concealment of material fact, or tendering of false evidence.

29. I proceed, now, to advert to the three decisions, of the Supreme Court, on which, principally, arguments, before me, revolved, namely ***Jagjit Singh***[2], ***Abu Salem Abdul Kayyum Ansari***[4] and ***Suresh Chandra Bahri***[5]. Reliance, on these decisions was, incidentally, placed by both the learned ASG, appearing for the petitioner, as well as Mr. Handoo, learned Counsel for the respondent.

30. The respondent Jagjit Singh, in ***Jagjit Singh***[2], was granted pardon, under Section 306 of the Cr PC and, consequently, turned

approver. He was, thereafter, examined as a prosecution witness in the committal case proceeding, on 24th December, 1985, when he resiled from his earlier statement. In the Court of Sessions, Jagjit Singh sought to contend that he could not be examined as a witness, as he had not accepted the pardon, and did not support the version of the prosecution. This submission was rejected by the learned Trial Court, and the Criminal Revision Petition, preferred thereagainst, was also dismissed by this Court. Thereafter, one of the accused, who was a proclaimed offender, was arrested and the supplementary challan was filed, against him, in the court of the Metropolitan Magistrate. In the said proceedings, Jagjit Singh was sought to be examined, by the prosecution, as an approver. He, however, opposed his being summoned as an approver, on the ground that, as he had resiled from his pardon, he could not be examined as a witness in the case. The learned Chief Metropolitan Magistrate dismissed the application, but the Criminal Revision Petition, preferred by Jagjit Singh, thereagainst, was allowed, by a learned Single Judge of this Court, who directed the State not to examine Jagjit Singh as an approver in the supplementary FIR, lodged in the proceedings. Aggrieved, thereby, the State appealed to the Supreme Court.

31. Paras 7 and 8 of the decision, which are of some relevance, may (to the extent they are relevant) be reproduced thus:

> "**7.** It has been urged that the statement recorded under Section 164 of the Code of Criminal Procedure was not made by the respondent, Jagjit Singh voluntarily but it was obtained under coercion by the police. It has also been contended that he resiled from his statements in the court of the Committing Magistrate and he has not accepted the

pardon granted to him by the Magistrate. He should be arrayed as an accused in the case FIR No. 238 of 1985 and should be tried as an accused along with other accused in the said case. This contention is not tenable inasmuch as the pardon granted to the respondent, Jagjit Singh was accepted by him and other approver, Gurvinder Singh who were examined as PW 1 and PW 2 in the court of the Committing Magistrate. These approvers, of course, resiled from their statement in the court of the Committing Magistrate. It has therefore, been submitted that the prosecution cannot examine him as a witness in the said case as he has cast away the pardon granted to him. The submission, in our considered opinion, is not tenable inasmuch as *sub-section (4) of Section 306 of Code of Criminal Procedure clearly enjoins that a person accepting a tender of pardon has to be examined as a witness in the court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. It is therefore, a mandate of the provisions of the said Act to the prosecution to examine the approver to whom pardon has been granted as a witness both in the Committing Court as well as in the trial court. It does not matter whether the approver has resiled from his statement and has not made a full and true disclosure of whole of the circumstances within his knowledge relating to the offence so long as the Public Prosecutor does not certify that in his opinion the approver has either wilfully concealed anything essential or has given false evidence contrary to the condition on which the tender of pardon was made.*

8. It has been next contended that the grant of pardon is in the nature of a contract between the State granting the pardon on the one hand and the person accepting the pardon on the other hand. As the State has the power to revoke the pardon at any time the approver has also got the reciprocal right to cast away the pardon granted to him. This submission is also not tenable. 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 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*. In these circumstances, the question of casting away the pardon granted to an approver and his claim not to be examined by the prosecution as a witness before the trial court is without any substance."

32. The learned ASG sought to distinguish the decision in ***Jagjit Singh***[2], and also criticised the learned Special Judge for having, in his submission, picked a sentence out of the said judgment, oblivious of the context in which it was rendered. The learned ASJ has submitted – and, it must be accepted, unexceptionably – that a judgment has to be read as a whole, and in the context of the fact situation obtaining before the Court, and cannot be relied upon, for precedential worth, by extracting, therefrom, a sentence here nor there. The learned ASG pointed out that the controversy before the Supreme Court, in ***Jagjit Singh***[2] was whether, merely because Jagjit Singh had resiled from the statement, rendered by him, consequent to grant of pardon, he stood converted, *ipso facto*, into an accused, from

an approver. Moreover, points out learned ASG, the Public Prosecutor, in ***Jagjit Singh***[2], had not issued the requisite certificate under Section 308 (1) of the Cr PC. These two circumstances, in his submission, clearly distinguish the case, at hand, from ***Jagjit Singh***[2]. In relying, blindly, on ***Jagjit Singh***[2], without taking stock of these two vitally distinguishing circumstances, the learned Special Judge has, contends the learned ASG, materially erred.

33. To the extent of his contention that, in respect of the above two circumstances, the facts in ***Jagjit Singh***[2] are different from those in the present case, I find myself in agreement with the learned ASG. However, these two distinguishing circumstances, by themselves, cannot, in my considered opinion, entirely erode the precedential worth of the pronouncement in ***Jagjit Singh***[2], insofar as its applicability, to the case before me, is concerned. It is true that, at times, a single distinguishing fact, may affect, vitally, the applicability of an earlier pronouncement, as a precedent in a later case[10]. Equally true, however, is it that every distinguishing factual circumstance cannot result in evisceration of the precedential value of an earlier judgment[11]. It is also trite, and well settled, that hierarchically lower judicial authorities ought not to seek to escape the precedential value of a pronouncement of the Supreme Court, constitutionally sanctified by Article 141, by relying on factual distinctions, which do not affect the *ratio decidendi* of the judgment[12]. It is a truism that no two cases

[10] **Gian Chand v. State of Haryana, (2013) 14 SCC 420; Megh Singh v. State of Punjab, (2003) 8 SCC 666; Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd., AIR 2003 SC 511**
[11] **Fida Hussain v. Moradabad Development Authority, (2011) 12 SCC 615; Ballabhadas Mathurdas Lakhani v. Municipal Committee, Malkapur, (1970) 2 SCC 267**
[12] **Fuzlunbi v. K. Khader Vali and Anr., (1980) 4 SCC 125**

are absolutely identical on facts, and if identity on facts is to be a prerequisite for a pronouncement of the Supreme Court to have precedential value, Article 141 may well stand reduced to a dead letter. Tweedledum and Tweedledee existed only in the fertile imagination of Lewis Carroll. Article 141 makes the declaration of the law, by the Supreme Court, binding on all authorities in the territory of India. It would be an affront to Article 141, to understand the precedential worth of the declaration of the law, by the Supreme Court, by limiting the declaration by the factual matrix in which it was made. What has, in every case, to be examined, is, rather, whether the factual difference(s), between the earlier pronouncement, and the case at hand is, or are, such as to affect the precedential applicability, of the former, on the latter.

34. In paras 7 and 8 of ***Jagjit Singh***[2], while examining whether the Court could withdraw the pardon granted to the approver, or the approver could cast away the pardon granted him, and answering the issue in the negative, the Supreme Court held that, even if the approver were to resile from his statement, he, nevertheless, has to be examined as a witness, and it is only when the Public Prosecutor certifies that the approver has not complied with the conditions of tender of pardon, by concealing something essential or giving false evidence, that the approver could be tried under Section 308 of the Cr PC. Though the judgment, it is true, does not say, in so many words, that the certificate of the Public Prosecutor, under Section 308 (1), has to be based on the evidence, recorded by the Committing Court, of the approver, a contextual reading of the observations of the

Supreme Court indicate that the examination of the approver, as a witness, by the prosecution, as well as the certification, by the Public prosecutor, regarding non-compliance, by the approver, of the conditions of pardon, are both essential precursors, to trial of the approver, under Section 308, in respect of the offence for which pardon was granted as well as in respect of other offences in which he may be involved.

35. In ***Abu Salem Abdul Kayyum Ansari***[4], Respondent No. 3, before the Supreme Court, was granted pardon, by the Sessions Court, under Section 307, Cr PC, and made an approver. He, thereafter, was examined as a witness in the trial, by the prosecution. During the course of such examination, the Public prosecutor realised that Respondent No. 3 was being economical with the truth. To a specific query as to whether he desired to inform the court regarding the conspiracy forming subject matter of the trial, the answer of Respondent No. 3 was in the negative. The Public Prosecutor, forthwith, issued a certificate, under Section 308, Cr PC, to the effect that Respondent No. 3 had not complied with the condition, subject which pardon had been extended to him, and prayed, therefore, that he be tried separately.

36. Respondent No. 1, before the Supreme Court, desired to cross-examine Respondent No. 3. The learned Designated Court, trying the case, allowed the request. Aggrieved, the State of Maharashtra appealed to the Supreme Court.

37. On facts, there is a significant distinction, between ***Abu Salem Abdul Kayyum Ansari***[4] and the present case, as the tendering of pardon, in ***Abu Salem Abdul Kayyum Ansari***[4] was by the Sessions Court, during trial, under Section 307, and not by the committal Court, under Section 306, Cr PC. No occasion, therefore, arose for sub-section (4) of Section 306, to apply. The decision, nevertheless, assumes significance, as a precedent in the present case, on account of the following findings, returned by the Supreme Court in paras 17 and 21 of the report. Para 17 contains the following clear and unequivocal exposition of the law, in relation to Sections 306 and 307, Cr PC:

> "An accomplice who has been granted pardon under Section 306 or 307 Cr PC 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 PC to that effect, the protection given to him is lifted*."
>
> (Emphasis supplied)

This passage, therefore, echoes the view, in ***Bipin Behari Sarkar***[7], that concealment of anything material, or giving false evidence, by an approver, would arise "when he is called as a witness for the prosecution". The approver, when so called, is under a duty to make a full and true disclosure of the circumstances within his knowledge, concerning the offence, and with respect to every other person so concerned. If he suppresses anything essential, within his knowledge,

concerning the offence, or, by giving false evidence, fails to comply with the condition, subject to which pardon was tendered by him, the Public Prosecutor so certifies, under Section 308 (1), whereupon the approver becomes an accused, in respect of the offence for which pardon had been tendered to him, and any other offence, of which he appears to be guilty in connection with the same matter. He also becomes liable to be tried for the offence of giving false evidence, albeit with the sanction of the High Court.

38. The judgment in ***Abu Salem Abdul Kayyum Ansari***[4] goes on to reproduce para 7 of the report in ***Jagjit Singh***[2], and return the following findings, in respect thereof (in para-21):

> "The above statement of law in ***Jagjit Singh [1989 Supp (2) SCC 770 : 1990 SCC (Cri) 133]*** cannot be understood as laying down that an accomplice who has been tendered pardon *and called as a witness for the 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 case [1989 Supp (2) SCC 770 : 1990 SCC (Cri) 133]*** no certificate was given by the Public Prosecutor. The legal position that flows from the provisions contained in Sections 306, 307 and 308 Cr PC 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."

(Emphasis supplied)

Though the above passage concerns itself more with the consequence of issuance, by the Public Prosecutor, of the certificate under Section 308 (1) of the Cr PC, it reiterates, nevertheless, the position that "an accomplice who has been tendered pardon *and called as a witness for the prosecution*" cannot be continued to be examined as a prosecution witness, if the Public Prosecutor certifies that the accomplice has not complied with the condition on which tender of pardon was made. Here, again, calling of the accomplice-turned-approver, as a witness for the prosecution, between the tendering of pardon to the accomplice (thereby making him an approver), and the issuance of Certificate, by the Public Prosecutor, is regarded as inevitable.

39. The facts, in ***Suresh Chandra Bahri***[5], are extremely involved, and it is not necessary to be make reference thereto, in order to extract, from the said judgment, the applicable *ratio decidendi*, insofar as the present case is concerned. Suffice it to state that, in the said case, after tender of pardon to the approver Ram Sagar Vishwakarma, the learned Magistrate, who took cognizance and committed the offence for trial to the Court of Sessions, did not record his statement under Section 306 (4) of the Cr PC. The learned Sessions Court remanded the matter, to the learned Magistrate, to record the statement of the approver, under the said provision. The Supreme Court was, *inter alia*, seized with the issue of whether such a procedure was permissible, and answered it, ultimately, in the affirmative (in paras

31 to 33 of the report). In the process of doing so, the Supreme Court, in para 30 of the report, returned the following findings which, in my opinion, practically clinch the controversy in issue before me:

> "A bare reading of clause (a) of sub-section (4) of Section 306 of the Code will go to show that *every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any*. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (i) or (ii) of clause (a) of sub-section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. *The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial. As envisaged in sub-section (1) of Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, the failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages*. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal. *The object and purpose in enacting this mandatory 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 an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the

> trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as unreliable. Further clause (b) of sub-section (4) of Section 306 of the Code will also go to show that it mandates that a person who has accepted a tender of pardon shall, unless he is already on bail be detained in custody until the termination of the trial. We have, therefore, also to see whether in the instant case these two mandatory provisions were complied with or not and if the same were not complied with, what is the effect of such a non-compliance on the trial?"
>
> (Italics and underscoring supplied)

40. Para 30 of the report in ***Suresh Chandra Bahri***[5], therefore, holds that the examination of the approver, as witness, under Section 306 (4), Cr PC, serves two objectives, the first being to test whether the approver is abiding by his undertaking – subject to which pardon was tendered to him – to make a full and true disclosure of all facts within his knowledge, and provided true evidence in respect thereof, and the second, so as to enable the accused to point out any inconsistencies, between the said statement and the subsequent evidence, of the approver, during trial, if any. With the second objective, we are not particularly concerned, in the present case; the first, however, is pivotal to the issue in controversy, as the Supreme Court has clarified, yet again, that examination of the approver, as a witness under Section 306 (4) is intended, *inter alia*, to ascertain whether the approver is abiding by the conditions of his pardon, or is an untrustworthy witness. In the latter eventuality, no doubt, the

Public Prosecutor would be in a position to so certify, under Section 308 (1), in which event the approver would revert to his former status as accused, albeit in respect of the offence for which he had been tendered pardon, as well as any other offence in which he may be involved. The approver-turned-accused would, then, be liable to be tried, separately from other accused in the main case, for the said offences – as well as for the offence of giving false evidence, with the leave of the High Court.

41. The position that results, in law, therefore, appears to be unmistakable. Tendering of pardon, to an accomplice, under Section 306 (1), Cr PC, and his conversion, thereby, into an approver, has, inexorably, to be succeeded by his examination, as a witness, under Section 306 (4). It is during the course of such statement, that the Public Prosecutor would be able to discern whether the approver is, or is not, abiding by the conditions, subject to which pardon was tendered in, of making a full and true disclosure of all facts within his knowledge. If the approver is found to have concealed something essential, or to be tendering false evidence, the Public Prosecutor would so certify, under Section 308 (1), whereupon, as the learned ASG correctly submits, the approver would metamorphose into an accused, and would be liable to be tried, separately, in respect of the offence for which he had been tendered pardon, any other offence in which he may be found to be involved, and the offence of providing false evidence (with the leave of the High Court). The manner in which such separate trial of the approver is to proceed, is provided in the succeeding sub-sections of Section 308 of the Cr PC, and the

controversy before me does not require me to travel into that terrain, as the impugned order, of the learned Special Judge, has rejected the application, of the petitioner, on the ground that, as the approver had not been examined as a witness, no question of revocation of the pardon, granted to him, arises, and has reserved liberty, with the petitioner, to re-approach at an appropriate stage.

42. *Ex facie*, the view adopted by the learned Special Judge, as reflected in paras 23 to 25 of the impugned order, dated 5th March, 2020, is eminently in accordance with the law laid down in the aforenoted decisions, as well as the statutory scheme of Sections 306 and 308 of the Cr PC, and does not merit any interference.

43. I am also in agreement, with Mr. Handoo, that the empowerment, of the Public Prosecutor, with the authority to issue certificate, under Section 308 (1), is also indicative of the fact that the concealment of essential facts, or tendering of false evidence, by the approver, has necessarily to relate to his evidence, as recorded during trial under Section 306 (4), and cannot relate to his conduct during investigation. Indeed, despite considerable research, I have been unable to come across a single instance, in any reported decision, in which the certificate of the Public Prosecutor, under Section 308 (1), is based on the conduct of the approver during investigation, or his response to queries put to him outside the Court. Nor has the learned ASG drawn my attention to any such decision, despite contending, emphatically, that Section 308 (1) did not specifically proscribe issuance of certificate, by the Public Prosecutor, regarding

concealment of material fact, or giving false evidence by the accused-turned-approver, on the basis of the proceedings in investigation.

44. Any such interpretation, in my view, would run against the very grain of the scheme, statutorily engrafted in Sections 306 and 308 of the Cr PC. In my perception, a holistic, and conjoint, reading of these provisions, reveal an inexorable sequence, in which one proceeding has to follow the next. The first step is tendering of pardon, to the accomplice, under Section 306 (1). The next step – which has been held to be mandatory and unrelenting, in decision after decision – is the examination, of the approver, as a witness, under Section 306 (4). The proceeding may, thereafter, follow one of two paths. In ordinary course, the court, taking cognizance would, after recording the evidence of the approver under Section 306 (4), commits the offence to trial, to the jurisdictional Court. If, however, the evidence of the approver, recorded under Section 306 (4), discloses concealment of anything essential, or tendering of false evidence, the Public Prosecutor would issue a certificate, to the said effect, under Section 308 (1), whereupon the approver would metamorphose into an accused, and be tried, separately, as already noted hereinabove, for (i) the offence in respect of which he had been tendered pardon, (ii) any other offence in which he may be involved and (iii) with the leave of the High Court, the offence of tendering false evidence. All the decisions of the Supreme Court, cited hereinabove, hold, clearly, that the very purpose of recording of the evidence, of the approver, under Section 306 (4), *is to ascertain whether he is complying with the*

conditions of pardon, or not. The question of "revoking pardon", before any such statement is recorded, cannot, therefore, arise.

45. The mere fact that the Public Prosecutor has issued a certificate, under Section 308 (1) of the Cr PC, even before the evidence of the approver was recorded under Section 306 (4) cannot, in my view, make any difference to this factual, or legal position. In my considered opinion, the certificate, dated 18th October, 2019, of the Public Prosecutor, issued in the present case, was an exercise in futility, inasmuch as it was not preceded by the recording of the evidence of the approver, under Section 306 (4), Cr PC. In the absence of any such statement, or evidence, it was not open to the Public Prosecutor to certify, regarding compliance, by the approver, of the conditions of pardon. The certificate issued by the Public Prosecutor in the present case, effectively, therefore, placed the cart before the horse.

46. The learned Special Judge cannot, therefore, be faulted, in any manner, in rejecting the application, for "revocation of pardon", as filed by the petitioner before him, as premature, as no evidence, of the approver, had been recorded under Section 306 (4), Cr PC.

47. I do not deem it necessary to examine the authority, of the Public Prosecutor, to "peep into" the investigation, and the evidence garnered therein. It is obviously not possible to hold that the Public Prosecutor should remain a stranger to the investigative process, which constitutes the *terminus a quo*, wherefrom the entire proceeding emanates. Suffice it, therefore, to state that the certificate, under

Section 308 (1) of the Cr PC, to be issued by the Public Prosecutor, is required to be based on the examination, of the approver, under Section 306 (4), or any other evidence adduced by the approver during trial, whether prior to committal or thereafter. The certificate of the Public Prosecutor, issued in the present case, being based entirely on the alleged non-co-operation, by the respondent, during investigation, does not conform to the scheme of Section 306 and 308 of the Cr PC. It could not, therefore, constitute, legitimately, the sole basis to seek "revocation" of the pardon tendered to the respondent.

48. Had the evidence of the respondent been recorded, under Section 306 (4), as statutorily ordained, it is quite possible that he may have come clean, and disclosed all information known to him, without giving any false evidence. Could, in such a circumstance, the Public Prosecutor have issued the certificate under Section 308(1)? The answer, in my view, has necessarily to be in the negative. The evidence that ultimately becomes admissible, and relevant, would be the evidence which emerges before the Court. Inculpatory material, even if garnered during investigation, has to be proved before the Court before the prosecution could seek to take advantage thereof. The disclosure before the Court is what, therefore, may tilt the scale, one way or the other. Candour, and a clean breast, are, therefore, expected, of the approver, in his evidence before the Court, and, so long as that is forthcoming, no case for invoking, against him, Section 308 (1) of the Cr PC can be said to exist, no matter how much he may have prevaricated during the investigative process.

49. The learned ASG had sought to draw attention to the fact that, of the two inhibiting circumstances, visualised in Section 308 (1), namely "wilfully concealing anything essential", or "giving false evidence", while the "leading of evidence" may be relatable to the proceedings before the Court, there was nothing to indicate that the "concealment", of "anything essential" could not be extended to include the investigative process. Though the submission, semantically, may be attractive, viewed schematically, it fails to impress. When one reads Section 308 (1) in juxtaposition, and in conjunction, with 306 (1) and (4), it is apparent that the "concealment", as well as the "giving false evidence", to which Section 308 (1) alludes, both related to evidence before the Court.

50. That the above interpretation is correct, also becomes apparent when one reads Section 306 (1), itself. In fact, Section 306 (1), even by itself, aids in the interpretation of Section 308 (1). Section 306 (1) opens by clarifying that the purpose of granting tenure of pardon, to an accomplice-accused, case "obtaining (of his) evidence". The obtaining of evidence has to be by the Magistrate, Judicial Magistrate, or Magistrate of the first class, tendering pardon; not by the investigating officer. When, and where, does the Chief Judicial Magistrate, the Metropolitan Magistrate, or the Magistrate of the first class, obtain evidence? Obviously, and axiomatically, during trial. Section 306 (1) goes on to stipulate that pardon may be tendered, to the accomplice, "on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge…" It is obvious that Section 306 (1) has to be read as a single provision, and

that different parts of the provision cannot conflict with each other. Where the purpose of tendering pardon is obtaining of the evidence of the person, by, and before, the Court, the "full and true disclosure", required to be made by the person, to whom pardon is being tendered, has also, necessarily, to be before the Court. The Chief Judicial Magistrate, or the Metropolitan Magistrate or the Magistrate of the first class, cannot be said to be obtaining evidence during the investigative process. Obtaining of evidence, by a court, is always before the court itself. Full and true disclosure by the approver, towards obtaining of such evidence, has also, therefore, to be before the court itself, and not during the investigative process. The "condition of pardon" therefore, applies to the proceedings before the Court, and do not encompass the proceedings in investigation.

51. When one reads Section 308 (1) with this understanding, the legal position becomes self-apparent. Interestingly, wilful concealment of anything essential, or giving false evidence, by the approver, do not, by themselves result in Section 308 (1) becoming applicable. The Public Prosecutor is required to certify that the approver is guilty of these indiscretions, and has, thereby, "*not complied with the condition on which the tender was made*". This expression, in my view, is of fundamental significance. The approver stands mulcted, in Section 308 (1), *not because* he has concealed anything essential, or given false evidence, *but because*, *by doing so, he has not complied with the condition on which the tender was made*. If, therefore, pardon is tendered on condition of being forthright before the court, it is only want of forthrightness, before the court,

which can be said to breach the condition of tender of pardon. A juxtaposed reading of Section 308 (1) and Section 306 (1), therefore, further reinforces the position, in law, that issuance of certificate, by the Public Prosecutor, under Section 308 (1) would be justified only if the approver conceals anything essential, or gives false evidence, before the Court – which, therefore, must relate to the examination of the approver, under Section 306 (1).

52. The Certificate, of the Public Prosecutor, in the present case, does not allege that, before the Court, the respondent concealed anything essential, or gave false evidence. In fact, a holistic reading of the application, filed by the petitioner before the learned Special Judge, reveals that the grievance of the petitioner is, essentially, that the respondent has not cooperated during investigation, and has withheld material in his possession. Mr. Handoo is right when he contends that non-co-operation, during investigation, is not one of the circumstances contemplated, by Section 308 (1), as justifying issuance of certificate by the Public Prosecutor. Quite obviously, this is because the condition, whereunder pardon is granted to the accomplice, is candour before the court, and not candour before the investigating officer. Non-cooperation with the investigative process, therefore, is irrelevant, insofar as Section 308 (1) is concerned. So long as the approver does not conceal anything essential before the Court, and does not give false evidence before the Court, no occasion, for issuance of any certificate, by the Public Prosecutor, under Section 308 (1), can be said to arise. The grounds, urged in the application of the petitioner, preferred before the learned Special Judge did not,

therefore, make out a case for issuance of Certificate under Section 308 (1), by the Public Prosecutor. The learned Special Judge, therefore, rightly chose not to "revoke the pardon" extended to the respondent, on the basis of the said averments.

53. One of the serious apprehensions, voiced by the learned ASG, was that, as a consequence of the impugned order of the learned Special Judge, the prosecution would be compelled to lead the evidence of the respondent, even after having found him to be an untrustworthy witness. This apprehension, in my view, cannot be said to rest on any sound factual, or legal, basis. Factually, the apprehension is unfounded, as the learned Special Judge has not rejected the application, of the petitioner, on merits, but has dismissed it as premature, as no statement, of the respondent-approver, was recorded during trial. Liberty has been reserved, even in the impugned order, with the petitioner, to move an appropriate application, at the appropriate stage. It cannot, therefore, be said that, by operation of the impugned order, the petitioner has been compelled to use the evidence of an untrustworthy witness. Legally, too, this apprehension cannot sustain. One may only refer, in this context, to the following statement of the law, as exposited by the High Court of Lahore in ***Mahla v. Crown***[13] :

> "The fact, however, that an approver appears to the court to be an untrustworthy witness does not absolve the court from complying with the statutory provisions."

[13] **AIR 1930 Lah 95**

The above passage from ***Mahla***[13], incidentally, was quoted and relied upon, by the High Court of Madras, in ***Arusami Goundan***[6] which, in turn, was quoted, with implied approval, by the Supreme Court in ***Jagjit Singh***[2].

54. A preliminary objection had been advanced, by Mr. Handoo, that the Cr PC does not contemplate "revocation of pardon". Pardon, once granted, he contends, can neither be revoked, nor withdrawn or cancelled. Strictly speaking, this contention may be correct; however, certain judicial decisions have referred to revocation of pardon, once tendered under Section 306 of the Cr PC, following the issuance of certificate, by the Public Prosecutor under Section 308 (1). Interestingly, Ratanlal and Dhirajlal, too, in their "The Code of Criminal Procedure" – which has, with the passage of time, become a classic of sorts – specifically refer to "revocation of pardon". In any event, the impugned order, dated 5th March, 2020, does not reject the application, of the petitioner, on the ground that no concept of "revocation of pardon" exists in law, but proceeds to hold that the application was not maintainable, as no statement, of the respondent, had been recorded, before moving the application. This view, as expressed by the learned Special Judge, eminently commends itself to acceptance. It is not necessary, therefore, to enter, in any detail, into the issue of whether, in law, "revocation of pardon", as a concept, exists, or not.

Conclusion

55. Resultantly, I find myself in agreement with the view, expressed by the learned Special Judge, that, before the recording of his statement under Section 306 (4) of the Cr PC, the application, of the petitioner, as preferred before him, was not maintainable. I entirely endorse the view, of the learned Special Judge, expressed in para 23 of the impugned order, that the issuance of certificate, by the Public Prosecutor, under Section 308 (1), Cr PC, had to be necessarily preceded by the recording of the statement of the approver, under Section 306 (4).

56. The petition, therefore, fails and is dismissed. Needless to say, however, the liberty, reserved by the impugned order, with the petitioner, to re-approach the learned Special Judge by an appropriate application, at the appropriate stage, remains reserved.

57. Pending applications, if any, do not survive for consideration, and are disposed of accordingly.

C. HARI SHANKAR, J.

JUNE 08, 2020
HJ