F. R.

THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 2 OF 2005

(Arising out of impugned judgment dated 28.02.2005 passed by Shri B.C. Sharma, Sessions Judge, South & West at Namchi, South Sikkim in Sessions Trial Case No. 12 of 2004)

Surjay Bdr. Darjee
Son of Padam Lall Darjee,
R/o Namthang,
South Sikkim ..... **Appellant**

Versus

State of Sikkim ..... **Respondent**

For the appellant : Mr. B. Sharma, learned Senior Counsel assisted by Mr. B. Pokhrel, learned counsel, Legal Aid Counsel.

For the Respondent: Mr. J. B. Pradhan, learned Public Prosecutor assisted by Mr. Karma Thinlay, learned Additional Public Prosecutor.

PRESENT: THE HON'BLE MR. JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.

DATE OF JUDGMENT : 30TH MARCH, 2006.

JUDGMENT

A. P. Subba, J.

The present appeal arises out of the judgment and order passed by the Ld. Court of Sessions Judge (South & West) in S.T. Case No. 12 of 2004 convicting the appellant herein and sentencing him to imprisonment for life and to pay a fine of

Rs. 10,000/- in default to undergo further imprisonment for 6 (six) months under Section 302/34 I.P.C. The facts of the case, briefly stated, are as follows: -

The present appellant was working as canteen boy in Namthang Branch of the State Bank of India in South Sikkim in the year 2003. At the relevant time, only four persons including the Appellant were working in the said Branch of the Bank. The other three persons manning the Branch were, the deceased Shri Dhan Bahadur Diyali, who was the Branch Manager, one Sanjay Kumar Singh who was the Assistant, CAT (Cash Accounts and Typist) and one Shri Prasant Sarkar, the main accused who was Sweeper-cum-General Attendant. It was usual for all the staff members to continue their work till 7.00 p.m. i.e. even after normal working hours of the Bank. On the fateful day i.e. on 10.02.2003 also all of them worked over time after the closing of the Bank at 2 O-Clock. On that day, Sanjay Kumar Singh, Assistant (C.A.T.) left the Bank at around 1800 hrs after completing his work. After he left Prasant Sarkar the main accused sent away the appellant to the nearby shop to buy 1 kg of flour for him by giving him Rs. 10/- so as to ensure that he and the deceased were left alone in the Bank premises. Thus when the appellant left, the said Prasant Sarkar quietly closed the door from inside and seizing the opportunity picked up the iron rod which was already cut to size and kept concealed underneath the Almira and struck the deceased on the head at a time when

he was deeply engrossed in his work. The repeated blows knocked down the deceased flat on his back and he lay there unconsciousness. However, before the deceased succumbed to the injuries the appellant returned back from the shop. On his return the said Prasant Sarkar allowed him to enter and as he bolted the door from inside he asked the appellant to help him to finish off the deceased lying unconscious and half dead on the floor then, offering him a share of two lakhs with simultaneous threat that he will meet the same fate as the Bank Manager if he did not oblige. The appellant then joined hands with the main accused under such inducement and threat. Then both of them strangulated the deceased to death by tying split bamboo strings (choya) around his neck and tightening it. When the deceased was dead they dragged the deadbody to another adjoining room and left the same there. After accomplishing the job the said Prasant Sarkar took out keys of the main vault from the pocket of the deceased and opening the strong vault room with the said keys removed all the cash amounting to Rs. 7.00 lakh approximately and concealed in different places.

On completion of the investigation a common chargesheet was filed against both the accuseds and both of them were put on trial for charges under Section 302/392/34 IPC. Both accuseds pleaded not guilty to the charges. The matter was then posted for recording prosecution evidence. However before prosecution evidence commenced the present

appellant expressed a desire to become an approver and on the application made by the prosecution the Ld. Sessions Judge tendered him pardon on condition that he will make full and true disclosure of all that he knew about the crime in question. The tender of pardon was accepted by the appellant and his statement was recorded. However after his statement was recorded the Ld. Public Prosecutor applied for withdrawal of the pardon granted to the appellant on the ground that he failed to disclose any material facts and circumstances implicating the other accused person involved in the case. The Ld. Court vide order dated 30.09.2003 withdrew the pardon granted to the appellant and directed a separate trial to be held in respect of him by splitting up the S.T. Case No. 6 of 2003. The separate trial so split up and registered against the appellant was numbered as S.T. Case No. 12 of 2004 and trial was commenced. Vide order dated 22.12.2003 passed in the said case after the commencement of the separate trial the Ld. Court observed that charges had already been framed against the accused before the case was split up and accordingly directed the prosecution to adduce its evidence and accordingly evidence was produced and recorded. On completion of the trial the Ld. Court found the appellant guilty of the original offence and accordingly convicted and sentenced him to life imprisonment and to pay a sum of Rs. 10,000/- as already narrated above.

At the hearing Shri B. Sharma the Ld. Legal Aid Counsel before addressing his arguments on merits of the case, raised a preliminary objection that the trial was vitiated on account of non-compliance of the provisions of Section 308 Cr. P.C. on the part of the Court below and as such the matter was liable to be remanded back for fresh trial. Since the point raised was pertinent both sides were heard on the preliminary point.

It was contended by the Ld. Counsel for the appellant that the appellant who was granted pardon earlier should have been given the opportunity of pleading and proving that he had complied with the condition of pardon before he was tried for the original offence under the provisions of Section 308 of Cr. P.C. The Ld. Counsel also submitted that the provisions contained in the above Sections being mandatory non-compliance thereof had vitiated the trial. Shri Jagat Pradhan, Ld. Public Prosecutor in his reply submitted, without disputing that there was failure on the part of the Court below to give an opportunity to the appellant to plead whether he had complied with the conditions of pardon, that the procedural lapses in question was curable and as such there was no need to send back the matter for re-trial.

As may be noticed from the above the fact that the Ld. Court below straight away proceeded with the trial of the main offence without asking the accused whether he pleads that he had complied with the condition of tender of pardon is undisputed and is borne out by records. Therefore the

question that falls for consideration is whether the denial of the right of the appellant to make his stand clear with regard to the compliance or non-compliance of the conditions of pardon in terms of Section 308 (4) & (5) Cr.P.C. before he was tried for the main offence vitiates the trial?.

To find an answer to the above question a reference to the provisions contained in Section 308 Cr. P.C. as referred to by the Ld. Counsel for the appellant in support of his submission is called for. As it may be noticed, the Section consists of 5 Sub-sections. Sub-sections (1) (2) and (3) inter alia, lay down that the approver can be tried for the offence in respect of which pardon was granted if he willfully conceals anything essential or gives false evidence thereby forfeiting the pardon. Sub-sections (4) and (5) provide for the procedure for such trial. Since the claim of the Ld. Counsel for the appellant that the appellant had a right to be asked as to whether he had complied with the conditions of pardon before his prosecution is based mainly on the provisions contained in the above two Sub-sections it would be useful to reproduce the two Sub-sections as below: -

Sub section (4) and (5)

"(4) At such trial, the Court shall-

(a) if it is a Court of Sessions, 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".

A bare reading of the above two Sub-sections makes it clear that in the trial of an approver who has forfeited the pardon the question whether he pleads that the conditions of pardon have been complied with by him has to be first decided before he is tried for the original offence. Sub-section (4) of Section 308 reproduced above leaves no room for doubt that it is imperative for the Sessions Court to ask the accused whether he pleads that the conditions of the pardon have been complied with by him before the charge in respect of the original offence is read out and if he so pleads a clear finding on the question of compliance or non-compliance of the conditions of pardon would be a condition precedent to his prosecution for the original offence after he forfeits his pardon. This provision cannot obviously be skipped over because the accused shall be entitled to judgment of acquittal if the Court comes to the conclusion that he has complied with the conditions of the pardon. There is, therefore, no doubt that a valuable right has been conferred on the approver by these provisions in his trial for the original offence following

withdrawal of pardon for alleged non-compliance of the conditions thereof.

In view of the position of law as indicated above, it follows that the submissions of the Ld. Public Prosecutor that the failure of the Court below to follow the procedure laid down in Sub-section (4) and (5) of Section 308 will not vitiate the trial does not carry much force. A perusal of the decision of the Hon'ble Supreme Court reported in (2002 SCC 396) which has been relied on by the Ld. Public Prosecutor in support of his submission would go to show that what has been observed by the Apex Court is that the use of the word 'shall' in Section 306 (4) (a) does not mean that non examination of the approver at the time of recording approver's evidence at the pre-committal stage would vitiate the trial. The decision is thus not a direct authority on the point. No doubt, in the present case as well, we are concerned with the connotation of the word 'shall' but then it is a word occurring in Sub-section (4) of Section 308 and not in Section 306 (4) (a). It is, therefore, to be noted that even though the word 'shall' occurs in both the sections they have been used in different context in the two sections and thus have different connotations. While the word 'shall' in Section 306 (4) (a) has reference to the duty of the Court to examine an approver who has forfeited grant of pardon the same word in Section 308 (4) has reference to the valuable right of the accused approver to be asked as to whether he pleads that he has

complied with the conditions of pardon before he is charged with the original offence. The importance of this requirement of giving an opportunity to the approver lies in the fact that, if after the approver exercises this right it is found at the trial that he has complied with the conditions of pardon he will be entitled to a judgment of acquittal. It is, therefore, obvious that unless the word 'shall' occurring in Section 308 (4) is interpreted as laying down a mandatory requirement of law the very purpose for which the provision has been engrafted would be defeated. There is therefore hardly any scope for interpreting it otherwise. Indeed, interpretation placed on this provision by different decisions ever since it came into the statute book after the amendment made in 1923 on the recommendations of the Select Committee has all along been consistent. As it may be noticed from the following decisions it has consistently been held by various Courts that non-compliance with the provision in question vitiates the trial.

In an old decision rendered in Itwari –Vs- Emperor, AIR 1929: Oudh 256, the Oudh Court relying on an old decision of Lahore High Court in Ali –Vs- Emperor reported in AIR 1925 Lah 15 held that the failure on the part of the Court to comply with the conditions of Section 339-A (which corresponds to Sec. 308 of the 1973 code) vitiates the trial. Dealing with the question of the requirement of adhering to the provision in the case, the the Ld. Court observed as follows:

> **"It was the duty of the Court, that is to say, the Sessions Court to put this question to the accused and to record his plea and if he pleaded that he had complied with the conditions of his pardon the Court had to make a finding as to whether or not he had complied with the conditions of the pardon. These provisions of the code are compulsory, and the accused could not be properly tried and convicted of the offence of murder until the Court trying him had recorded a finding that he had forfeited the pardon which had been offered to him owing to non-compliance with its conditions".**

To the similar effect are the observations made by Nagpur High Court in a later decision rendered in Horilal Mohanlal Gond –Vs- Emperor, AIR 1940 Nagpur 77. Confronted with the similar question the Ld. Court had observed that ,

> **"It is the duty of the Court under Sec. 339-A to explain to the accused the terms of the Section and invite him to plead, record his plea, and call upon the assessors to deliver their opinion upon that plea and then to record his own finding. Failure to perform this duty vitiates the trial".**

In a much later decision reported in 1972 Cr. L.J. 1645 Sunki Reddy –Vs- State of Andhra Pradesh a Division Bench of Andhra Pradesh High Court duly taking notice of above Horilal Mohanlal Gond's case made the observation that the provision is not an idle formality. The relevant observation in para 3 of the judgment is as follows: -

> **"This provision has been introduced to ensure that once pardon has been tendered under Section 337 he shall not be prosecuted for the offence in case he has complied with the conditions of the pardon. It is for the Court to satisfy itself as to whether the conditions have been complied with or not. It is therefore mandatory on the court to question the accused and elicit the answer in this regard ....."**

It has accordingly been held that

".....As the procedure prescribed had not been followed, we are constrained to hold that the trial is vitiated".

No doubt, the above decisions are in relation to a provision contained in the old code of 1898. It is, however, to be noted that the law on the point remains the same under the new code 1973 as well. A perusal of the history of the present Section namely Sec. 308 of the 1973 Code shows that it is substantially a reproduction of the law contained in Section 339 and 339-A of the 1898 code. Such being the position we find it unnecessary to multiply decisions on the point. Suffice it to say that the Section itself is too clear to admit of any doubt on the imperative nature of the provision. It is evident that an approver whose pardon has been withdrawn can only be prosecuted for the original offence after it is established that he has not complied with the condition of pardon.

We are, accordingly, of the view that provisions contained in Sub-sections (4) and (5) of Section 308 Cr. P.C. which require a finding to be given on whether the approver had complied with the conditions of pardon before prosecuting the approver for the original offence are compulsory and failure to comply with the same vitiates the trial. It, therefore, follows that the Ld. Sessions Judge committed grave irregularities in so far as he has overlooked and ignored a

mandatory provision of law in the trial of the appellant in respect of the main offence. The conviction and sentence passed against the appellant by the Ld. Court below must, therefore, be quashed and re-trial ordered.

Accordingly, the conviction and sentence passed against the appellant stands quashed. The Court below shall try the appellant according to the related provisions of law in the light of the observations made herein-above and shall dispose of the matter within six months from the date of the order.

Records of the lower Court may be sent forthwith.

(A. P. Subba)
Judge
30-03-2006

N. S. Singh, C.J. (Atcg.)

While concurring the observations and findings made by my learned brother (A. P. Subba, J.), I hereby add the observations and opinion of mine in the following order:-

By virtue of the provisions of the law laid down under section 308 of the Code of Criminal Procedure, 1973, a person who has accepted a tender of pardon made under section 306 of the Code of Criminal Procedure, 1973 shall not be tried jointly with any other of the accused: and at such ~~time~~ trial the person/accused shall be entitled to plead that he has complied with the conditions upon which such tender was made; and in which case it shall be for the prosecution to prove that the condition has not been complied with. In my

considered view, the learned trial Judge had failed to record his findings that either the prosecution has proved the related conditions has been complied with or not at the relevant stage of the trial which according to me, the learned trial Judge had lost the sight of this mandatory provisions of law laid down under section 308 of the Code of Criminal Procedure, 1973 pertaining to the trial of person not complying with conditions of pardon. It is well-settled that for ends of justice, and transparency of the trial, the trial Judge is to adhere to the mandatory procedural standards laid down under section 308 of the Code of Criminal Procedure, 1973 to avoid arbitrariness and illegalities or irregularities, failing which the action taken by the trial Judge would be invalid resulting to vitiations of the trial.

For the reasons and observations made above, I fully agree with the findings and observations made by my learned brother (A. P. Subba, J.) thus concurring it to meet the ends of justice.

(N. S. Singh)
Chief Justice (Acting)
30-03-2006