

Reserved on : 25.11.2024
Pronounced on : 04.12.2024



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 04TH DAY OF DECEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.12176 OF 2024

C/W

CRIMINAL PETITION No.12188 OF 2024

CRIMINAL PETITION No.12479 OF 2024

CRIMINAL PETITION No.12492 OF 2024

IN CRIMINAL PETITION No.12176 OF 2024

BETWEEN:

SRI VINAY RAJASHEKHARAPPA KULKARNI
AGED ABOUT 54 YEARS
S/O LATE RAJASHEKHARAPPA KULKARNI
RESIDING AT BARAKOTRI
SHIVAGIRI, DHARWAD
KARNATAKA – 580 007.

... PETITIONER

(BY SRI C.V.NAGESH, SR.ADVOCATE A/W
SRI GAURAV N., ADVOCATE)

AND:

1 . CENTRAL BUREAU OF INVESTIGATION
ANTI-CORRUPTION BRANCH,
NO.36, BELLARI ROAD,

GANGANAGAR,
BENGALURU – 560 032.

- 2 . SMT. MALLAVVA
AGED ABOUT 33 YEARS,
W/O YOGISH GOUDA GOUDAR,
R/O GOVANAKOPPA, DHARWAD,
KARNATAKA – 580 112.

... RESPONDENTS

(BY SRI P.PRASANNA KUMAR, SPL.PP FOR R-1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE IMPUGNED ORDER DATED 30.10.2024 (ANNEXURE-B) PASSED BY THE LXXXI ADDL.CITY CIVIL AND SESSIONS JUDGE, BENGALURU (SPL.COURT EXCLUSIVELY TO DEAL WITH CRIMINAL CASES RELATED TO ELECTED MP/MLA's IN THE STATE OF KARNATAKA) IN SPL.C.C.NO.565/2021 FOR THE OFFENCES P/U/S 143, 147, 148, 120B, 302, 201 R/W SECTION 149 OF IPC U/S 25 R/W 3, 5, 8 AND SEC.29 OF THE ARMS ACT IN SO FAR AS THE PETITIONER IS CONCERNED.

IN CRIMINAL PETITION No.12188 OF 2024

BETWEEN:

- 1 . SRI DINESH M.,
S/O LATE MARIYAPPA
AGED ABOUT 48 YEARS
RESIDING AT HOUSE NO.4S IJOOR
VENKATAPPA LAYOUT
BADAVANE, RAMANAGAR TALUK

RAMANAGAR – 562 159.

- 2 . SRI ASHWATH S.,
S/O SHIVANNA GOWDA,
AGED ABOUT 38 YEARS,
RESIDING AT HOUSE NO.66,
1ST MAIN ROAD, D GROUP LAYOUT
NAGARABHAVI,
BENGALURU – 560 078.
- 3 . SRI SUNIL K.S.,
S/O SHIVANNA,
AGED ABOUT 42 YEARS,
RESIDING AT KALAHALLI,
1ST MAIN ROAD,
NEAR SOMESHWARA GOWDA
SAMMUDAYA BHAWAN,
MANDYA CITY – 571 401.
- 4 . SRI NAZEER AHAMAD
S/O BASHEER AHAMAD,
AGED ABOUT 33 YEARS,
RESIDING AT 12TH CROSS,
SONNENAHALLI, BASTHI
BENGALURU – 560 078.
- 5 . SRI SHANAWAZ
S/O SARDHAR,
AGED ABOUT 45 YEARS,
RESIDING AT NO. 1/2,
4TH CROSS, 1ST MAIN ROAD,
AZAD NAGAR,
NEAR CAMBRIDGE SCHOOL,
BENGALURU – 560 026.
- 6 . SRI NUTAN K.,
S/O K.N.KRISHNAPPA,
AGED ABOUT 39 YEARS

RESIDENT OF NO.146, GUBBALALA,
SUBRAHAMANYAPURA POST,
NEAR MANJUNATH FLOUR MILL,
SUBRAHAMANYAPURA,
BENGALURU – 560 061.

- 7 . SRI HARSHITH C.,
S/O CHINNAGIRI,
AGED ABOUT 34 YEARS,
RESIDING AT NO. 55/1,
JANTA COLONY, SOMWARPET,
KODAGU, KARNATAKA – 571 236.

... PETITIONERS

(BY SRI SANDESH J.CHOUTA, SR.ADVOCATE A/W
SRI SUNIL KUMAR S., ADVOCATE)

AND:

- 1 . CENTRAL BUREAU OF INVESTIGATION
ANTI CORRUPTION BRANCH,
REPRESENTED BY
SPECIAL PUBLIC PROSECUTOR,
36, BELLARY ROAD, KGH LAYOUT,
GANGANAGAR,
BENGALURU – 560 032.
- 2 . SMT. MALLAVVA GOUDAR,
W/O. YOGISH GOUDA GOUDAR,
AGED ABOUT 33 YEARS,
RESIDING AT GOVANAKOPPA,
DHARWAD – 580 112.

... RESPONDENTS

(BY SRI P.PRASANNA KUMAR, SPL.PP FOR R-1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO SET ASIDE THE IMPUGNED ORDER DATED 30.10.2024 PASSED BY THE LXXXI ADDL. CITY CIVIL AND SESSIONS JUDGE, BENGALURU (CCH-82) (SPECIAL COURT EXCLUSIVELY TO DEAL WITH CRIMINAL CASES RELATED TO ELECTED MP/MLA's IN THE STATE OF KARNATAKA) IN SPL.C.C.NO.565/2021 FOR THE OFFENCES P/U/S 143, 147, 148, 120-B, 302, 201 R/W SEC.149 OF IPC 1860 AND U/S.25 R/W SEC. 3, 5, 8, AND SEC.29 OF THE ARMS ACT AND SEC.7, 13(2) R/W SEC.13(1)(d) OF PC ACT 1988 IN SO FAR AS THE PETITIONERS ARE CONCERNED.

IN CRIMINAL PETITION No.12479 OF 2024

BETWEEN:

CHANNAKESHA B. TINGARIKAR
S/O BASAPPA TINGARIKAR,
AGED ABOUT 46 YEARS,
RESIDING AT BASAVA NILAYA,
3RD MAIN, 3RD CROSS,
K.C.PARK,
HUBBALLI – 580 008.

... PETITIONER

(BY SRI SUDHANVA D.S., ADVOCATE)

AND:

- 1 . CENTRAL BUREAU OF INVESTIGATION
ANTI CORRUPTION BRANCH,
REPRESENTED BY
SPECIAL PUBLIC PROSECUTOR,
36, BELLARY ROAD, KGH LAYOUT,
GANGANAGAR,
BENGALURU – 560 032.
- 2 . SMT. MALLAVVA GOUDAR
W/O YOGISH GOUDA GOUDAR,
AGED ABOUT 33 YEARS,
RESIDING AT GOVANAKOPPA,
DHARWAD - 580112.

... RESPONDENTS

(BY SRI P.PRASANNA KUMAR, SPL.PP FOR R-1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE IMPUGNED ORDER DATED 30.10.2024 PASSED BY THE LXXXI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU (CCH-82)(SPECIAL COURT RELATED TO MP/MLA's IN THE STATE OF KARNATAKA) IN SPL.C.C.NO.565/2021 FOR OFFENCES P/U/S 143, 147, 148, 120-B, 302, 201 R/W SEC.149 OF IPC, 1860 AND U/S.25 R/W SEC.3, 5, 8, AND SECTION 29 OF THE ARMS ACT AND SEC.7, 13(2) R/W SEC.13(1)(d) OF THE PC ACT 1988.

IN CRIMINAL PETITION No.12492 OF 2024**BETWEEN:**

SHRI CHANDRASHEKHAR INDI @
 CHANDU MAMA
 S/O SHARNABASSAPPA INDI
 AGED ABOUT 62 YEARS
 RESIDENT OF NO.27,
 SHANKESHWAR VILLA,
 II CROSS, ATHANI ROAD,
 VIJAYPURA – 586 101.

... PETITIONER

(BY SRI KIRAN S.JAVALI, SR.ADVOCATE A/W
 SRI VIPIN KUMAR JAIN, ADVOCATE)

AND:

1 . CENTRAL BUREAU OF INVESTIGATION
 ANTI-CORRUPTION BRANCH,
 REPRESENTED BY
 SPECIAL PUBLIC PROSECUTOR,
 36, BELLARY ROAD, KGH LAYOUT,
 GANGANAGAR,
 BENGALURU – 560 032.

2 . SMT. MALLAVVA GOUDAR
 W/O. YOGISH GOUDA GOUDAR,
 AGED ABOUT 33 YEARS,
 RESIDING AT GOVANAKOPPA,
 DHARWAD – 580 112.

... RESPONDENTS

(BY SRI P.PRASANNA KUMAR, SPL.PP FOR R-1)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO SET ASIDE THE ORDER DTD 30.10.2024 PRODUCED AS ANNEXURE-A PASSED BY THE LXXXI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU (CCH-82) (SPECIAL COURT EXCLUSIVELY TO DEAL WITH CRIMINAL CASES RELATED TO ELECTED MP/MLA's IN THE STATE OF KARNATAKA) IN SPL.CC.NO.565/2021, FOR OFFENCES P/U/S 143, 147, 148, 120(B), 302, 201 R/W SECTION 149 OF IPC, 1860, AND U/S 25 R/W SEC.3, 5, 8 AND SECTION 29 OF THE ARMS ACT IN SO FAR AS THE PETITIONER IS CONCERNED.

THESE CRIMINAL PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 25.11.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

CAV ORDER

Batch of these petitions call in question a solitary order dated 30-10-2024, passed by the LXXXI Additional City Civil and Sessions Judge, Bengaluru in Special C.C.No.565 of 2021 whereby the concerned Court grants pardon to accused No.1/Basavaraj

Shivappa Muttagi and considers him as an approver under Section 306 of the Cr.P.C.

2. Petitioner in Criminal Petition No.12176 of 2024 is accused No.15; petitioners in Criminal Petition No. 12188 of 2024 are accused Nos. 8 to 14; petitioner in Criminal Petition No.12492 of 2024 is accused No.16 and petitioner in Criminal Petition No.12479 of 2014 is accused No.19. Therefore, accused Nos. 8 to 16 and 19 in all are before this court in these petitions. Since these petitions call in question a solitary order, they are taken up together and considered by this common order.

3. For the sake of convenience, the pleadings and contentions in Criminal Petition No.12176 of 2024, which are common in all the petitions, are noticed.

4. Adumbrated in brief, the factual background, as projected by the petitioner/s are as follows:-

The history of the case dates back to 15-06-2016 on which day a complaint comes to be registered by one Smt. Mallavva

Goudar alleging offence punishable under Section 302 of the IPC on the murder of her husband Yogesh Goudar, who was a member of Zilla Panchayat, Dharwad, against unknown persons. The complaint was registered before the Sub-Urban Police Station, Dharwad. The Police conduct investigation and file a charge sheet against 6 persons on 09-09-2016. The concerned Court took cognizance of the offence against those 6 accused for offences punishable under Sections 143, 147, 148, 120B, 302, 201 r/w Section 149 of the IPC and committed the case to the Court of Sessions. The Court of Sessions, in terms of its order dated 14-09-2017 registers the case as S.C.No.50 of 2017 and frames charges against accused Nos. 1 to 6. The trial continued for 2 years between 2017 and 2019, during which 63 witnesses were examined.

5. The mother and brother of the deceased prefer writ petitions before this Court in Writ Petition Nos.58183-58184 of 2017 seeking further investigation from the hands of the Central Bureau of Investigation ('CBI'). The said writ petitions come to be dismissed on 01-03-2019. This becomes final, as the Apex Court in a challenge to the said order also dismissed the petitions. During

the pendency of trial, an application comes to be filed by the brother of the deceased under Section 319 of the Cr.P.C. to array additional accused into the web of trial. This also comes to be dismissed. In the meanwhile, Government of Karnataka, in terms of its order dated 06-09-2019 accords sanction for conduct of further investigation at the hands of the CBI in respect of the crime in Crime No.135 of 2016. It is here the CBI enters the scene. The CBI on 24-09-2019 registers a fresh FIR in RC 17(S)/2019/CBI/ACB/BLR against accused Nos. 1 to 6 and other unknown persons for the offences punishable under Sections 143, 147, 148, 120B, 302, 201 r/w Section 149 of the IPC. Accused No.1 prefers writ petition before this Court in Writ Petition No.51012 of 2019 seeking quashment of order dated 06-09-2019 entrusting the matter to the CBI. This Court dismissed the petition in terms of its order dated 19-11-2019. Then begins complete investigation by the CBI.

6. First supplemental charge sheet was filed arraigning 14 accused in all, as against 6 that were arraigned earlier. A second supplemental charge sheet was filed arraigning 3 more accused on

30-01-2021. It is here the then Minister in-charge of Dharwad District comes into the web of trial as accused No.15. Investigation did not stop. A third supplemental charge sheet was filed by the CBI arraigning 4 more accused as accused Nos. 18 to 21. In all, the trial now is against 21 accused. The Special Court takes cognizance of all the supplemental charge sheets mentioned hereinabove. The issue in the *lis*, at this juncture, does not concern the merit of the matter before the concerned Court.

7. In the proceedings, accused No.1 files an application under Section 306 of the Cr.P.C., seeking pardon and transposing him as a witness, by considering him as an approver in the case. On the application, the Special Court directs the learned Magistrate to record the statement of accused No.1 who had filed the application to turn himself as an approver as obtaining under Section 164 of the Cr.P.C. On receipt of such statement, the concerned Court forms that as the foundation of the order and grants pardon in terms of the order impugned. Calling in question the said order, these petitions are preferred by the afore-noted accused.

8. Heard Sri C.V.Nagesh, learned senior counsel appearing for the petitioner in Criminal Petition No.12176 of 2024; Sri Sandesh J Chouta, learned senior counsel appearing for the petitioners in Criminal Petition No.12188 of 2024; Sri Sudhanva D S, learned counsel appearing for petitioner in Criminal Petition No.12479 of 2024; Sri Kiran S. Javali, learned senior counsel appearing for petitioner in Criminal Petition No.12492 of 2024 and Sri P.Prasanna Kumar, learned Special Public Prosecutor appearing for the respondent/Central Bureau of Investigation.

9. The learned senior counsel Sri C.V.Nagesh has spearheaded the submissions on behalf of accused No.15 and others have followed suit. The learned senior counsel would vehemently contend that the concerned Court had no jurisdiction to direct the learned Magistrate to record the statement of the applicant under section 164 of Cr.P.C., on an application seeking pardon under Section 306 of the Cr.P.C. It is his submission that once the trial commences, there is no jurisdiction of recording a confession statement under Section 164 of the Cr.P.C. The statute does not permit it.

9.1. He would contend that a similar application for pardon was preferred by the very same accused in the year 2023 and that comes to be rejected by a detailed order of the previous Presiding Officer of the said Court. The present order does not even make a reference to the said order and an order granting pardon/approval under Section 306 of the Cr.P.C., is passed solely basing the order on impermissible and illegal Section 164 Cr.P.C. statement recorded by the learned Magistrate. It is his submission that it was open to the concerned Court to consider the application on its merits independently, at which point in time the earlier order would cause an impediment. Therefore, the concerned Court has sought to take the impugned route of recording statement under Section 164 of the Cr.P.C., and then pass the order on the said statement. In all, the learned senior counsel would seek quashment of the order impugned.

10. The learned senior counsel Sri Sandesh J Chouta appearing for the petitioners in Criminal Petition No.12188 of 2024, Sri Sudhanva D S in Criminal Petition No.12479 of 2024 and Sri Kiran S. Javali, learned senior counsel appearing for the

petitioner in Criminal Petition No.12492 of 2024 would toe the lines of the learned senior counsel Sri C.V. Nagesh.

11. Per contra, the learned Special Public Prosecutor Sri P. Prasanna Kumar representing the respondent-CBI would vehemently refute the submissions contending that the petitioners, on one ground or the other, are repeatedly knocking at the doors of this Court only to delay the proceedings before the concerned Court. He would take this Court through the statement of objections to contend that this Court should eschew the statement under Section 164 of the Cr.P.C., consider the order impugned only on the strength of the application so preferred and affirm the order of pardon.

11.1. The learned Special Public Prosecutor would submit that the objections/report filed by the CBI to the application seeking grant of pardon did contain a communication from accused No.1 to the Investigating Officer initially, but when accused No.1 who has now sought pardon for the second time, in detail he submits as to what he is going to depose in favour of the prosecution which later

forms part of the additional objections and the contents of the additional statement and forms a part of the order impugned. In effect, he would submit that Section 164 Cr.P.C. statement of accused No.1 is on record or not is immaterial, as the contents of the letter and Section 164 statement are the same. Merely because the Court has referred to Section 164 Cr.P.C. statement, it would not mean that accused No.1 cannot be granted pardon or the order granting pardon suffers from any illegality.

12. The learned senior counsel Sri Sandesh J Chouta would join issue to contend that, if this be the statement of the learned counsel for the CBI, the order refusing to grant pardon earlier has attained finality. There can be a second application seeking pardon only on fresh and changed circumstances. There is no changed circumstances in the case at hand and, therefore, pardon should not be granted. He would contend that the concept of *res judicata* is applicable to criminal cases as well. He would further elaborate in contending that the issues of *estoppel* and constructive *res judicata* are also applicable to criminal cases, more so, in the present case. The procedure for grant of pardon is to treat the accused as an

approver at the outset and then record his statement during his evidence. Grant of pardon to an applicant in a case where there is already a committal can only be under Section 307 of the Cr.P.C., and not under Section 306 of the Cr.P.C. The learned senior counsel has relied on plethora of judgments to buttress his submissions all of which would bear consideration *qua* their relevance in the course of the order.

13. The learned senior counsel Sri C.V.Nagesh would take serious objections to paragraphs 18 and 19 of the statement of objections in contending that delay is not caused by these petitioners repeatedly approaching this Court, but by the acts of the prosecution itself and this is clearly indicated in the order passed by the concerned Court from time to time.

14. I have given my anxious consideration to the submissions made by the respective learned senior counsel, the learned Special Public Prosecutor for the CBI and have perused the material on record.

15. The afore-narrated facts are not in dispute. What has driven the petitioners to this Court is the order of the concerned Court, by which accused No.1 is now transposed as a witness by granting him the status of an approver under Section 306 of the Cr.P.C. In furtherance of the aforesaid submissions, the following issues would arise for my consideration:

- (i) Whether a second application seeking pardon under Section 306 of the Cr.P.C., is maintainable?**
- (ii) Whether recording of Section 164 Cr.P.C. statement, prior to grant of pardon, would vitiate the order granting pardon under Section 306 of the CrPC?**
- (iii) What should be the procedure for grant of pardon under Section 306 of the Cr.P.C.?**
- (iv) Whether the co-accused have a right to question the order granting pardon?**

Issue No.1:

Whether a second application seeking pardon under Section 306 of the Cr.P.C., is maintainable?

16. Since the issue revolves round Section 306 of the Cr.P.C., I deem it appropriate to notice the said provision. It reads as follows:-

"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."

(Emphasis supplied)

As observed hereinabove, the issue in the case at hand is not with regard to merit of the matter before the concerned Court. It is the order dated 30-10-2024 passed by the concerned Court that has driven all these petitioners to this Court. The order is allowing the application filed by accused No.1 under Section 306 of the Cr.P.C., to turn him as an approver. To consider the first issue, it is necessary to travel a little back in the journey of trial before the concerned Court, *i.e.*, in Special C.C.No.565 of 2021. An identical application was preferred by accused No.1 on 13-03-2023, the first in line, seeking himself to become an approver, by grant of pardon under Section 306 of the Cr.P.C. The application reads as follows:

**"APPLICATION UNDER SECTION 306 OF THE CODE
OF CRIMINAL PROCEDURE, 1973.**

Herein, the accused No.1 submits as under:-

That, in the top noted case accused No.1 Basavaraj S. Muttagi seeking permission for approver to tender evidence, as accused No.1 is ready to give tender of pardon in support of prosecution and in this regard said accused No.1 is also ready to give Section 164 of Cr.P.C statement as a confession. Hence, Hon'ble Court be pleased to kindly accept a tender of pardon of accused No.1 Basavaraj S. Muttagi and in the support of this application accused No.1 Basavaraj S.Muttagi is filing affidavit as same is made voluntarily without any threat or any influence.

Therefore, necessary order may be passed in the interest of justice and equity.

Place: Bengaluru
Date: 13-03-2023

Sd/-
Advocate for accused No.1.

Sd/-
Accused No.1"

(Emphasis added)

To the said application, the respondent/CBI has filed its objections/report. The objections filed by the CBI reads as follows:

"IO REPORT/OBJECTION FILED AGAINST APPLICATION
FILED U/S 306 OF CR.P.C.

The respondent humbly submits as under:-

The present application has been filed by petitioner/Accused No.1 seeking tender of pardon under Section 306 of Code for offences punishable under Section U/s 120B, 143, 147, 148 r/w 149, 302 of IPC & u/s 25 r/w Section 3, 5 and 8 of Arms and Section 29 of Arms Act is devoid of merits and hence it is objected.

2. it is submitted that the petitioner has submitted an application seeking tender of pardon in support of prosecution but in the instant application, nothing is mentioned is indicated regarding the role played by the applicant whether as principal or abettor in the commission of crime. On the face of the application prosecution could not conclude that he has made a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

3. It is humbly submitted that on perusing the application CBI could not able to ascertain on disclosure

of which facts the petitioner is going to support the prosecution case. It is further submitted, that the affidavit attached with the application also is devoid of merits. It is pertinent to mention that purpose of Section 307 CrPC is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence "during investigation or enquiry or trial" and the same could not be proved by the available evidence by the prosecution.

4. In this regard, it is respectfully submitted that this Hon'ble Court may be pleased to direct the petitioner to record his confession statement U/s 164(1) CrPC and after perusing the recorded confession statement of the petitioner, prosecution will be in the position to take appropriate decision.

PRAYER

In view of the facts discussed above, it is, humbly prayed that this Hon'ble Court may be pleased to direct the petitioner to record his confessional statement U/s 164(1) of Cr.PC and liberty may be granted to prosecution to analyze the recorded statement of the petitioner before giving any opinion on the submission made u/s 306 CrPC in the interest of justice and thus render justice.

Dated this 30th day of March, 2023."

(Emphasis added)

On the said application, the concerned Court rejects the application on 29-04-2023. Quoting the order assumes certain significance. The reasons rendered by the concerned Court to reject the application of accused No.1 who sought pardon are as follows:

" "

7. **Point No.1:** It is pertinent to note that Dharwad Sub-Urban Police have registered a criminal case in Cr.No.135/2016 for the offences punishable under Sec. 143, 147, 148, 120B, 302 and 201 r/w Sec. 149 of IPC on 15.06.2016 at 9.30 a.m. on the first information lodged by Smt. Mallavva Goudar W/o deceased Yogesh Goudar alleging that Yogesh Goudar was shot dead on 15.06.2016 between 7.37 a.m and 7.38 a.m, against unknown accused persons. The Dharwad Sub-Urban Police took up investigation on the basis of the first information lodged by Smt. Mallavva Goudar and in the course of investigation, the police have arrested accused No.1 to 5 on 17.06.2016 at 6.30 a.m. and accused No.6 was arrested on 20.06.2016 and after completion of investigation formalities, charge sheet was laid by Dharwad Sub-Urban Police on 09.09.2016 alleging the offences punishable under Sec.143, 147, 148, 120B, 302 and 201 r/w Sec.149 of IPC.

8. After filing of charge sheet by Dharwad Sub-Urban Police station, criminal case was registered in CC No.964/2016 on the file of learned JMFC Court, Dharwad. Thereafter, the case was committed to Prl. District and Sessions Judge, Dharwad and the same was numbered as SC No.50/2017 and the case was made over to IV Addl. District & Sessions Court, Dharwad for trial. In the mean while, Smt. Thungamma, the mother of the deceased and Gurunath Goudar, the brother of the deceased have preferred Writ Petition in W.P. No.58183-184/2017 before Hon'ble High Court of Karnataka, Dharwad Bench seeking direction for further investigation in respect of the information registered as Cr. No. 135/2016 dated 15.06.2016 and to transfer the case to CBI for conducting further investigation.

9. After committal, IV Addl. District and Sessions Judge, Dharwad, out of 63 witnesses, examined 57 witnesses and the statements of the accused under Sec.313 of Cr.P.C., had been recorded. The writ petition filed by Smt. Thungamma, the mother of the deceased and Gurunath Goudar, the brother of the deceased came to be dismissed and prayer for handing over the investigation to the CBI

came to be rejected. However, liberty was granted to invoke power of Court under Sec.319 of Cr.P.C., and said Smt. Thungamma and Gurunath Goudar had challenged the said order dated 01.03.2019 passed by the Hon'ble High Court of Karnataka, Dharwad Bench in W.P.No.58183-184/2017 before the Hon'ble Supreme Court of India in SLP (Crl.) 5760-61/2019. Said SLP petition came to be dismissed by the Hon'ble Apex Court. Thereafter, the brother of the deceased i.e., Gurunath Goudar filed an application under U/s.319 of Cr.P.C., seeking to add Vinay Kulkarni and Manjunath Basannavar as accused in the SC 50/2017, which also came to be dismissed by the IV Addl. District and Sessions Judge, Dharwad. Thereafter, the Government of Karnataka sought opinion from the Advocate General of Karnataka with regard to entrusting of the case to CBI and by proceedings dated 06.09.2019, the Government of Karnataka was pleased to direct the concerned to handover the records to CBI by according sanction to CBI under Sec.6 of Delhi Police Establishment Act for further investigation. After receiving notification under Sec.5 from the DoPT, CBI filed a memo before the Prl. Civil Judge (Jr.Dn) and JMFC Court, Dharwad under Sec.173(8) of Cr.P.C. and another memo before the IV Addl. District & Sessions Judge, Dharwad under Sec.173(8) of Cr.P.C., intimating the Court about the CBI taking up further investigation and after receipt of the order, the CBI re-registered the case in FIR vide RC-17(S)/2019, CBI, ACB, Bengaluru on 24.09.2019 for offence under Sec.143, 147, 148, 120(B), 302 & 201 r/w 149 of IPC. During the course of investigation, the CBI arrested accused No.7 to 14 and in addition to the accused No.1 to 6 already charge sheeted by Sub-Urban Police Station Dharwad, the Central Bureau of Investigation, Anti Corruption Branch, Bengaluru, filed charge sheet and additional charge sheet in the above case against accused No.1 to 21 for the offences punishable under Sec. 143, 147, 148, 120-B, 302, 201 R/w Sec.149 of IPC and Sec.3, 5, 8, 25 & 29 of Arms Act and Sec.7 and Sec. 13(2) r/w Sec.13(1)(d) of the Prevention of Corruption Act, 1988.

.....

14. Sec.306 of Cr.P.C. forms a clear exception to the principle that 'no inducement shall be offered to a

person to disclose what he knows'. The object of Sec.306 of Cr.P.C., is to allow pardon in cases where a grave offence is alleged to have been committed by several persons so that with the aid of the evidence of the person pardoned, the offence could be brought home to the rest. The principles behind tendering of pardon to an accomplice is to unravel the truth in a grave offence, so that the guilt of the other accused persons concerned in commission of crime could be brought home. Sec.306(1) empowers the Chief Judicial Magistrate, Metropolitan Magistrate or the Magistrate of First Class, to tender pardon to any person supposed to have been directly or indirectly concerned in or privy to an offence to which this 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.

15. Sec.307 of CR.P.C., empowers the Court, to which the offence is committed under Sec. 306(5)(ii), 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.

....

17. I have gone through Sec. 306, 307 and 308 of Cr.P.C. There is no bar either under Sec.306 and 307 of Cr.P.C., to tender pardon to an accomplice and court can tender pardon at any stage of the investigation or inquiry into, or the trial of the offence. Now in this case, charge is not yet framed. At this stage, the accused No.1 has filed the application under Sec.306 of Cr.P.C. seeking tender of pardon from this court. In the application filed by the accused No.1, he stated that he is ready to give tender of pardon in support of prosecution and in this regard, he is ready to give statement under Sec. 164 of Cr.P.C., as a confession and prayed for granting pardon. In the affidavit, he has stated that the contents of the application are voluntarily made and no person influenced and threatened him to file this application. There are no specific grounds urged, under which he seeks pardon. The accused has not

stated his role in the case. He has not explained the role of other accused. He has not stated why he is seeking pardon and how his evidence helps the Court to bring home the guilt of the accused. The dominant object is that the offenders of the heinous and grave offences do not go unpunished. The Legislature in its wisdom considered it necessary to introduce this section and confine its operation to cases mentioned in Section 306 of the Code. The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence.

18. The prosecution has filed objection and contended that the CBI could not able to ascertain on disclosure of which facts the petitioner is going to support the prosecution case and the affidavit attached with the application is also devoid of merits. Further, it is contended that this Court may be pleased to direct the petitioner to record his confession statement under Sec.164(1) of Cr.P.C., and after perusing the recorded confession statement of the petitioner, the prosecution will be in a position to take appropriate decision. This Court cannot direct the accused to give confession statement under Sec. 164(1) of Cr.P.C., which is self-incriminating. However to grant pardon to one of the prime accused in the case, this Court has to satisfy that this is the accused who is going to make full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

19. When the accused is not ready to disclose either his role or the role of the other accused, how this Court can expect from the present accused that he would make full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. This court is not aware as to how much information is known to the present accused regarding

the commission of the alleged offence and whether he had participated in the larger conspiracy to commit murder of Yogesh Goudar and if so, who is the key conspirator to commit the offence of murder of Yogesh Goudar. I do not think that the tender of pardon will be in the interest of successful prosecution of the other offenders, whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. Therefore, I am not satisfied that a tender may be granted to the accused No.1 Basavaraj Shivappa Muttagi on the ground that he would make full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. He has shirked his responsibility to disclose his role and role of other accused in the commission of offences while filing this application before the Court and therefore, this Court has no confidence with him that he would make a full and true disclosure of the whole of the circumstances relating to the offence. Therefore, I answer point No.1 in the Negative.

20. **Point No.2:** In view of my findings on point No.1, I proceed to pass the following:

ORDER

The application filed by accused No.1 Shri Basavaraj Shivappa Muttagi under Sec. 306 of the Code of Criminal Procedure is hereby dismissed."

(Emphasis added)

By a detailed order, the Special Court rejects the application seeking pardon on the score that there is no specific ground urged as to why he is seeking pardon and what the accused is going to depose after granting pardon. The Court does not agree with the

application and expresses that the Court has no confidence in accused No.1 that he would make full and true disclosure of whole circumstance.

17. Now comes the subject application, second in line, seeking pardon. The second application is in slight detail. It is preferred on 19-10-2024. It reads as follows:

"APPLICATION UNDER SECTION 306 OF THE CODE OF CRIMINAL PROCEDURE CODE."

The accused No.1 submits as follows:-

1. The Accused No.1 was arrested by the State Police in Crime No.135/2016 by the Dharwad Sub-Urban Police. Thereafter, the Police have filed the charge sheet and the trial was in progress. At that stage, the matter was referred to CBI. The accused was in custody for almost eleven months. Thereafter, several developments have taken place during investigation and the subsequent trial.

2. The applicant is facing threat for his life from various corner including the accused No.15 and 16 in this case. The threat faced by this Accused is constant. In this case from the commission of crime till now the threat perception persists.

3. The Accused submits that after introspection of the entire event, the accused decided that he should reveal the true facts before this Hon'ble Court to save the ends of justice. On the earlier occasion this Accused has filed an application seeking pardon, however, the same was not appreciated by the Hon'ble Court as confession statement under S.164(1) Cr.P.C. was not available before this Hon'ble Court for consideration.

4. The Accused submits that he has to disclose the truth before this Hon'ble Court for the sake of justice and if this Hon'ble Court pleased with the disclosure of the fact, it may take appropriate decision to pardon or otherwise. The accused is ready and willing to depose before the Magistrate disclosing his role and the role of the other accused in the commission of the crime. The accused may be provided proper security from any Central Security Agencies as he along with his family is facing life threat continuously. The accused is willing to depose true facts before the Magistrate and later depose before this Hon'ble Court. It is humbly prayed that if this Hon'ble Court permits or grants or allow to give the accused an opportunity to reveal the true facts of the crime, the same may be helpful to reach the justice.

5. The Accused No.1 prays that this Hon'ble Court may be pleased to allow the accused to disclose the true facts under Section 164(1) Cr.P.C to attain the justice.

Wherefore, the accused No.1 humbly submits that this Hon'ble Court may be pleased to tender pardon to the accused and treat him as prosecution witness in the interest of justice.

Bangalore.
Date: 19-10-2024

Sd/-
Advocate for Accused No.1"

(Emphasis added)

The CBI again files its report/objections to the application. The objections read as follows:

"IO Report/Objection filed against application U/s 306 of Code of Criminal Procedure (New 309 of BNSS 2023)

This may please your honour, that the present application has been filed by the petitioner/Accused No.1 seeking tender of pardon U/s 306 of CrPC for offences punishable U/s 120B, 143, 147, 148 r/w 149, 302 of IPC and U/s 120B, 143, 147, 148 r/w Section 3, 5 and 8 of Arms Act and Section 29 of Arms Act in of not speaking about the entire criminal act of the accused and hence objection.

The petitioner has submitted an application seeking tender of pardon in support of prosecution but in the terms of the application, nothing is mentioned or indicated regarding the role played by the petitioner whether as principal or abettor in the commission of the crime. On the face of the application, the prosecution could not conclude that he has made a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

It is humbly submitted that on persisting application, CBI could not be able to ascertain of which facts the petitioner is going to support the prosecution version. It is further submitted, that the affidavit attached with the application is also devoid of merit. It is pertinent to mention that purpose of Section 307 crpc is to obtain the evidence of any person supposed to have been directly or indirectly concerned in a privy to an offence "during the investigation or enquiry or trial" and the same could not be proved by the available evidence by the prosecution.

In this regard, it is respectfully submitted that this Hon'ble Court may be pleased to direct the petitioner to record his confession statement U/s 164(1) of CrPC and after perusing the recorded confession statement of the petitioner, prosecution will be in the position to take appropriate decision. I am also enclosing a letter of the petitioner addressed to IO of the instant case.

PRAYER

In view of the facts discussed above, it is humbly prayed that this Hon'ble Court may be pleased to direct the petitioner to

record his confession statement U/s 164(1) of CrPC and liberty may be granted to prosecution to analyze the recorded statement before giving a consent to tender pardon made U/s 306 CrPC in the interest of justice and thus render justice."

(Emphasis added)

What the Court would do on the application and the objections is, refer the matter to the learned Magistrate to record the statement of the accused under Section 164 of the Cr.P.C. The order reads as follows:

"Case advanced and taken on board.

The learned counsel for accused No.1 has filed application under Sec.306 of Cr.P.C., requesting the court to tender him pardon and treat him as prosecution witness.

In the application it has been narrated by the accused that he is ready and willing to depose before the Magistrate with respect to his role and the role played by other accused persons in commission of crime.

Further the accused has requested to provide proper security from the Central Security agencies as he along with his family members are facing threat on their life continuously.

Further he has under taken to depose true facts before the Magistrate and also to depose about the incident truly before this court.

He has also requested the court to permit him to disclose the true facts by getting his statement recorded under Sec.164(1) of Cr.P.C.

On enquiry being made by the court the accused No.1 Basavaraj Muthagi who is before the court has submitted that he has appeared before the court voluntarily requesting him to tender pardon and there is no pressure exerted on him in this regard to tender any statement.

The learned Public Prosecutor is present who is assisting the learned SPP and report is filed through the Investigating Officer wherein it has been stated that since the accused No.1 Basavaraj Muthagi has not narrated about any of the facts which he would depose under oath in the event of granting of pardon, the I.O. has contended that it would not be permissible at this juncture to consider the veracity of his claim.

I have carefully appreciated the rival contentions urged by parties.

The accused No.1 has moved an application under Sec.306 of Cr.P.C., seeking to grant pardon to him. For the purpose of granting pardon the necessary provisions under Sec.306 if required to be complied by the court.

It is also relevant to note that the court should be satisfied prior to tendering pardon that the person is disclosing full and true disclosure of the whole of circumstances within his knowledge related to the offences and to every other person.

It is also relevant to note at the time of tendering pardon the court is required to assign reasons for doing so and also the court is required to assign reasons for not accepting the same in the event of rejecting the application.

In the instant case the trial as already commenced and the court has started the record the evidence of witnesses and already 3 witnesses have been examined as PW-1 to PW-3.

In order to accept tender of pardon the court is required to appreciate the materials available on record.

The accused No.1 who is present before the court has submitted that he is willing to get his statement recorded under Sec.164(1) of Cr.P.C.,

Only by looking into the said statement it would be possible for the court to arrive at a just conclusion. Even otherwise the main grievance of the prosecution is that they are unable to ascertain what would be his statement/disclosures which was within his exclusive knowledge.

Under the circumstances keeping open the application filed by accused No. 1 it would be appropriate to get his statement recorded under Sec. 164(1) of Cr.P.C. by learned JMFC Court.

Accordingly, the learned 17th ACMM, Bengaluru is hereby requested to get the statement of accused No.1 Basavaraj Muthagi recorded. The court has requested the learned 17th ACMM Court to get the statement recorded since court is officiating in the same premises and in the same floor where this court is situated and hence the apprehension of the accused No.1 would be mitigated to major extent.

A request is placed before the learned JMFC Court to get his statement recorded at the earliest since he has expressed threat on his life and if possible during the course of the day itself by looking into their work allotment.

The office shall communicate this order forthwith to the learned JMFC Court with the aforesaid request.

Needless to mention the statement recorded shall be sent to this court by the learned 17th ACMM Court.

Call on 21.10.2024.

**Sd/- 19/10/2020
(Santhosh Gajanan Bhal)**

LXXXI ACC & SJ, Bengalur (CCH-82)
(Special Court exclusively to deal with
criminal cases related to elected
former and sitting MPs/MLAs in the
State of Karnataka)”

(Emphasis added)

... ..

“Case called out.

Learned counsel for accused NO.1 is present and has filed application under Sec.2(1) of Witness Protection Scheme requesting the court to provide protection to accused No.1 and his family wherein he has filed application seeking permission to treat him as approver in the above case.

The learned counsel has argued that necessary protection is required to be given to the present accused as contemplated under the scheme and he had relied upon the judgment of the Hon'ble High Court reported in W.P. No. 15032/2019 dated 20.09.2021.

Heard and perused the materials.

For orders, call on 22.10.2024.

Sd/- 21/10/2024

(Santhosh Gajanan Bhat)

LXXXI ACC & SJ, Bengaluru (CCH-82)
(Special Court exclusively to deal with
criminal cases related to elected former and
sitting MPs/MLAs in the State of Karnataka)”

... ..

“Case called out.

The learned 17th ACMM Court had furnished the statement of accused No.1 Mr. Basavaraj

Muthagi recorded under Sec. 164(1) of Cr.P.C., in a sealed cover.

The sealed cover is opened now in the open court in the presence of both parties.

The complainant CBI authorities through the Public Prosecutor had filed their response stating that the application under Sec.306 of Cr.P.C., filed by A-1 Basavaraj Muthagi may be allowed and they have consented for the same.

The learned counsel for accused No.1 has submitted application under Sec.2(1) of Witness Protection Scheme provide him and his family necessary protection.

The accused No.1 Mr. Basavaraj Muthagi has sought permission to make submission. Permitted.

He has submitted that on 20.10.2024 accused No.9 Ashwath had telephonically called upon his friends and other nearby persons and had threatened that he would ensure that accused No.1 Basavaraj will not appear before the court. He has also submitted that they have obtained the mobile number of his wife and other family members and had threatened his son-in-law.

The accused No.1 is hereby directed to file his grievances in writing to the investigating officer herein who shall verify the same and file necessary report.

By considering the grave threat as contented by accused No.1, pending adjudication of the application seeking pardon it would be appropriate to pass order to the CBI authorities to provide him and his family necessary security till next date of hearing.

Needless to mention the CBI authorities may take the assistance of any centralized agency like CISF CRPF to provide necessary protection to the witness and his family till next date of hearing.

Office to communicate the above order to the CBI authorities.

For considering the application, call on **26.10.2024.**

Sd/- 22/10/2024
(Santhosh Gajanan Bhat)
LXXXI ACC & SJ, Bengaluru (CCH-82)
(Special Court exclusively to deal with
criminal cases related to elected former and
sitting MPs/MLAs in the State of Karnataka)"

(Emphasis added)

... ..

"Case called out.

Accused No.2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20 and 21 are present.

Accused No.1 is absent. EP filed and allowed for the day.

Learned SPP is present and has submitted that PW-2 is present before the court and CW-121 has requested for a short accommodation.

The witness has requested the court to provide him a short accommodation as he is suffering from back pain and he is unable to tender his evidence today...."

The learned Magistrate records the statement as directed by the Special Court. The order sheet maintained for recording statement of accused No.1 is as follows:

"... .."

Case called out before the open court at 05.00 p.m.

Accused No. 1 by name Sri. Basavaraj Shivappa Muttagi, S/o Shivappa Muttagi, R/at Kalmeshwara Oni, Managundi, Dharwad is present along with his Counsel Sri. R. Nagendra Naik.

On enquiry, the accused No. 1 by name Basavaraj Shivappa Muttagi submits that he has filed the application before the Hon'ble CCH-82 court and also produced his original Aadhar card and copy of the same. The original Aadhar card returned to the accused No. 1.

The procedure before the recording of statement of accused No. 1 u/s 164 of Cr.P.C is made since 05.10 p.m to 05.30 p.m and the procedure separately recorded.

The accused No. 1 submits that, he will make necessary arrangements for his security till recording of his statement.

The reflection time given to the accused No. 1 since today 05.30 p.m to 21.10.2024 at 12.30 p.m.

The accused No. 1 is directed to appear before the court along with his counsel on 21.10.2024 at 12.30 p.m.

Call on 21.10.2024 at 12.30 p.m.

Sd/- 19/10/2014
XVII ACJM
Bengaluru"

(Emphasis added)

... ..

"Case called out before the open court on 21.10.2024 at 01.00 p.m.

Accused No. 1 by name Basavaraj Shivappa Muttagi and his counsel Sri. R. Nagendra Naik (Roll No. KAR/1479/1993) are present before the open court.

The procedure before the recording of statement of accused No. 1 u/s 164(1) of Cr.P.C is conducted since 01.00 p.m to 01.06 p.m and the procedure separately recorded.

Further the statement of accused No. 1 u/s 164(1) of Cr.P. is recorded since 01.07 p.m. to 03.28 p.m in the presence of the counsel of the accused No.1.

The statement of the accused No. 1 u/s 164(1) of Cr.P.C and the procedures conducted before recording the statement of accused No. 1 u/s 164(1) of Cr.P.C is sealed before me.

The office is directed to send sealed cover to the Hon'ble LXXXI Addl. City Civil & Session Judge, [Special Court exclusively to deal with criminal cases related to elected former & sitting MPs/MLAs in the State of Karnataka (CCH- 82)] Bengaluru.

Copy of the statement of accused No. 1 be handed over to I.O with a direction that contents of the such statement should not be disclosed to any person."

(Emphasis added)

The recording of the statement under Section 164 of the Cr.P.C. which by itself was illegal, gets its crowning glory of recording the said statement in the presence of the Advocate representing the

accused No.1. If this can be the purport of Section 164 of Cr.P.C., it would turn the entire procedure ***topsy-turvy***. After recording of the statement comes the impugned order. The impugned order, insofar as it is germane, reads as follows:

"13.....For instance, I have culled out the necessary materials which are forthcoming in the additional response which has been filed by the CBI authorities which are as follows:

- The statement of accused No.1 discloses the motive for commission of murder of deceased Yogesh Goudar being hatched by accused No. 15
- The incident on 23.4.2016 is revealed by the statement of accused No.1 wherein several insult and humiliation were hurled by accused No.15 Vinay Kulkarni at Zilla Panchayat meeting towards deceased Yogesh Goudar.
- His statement also reveals of the roles of conspiracy between accused No.1 along with accused No. 18 Vikas Kalburgi, A3-Keerthi Kumar Kurahatti, A6-Mahabaleshwara Hongal, A-2-Vikaram Bellari and others with respect to the committing murder of Yogesh Goudar at the instance of accused No.15 Vinay Rajashekarappa Kulkarni.
- His statement reveals of request being made by accused No.15 Vinay Kulkarni to purchase 10 sim cards and 10 basic mobile sets for the purpose of communicating with various associates in the month of April-May, 2016.

- The sale agreement entered into between Todkar and Basavaraja Shivappa Muttagi through Nataraj and Veeresh on 24.5.2016 at the instance of accused No.15 Vinay Kulkarni establishes that the motive of the murder of Yogeshgoudar was to be deviated and projected as some land dispute between accused No. 1 and deceased Yogesh Goudar instead of political rivalry between accused No.15 and Yogesh Goudar.
- His statement indicates that on 12.6.2016 accused No.1 Basavaraja Shivappa Muttagi stayed in Ankita Hotel till the murder was completed and on 13.6.2016 accused No.21 Somashekar Nyame Gouda communicated with respect to executing murder of Yogesh Goudar which is required for establishing the fact of communication of criminal conspiracy.
- The statement of accused No.1 Basavaraja Shivappa Muttagi indicate of providing 3 country made pistols in the month of May 2016 by accused No.15 Vinay Kulkarni and also providing Rs.15 lakhs cash for utilising the same towards murder of deceased Yogesh Goudar.
- The information given to accused No.1 Basavaraja Shivappa Muttagi on 15.6.2016 around 7.30 a.m. after the murder of Yogesh Goudar with respect to nature and manner in which the murder was committed.
- His statement disclosing the role of Vinayak Katagi, Keerthi Kumar, Vikram Bellary meeting and travelling together in Chevrolet car in front of the Gym at 7.42 a.m. on 15.6.2016 establishes their role.

- His statement establishes understanding between the assailants that they stayed in different destinations for the purpose of hiding themselves also establishes conduct of the accused persons after committing murder.
- The fact disclosed by A1-Basavaraja Shivappa Muttagi proves the role of accused persons as to the arrangements done by them prior to surrendering accused No.1 to 6 before the State Investigating Agency in order to overcome the materials and also to deviate the investigation process.
- The fact disclosed by accused No.1 indicates of recovering of weapons at the murder place and also it indicates role played by accused No.19 and 20.
- The statement of accused No.1 also discloses about the fact and role played by accused No.15 Vinay Rajashekarappa Kulkarni.

14. When the entire facts is once again carefully appreciated with the statement of accused No.1 which is recorded under Sec.164(1) of Cr.P.C, does indicates that accused No.1 had tendered his statement revealing entire facts and circumstances of the case. At this juncture, the prosecution has contended that his statement is very much essential for the proper adjudication of the case and also to prove their case beyond reasonable doubt, since the entire case rests upon the circumstantial evidence.....

15. In the instant case, the court has relied upon the aforesaid authority which would clearly indicate that at the time of exercising judicial power in relation to grant of pardon the court is required to remove any suspicion of

consideration which is extraneous in nature. Further I have also relied upon the judgment of the Hon'ble Apex Court wherein the procedures for considering the application under section 306 of Cr.P.C is laid down. Further I have also bestowed my anxious reading to the fact that the present accused No.1 is seeking pardon when the trial is commenced.....

16. The statement which has been narrated by accused No.1 Basavaraja Shivappa Muttagi under Sec.164 of Cr.P.C., also indicates of the definite role being played by the accused No.1 in the commission of offence. It is not that the accused No.1 was not aware of the facts which would lead to the circumstances that in the event of disclosing the statement. In fact the learned Magistrate at the time of recording the statement itself had warned him of the consequences which would arise of the situation of his tendering his statement. Even then he had proceeded to tender his statement and after giving a specific time for retraction, then the statement came to be recorded.

17. I have bestowed my anxious reading to the entire statement, coupled with the materials which are available on record in the charge sheet. By looking in to the aforesaid aspects, the contentions urged by the applicant/accused in his application filed under Sec.306 of Cr.P.C., seems to be justifiable. Even otherwise, if the application is allowed and if the applicant-accused later on retracts from his evidence, then obviously the court will be having power to summon him and arraign him as accused at the later stage of the case. Under the facts and circumstances, the application filed by accused No. 1 Basavaraja Shivappa Muttagi under Sec.306 of Cr.P.C., deserves to be allowed and I answer Point No. 1 in the Affirmative.

18. Point No.2: In view the discussions made herein above, I proceed to pass the following:

ORDER

Application filed by the accused No. 1 Basavaraja Shivappa Muttagi under Sec.306 of the Code of Criminal Procedure is hereby allowed and he is hereby considered as approver in this case."

(Emphasis added)

The aforesaid order passed by the concerned Court is solely on the basis of statement tendered by accused No.1 under Section 164 of the Cr.P.C., as directed by the Special Court to the learned Magistrate to record it. The order of the Special Court is wholly on the basis of the statement recorded by the learned Magistrate under Section 164 of the Cr.P.C. The direction, to record such statement, and the recording of the statement, are all illegal. Therefore, illegalities galore in the impugned action.

18. Whether the second application was maintainable or otherwise need not detain this Court for long or delve deep into the matter. The application under Section 306 of the Cr.P.C. is akin to seeking enlargement on bail, where a second application would be maintainable, but only on changed circumstances. The issue bears consideration by a three Judge Bench of the Apex Court in the case

of ***STATE OF U.P. v. KAILASH NATH AGARWAL***¹, wherein it is held as follows:

" "

15. The decisions referred to above clearly establish that the powers conferred on the District Magistrate and the other Magistrates under Section 337 are concurrent and that a District Magistrate, even after commitment, has power to tender pardon. The proviso to Section 337(1) makes it dear that the District Magistrate, in addition to the Magistrates referred to therein, has power to tender pardon during inquiry into or trial of the offence. Though the above decisions had no occasion to consider whether the District Magistrate has power to tender pardon, when the Magistrate enquiring into the offence has once refused, we are not able to find any such restriction placed upon the power of the District Magistrate by the wording of the section itself. As the power conferred by sub-section (1) of Section 337 on the different classes of Magistrate is concurrent and is of the same character, it follows that the power to tender pardon can be exercised by everyone of the authorities mentioned therein subject to the limitations specified in the section itself. The mere fact that a Magistrate of the First Class enquiring into the offence has declined to grant pardon, as in the case before us, does not take away the power or jurisdiction of the District Magistrate to entertain a further application for grant of pardon. **Though the District Magistrate has got power to consider a further application, nevertheless, it is needless to state that he will have due regard to the views expressed by the Magistrate for refusing to grant pardon. We must, however, state that judicial propriety requires that if a higher authority had declined to tender pardon, a lower authority should not grant pardon except on fresh facts which were not and could not have been before the higher authority when it declined to grant pardon. Even if pardon has been refused on one occasion, a further request may be made before the**

¹ (1973) 1 SCC 751

Magistrate or the District Magistrate. But such a further request can be entertained and considered only if fresh or additional facts are placed by the party concerned.

...

...

...

17. The conferment of concurrent powers is also to be seen in Section 498. Under sub-section (1), the High Court or Court of Session has got power to direct that any person be admitted to bail or to reduce the bail required by a police officer or a Magistrate. Even though the Court of Session may have refused a request in this behalf for grant of bail, the High Court can be approached for a similar relief. Under sub-section (2), again power has been given to the High Court or Court of Session to order the re-arrest of a person admitted to bail under sub-section (1)."

(Emphasis supplied)

The aforementioned judgment is subsequently followed in several cases. Therefore, the issue is no longer *res integra* that a second application is maintainable, but only on changed circumstances. Whether there was a changed circumstance or not in the case at hand, requires to be noticed. As observed hereinabove, the first application preferred by accused No.1 was absolutely vague. On the vague application, a detailed order comes to be passed. There was no changed circumstance that would be in the strict sense of the term, but the accused No.1 throughout has been making a hue and cry about threat to his life, the threat according to his application looms large. This threat if would be continuous or continues in real

time, and not imaginary, it becomes a changed circumstance. In such circumstances only, the second application would be maintainable before the concerned Court, other than the factual or actual changed circumstance. The issue is answered accordingly.

Issue No.2:

Whether recording of Section 164 Cr.P.C. statement prior to grant of pardon would vitiate the order granting pardon under Section 306 of the Cr.P.C.?

19. Issue No.2 revolves round recording of Section 164 Cr.P.C. statement prior to grant of pardon. I, therefore, deem it appropriate to notice Section 164 of the Cr.P.C. It reads as follows:

“164. Recording of confessions and statements.—(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate."

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5-A)(a) In cases punishable under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, sub-section (1) or sub-section (2) of Section 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB], Section 376-E or Section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in Section 137 of the Indian Evidence Act, 1872 (1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

Section 164(1) of the Cr.P.C., stops at recording of confession statement on the date on which the trial commences. This is the

mandate of the statute, and it is trite law that if a statute directs performance of action in a particular manner, it shall be performed in that manner only.

20. It is apposite to refer to the judgment of the Apex Court in the case of **BABU VERGHESE V. BAR COUNCIL OF KERALA**² wherein the Apex Court holds as follows:

“30. We may point it out that the process for extension of the term of the Kerala Bar Council was initiated under Rule 6. If Rule 6 is to be applied, it must be shown that all its requirements were fulfilled.

31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor v. Taylor* [(1875) 1 Ch D 426 : 45 LJCh 373] which was followed by Lord Roche in *Nazir Ahmad v. King Emperor* [(1936) 63 IA 372 : AIR 1936 PC 253] who stated as under:

“[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.”

32. This rule has since been approved by this Court in *Rao Shiv Bahadur Singh v. State of V.P.* [AIR 1954 SC 322 : 1954 SCR 1098] and again in *Deep Chand v. State of Rajasthan* [AIR 1961 SC 1527 : (1962) 1 SCR 662] . These cases were considered by a three-Judge Bench of this Court in *State of U.P. v. Singhara Singh* [AIR 1964 SC 358 : (1964) 1 SCWR 57] and the rule laid down in *Nazir Ahmad case* [(1936) 63 IA 372 : AIR 1936 PC 253] was again upheld. This rule has since been applied to the exercise of

² **1999 SCC OnLine SC 284**

jurisdiction by courts and has also been recognised as a salutary principle of administrative law.”

The Apex Court clearly holds that it is settled principle of law that if an act under the statute is to be performed in a particular manner, it shall be only in that manner. The rule, the Apex Court observes, has since been applied to exercise of jurisdiction by Courts, it therefore becomes a jurisdictional issue. The order of the concerned Court directing the learned Magistrate to record statement under Section 164(1) of the Cr.P.C., is quoted hereinabove. The trial, in the case at hand, has commenced long ago, admittedly. Therefore, there can be no order directing recording of statement under Section 164 of the Cr.P.C., that too at the hands of the learned Magistrate, above all, in the presence of the advocate for accused No.1 and after the case has been committed to the Court of Sessions, and here the Special Court. The action of the Special Court in directing recording of statement under Section 164 of the Cr.P.C., is on the face of it, illegal and contrary to the statute. The order impugned does not bear independent consideration, or independent application of mind for passage of the impugned order. It is founded only upon Section 164

Cr.P.C. statement recorded by the learned magistrate pursuant to the direction, blatantly contrary to law. Therefore, illegalities galore in granting pardon of accused No.1. The impugned order is thus unsustainable, as it stems from procedure adopted contrary to law. The issue is answered accordingly.

Issue No.3:

What should be the procedure for grant of pardon under Section 306 of the Cr.P.C.?

21. What is the procedure to be adopted while passing an order on seeking pardon is also elucidated by the Apex Court in the case of **RAMPAL PITHWA RAHIDAS v. STATE OF MAHARASHTRA**³, wherein it is held as follows:

"....

30. From the statement of the approver appearing as PW 49 at the trial, it emerges that even though Babulal accused had told him that he shall be given 200 rupees, for joining the other accused in the commission of the crime, but after commission of the crime, he was not given any money and was told by accused Babulal to go back to his home town and in spite of his telling Babulal that he had no money, none was given to him. If as deposed to by the

³ **1994 Supp (2) SCC 73**

approver, Babulal and others wanted the approver to go away to his home town because the police was already making enquiries in the matter and he being a new person could be suspected and interrogated, but surprisingly they took no steps by giving him at least the railway fare to go back to his home town or put him on the train so that he would be out of the village and thus out of the reach of the investigating agency. Would the accused persons, who had joined a complete stranger for the commission of the crime, not even take the elementary steps to see that he is out of the village and left him high and dry? We find it difficult to accept. The approver, has only tried to remain clear either while committing or for sharing the fruits of the dacoity. The conduct of the approver going away without a penny and the co-accused letting him go like that belies logic and common sense.

31. The statement of the approver at the trial recorded more than three years after the occurrence, is so detailed that it is difficult to believe its authenticity particularly **when it also travels far beyond what was stated by the approver in his confessional statement recorded under Section 164 CrPC only a few days after the occurrence.** It is humanly not possible for an illiterate rustic person to remember all such minute details as have been given by the approver detailing even the sequence of events during the alleged occurrence.

32. The sequence of events at Ballarshah Road as detailed by the approver in his statement in the court is quite different than the sequence of events as deposed to by the three injured eyewitnesses. The High Court noticed that there was variations in the version given by Ramcharan approver and the three eyewitnesses as regards the sequence of events and the manner of assault but chose to ignore this by observing:

"But having regard to the nature of the incident, the fact that the life of the eyewitnesses was in peril and the horrendous conditions under which they had to make their escape, we do not think that the discrepancies regarding the order in which the vehicles came and the directions in which

they went can be reflecting upon the credibility of the eyewitnesses. All this eventually had been occurring in darkness, and even Ramcharan's recollection in this respect cannot but be too hazy because of the gruesome nature of the incidence. We, therefore, attach no value to the discrepancies."

This approach of the High Court does not appeal to us. The importance of the discrepancies had to be considered to test the credibility and trustworthiness of the approver and the High Court failed to do so.

33. A careful analysis of the statement of the approver given at the trial coupled with the circumstances under which he came to be arrested, the averments in his application for grant of bail and other circumstances has created an impression on our minds that the approver is a planted witness and his testimony is not at all worthy of reliance and credence. The investigating agency appears to have created false evidence and fabricated false clues insofar as the testimony of the approver is concerned. From all the attendant circumstances, we are satisfied that the approver Ramcharan is not a reliable witness; his arrest was intrinsically unnatural and his self-confessed participation in the crime without taking any active part in it not acceptable. The approver has claimed to be a spectator of every fact and of every moment but asserted that he did not participate in the assault at any stage and remained standing at a distance taking care of the clothes of some of the co-accused. His statement is almost of an exculpatory nature. His statement as a whole does not inspire confidence. His story is not worthy of credence. We find ourselves unable to place any reliance on his untrustworthy and unreliable evidence and in that view of the matter, we refrain even from expressing any opinion about the effect of the alleged non-compliance with the provisions of Section 306(4) CrPC read with Section 307 CrPC, as admittedly after the grant of pardon by the order dated April 24, 1987, no statement of Ramcharan approver was recorded till he

appeared at the trial as PW 49. It is only after the grant of pardon that the status of an accused is changed into that of a witness and the law enjoins upon the courts to record the statement of the approver immediately after pardon is granted to him so that he may consider himself bound by that statement and failure to do so at the trial would render him liable for prosecution. That exercise was not performed in this case.

34. Once, we have found that the approver is a planted witness and his testimony is not worthy of credence and is uninspiring and unacceptable justifying its rejection outright, it will be futile and wholly unnecessary to look for corroboration of his testimony. It is only when the approver's evidence is considered otherwise acceptable that the court applies its mind to the rule that his testimony needs corroboration in material particulars connecting or tending to connect each one of the accused with the crime charged. We need not therefore detain ourselves to consider the other evidence led by the prosecution to corroborate the testimony of the approver. Suffice it to say that even the corroborating evidence of identification of the appellants in court by the three injured witnesses, in the absence of any earlier test identification parade, or the recoveries made by the associating convenient panch witnesses for all the recoveries conducted from different places on different dates at the instance of different accused but in the presence of the same panch witness PW 27 is not trustworthy or reliable."

(Emphasis supplied)

The Apex Court holds that the evidence of the witness who has turned approver can be recorded only after grant of pardon during the trial and not before grant of pardon.

22. Insofar as the case at hand is concerned, there is gross procedural aberration, as the statement under Section 164 is recorded while considering an application seeking pardon under Section 306 of the Cr.P.C., which cannot be done. Section 306 of the Cr.P.C. does not empower the concerned Court, to adopt a procedure contrary to law. It is plain and simple that the Court should consider the application on its merit, either allow or reject the application, and in the event, the application is allowed, the procedure would be of recording of evidence – examination and cross-examination, of the said approver witness during the trial. Recording of confession/statement, under Section 164 of the Cr.P.C., after commencement of trial has no legal sanction.

23. The submission of the learned counsel for the CBI is that the statement under Section 164 of the Cr.P.C. should be eschewed, as everything is contained in the report of the Investigating Officer which is made part of the order and, therefore the order should be sustained. The said statement is also unacceptable. The communication of accused No.1 to the Investigating Officer does not bear a date, but it does bear

reference in the additional response of the CBI. The additional response reads as follows:

"The additional response of CBI to the application filed by A-1 u/s 306 Cr.PC r/w confessional statement recorded u/s 164(1) Cr.PC

The Prosecution has carefully perused the 164(1) Statement given by Basavaraj Shivappa Muttagi (A-1) which was given in consequence of filing 306 Cr.PC application for granting tender of pardon to A-1. In the said statement recorded u/s 164(1) Cr.PC before the Ld. 17th ACJM, Bangalore, Basavaraj Shivappa Muttagi has disclosed the following crucial facts which are in support of the prosecution case. The prosecution has mentioned below the underlined reasons for giving no objection to grant tender of pardon to A1.

1. The accused No.1 disclosed the facts that he has written letter to deceased Yogesh Goudar stating Yogesh Goudar life under risk and accused No.15 Vinay Kulkarni was planning to kill the deceased Yogesh Goudar. The said letter was cited as the document in the instant case and also marked in the earlier trial held in IV Additional District and Session Judge, Dharwad in S.C. 50 of 2017. **The said letter establishes the motive of A15 to murder Yogesh Goudar. Further, the letter proves the conspiracy is being hatched by A15 to murder the Yogesh Goudar. It is pertinent to note that A1 is only witness to prove the contents of the letter which is crucial for the prosecution case.**
2. Yogesh Goudar insulted and humiliated Vinay Kulkarni in a Zilla Panchayat meeting held on 23-04-2016 because of which Vinay Kulkarni started planning for murder of Yogesh Goudar and instructed Basavaraj Muttagi to

commit the murder of YogeshGoudar. **This fact disclosed by the Accused No.1 proves the motive for the commission of murder.**

3. The conspiracy was hatched between Basavaraj Shivappa Muttagi (A1) with Vikas Kalburgi (A18), Keerthi Kumar Kurahatti (A-3), Mahabaleshwar Hongal (A-6), Vikram Bellari (A-2), Sandeep Savadatti (A-4) Santosh Savadatti (A-7), Vinayak Katagi (A5), Dinesh M.Dinni (A-8), Aswath (A-9), Sunil (A10) Nazeeer Ahmed (A-11), Shanawaz (A-12), Nutan (A-13), Harshith (A-14) to commit the murder of Yogesh Goudar at the instance of Vinay Kulkarni (A-15). **These facts disclosed by A1 clearly prove the role of A1 to A14 in hatching conspiracy for the commission of the murder of Yogesh Goudar on the instruction of Accused No.15.**
4. Basavaraj Shivappa Muttagi met Dinesh for the purpose of committing the murder of Yogesh Goudar. **These facts disclosed by A1 clearly prove the role of Dinesh in the murder of Yogesh Goudar.**
5. While committing the conspiracy of the murder the understanding was that Dinesh M. Dinni, Aswath, Sunil, Nazeer Ahmed, Shanwaz, Nutan, Harshith would commit the murder of Yogesh Goudar. However, they were not willing to go to jail. Hence, Vinay Kulkarni instructed Basavaraj Shivappa Muttagi that the murder would be committed by Dinesh M. Dinni, Aswath, Sunil, Nazeer Ahmed, Shanawaz, Nutan, Harshith but Basavaraj Shivappa Muttagi and his associates who belonged to Dharwad namely Vikas Kalburgi, Keerthi Kumar Kurahatti, Mahabaleshwar Hongal. Vikram Bellari, Sandeep Savadatti, Santosh Savadatti,

Vinayak Katagi would go to jail in place of original assailants. **These facts disclosed by A1 establish that A1 to A6 has surrendered in place of A7 to A14 as instructed by A15 which is crucial to prove the prosecution case.**

6. During April-May 2016 Basavaraj Muttagi was asked by Vinay Kulkarni to bring 10 Sim Cards and 10 basic model mobiles for the purpose of communicating to the various associates who were going to be involved in the murder of Yogesh Goudar. **These facts disclosed by A1 establishes the modus operandi adopted by A15 by instructing A1 to purchase sim cards and basic mobiles so that communications between the accused person in respect of Yogesh Goudar can be carried out secretly.**
7. Before the commission of Yogesh Goudar murder, at the instance of Vijay Kulkarni on 24-05-2016, the sale agreement was entered between Todkar and Basavaraj Shivappa Muttagi through Nataraj and Veeresh. **These facts disclosed by A1 establishes that the motive of the murder of Yogesh Goudar was deviated and was projected (at the instance of A15) as the land dispute between A1 and Yogesh Goudar instead of political rivalry between A15 and Yogesh Goudar.**
8. On 12-06-2016 Basavaraj Muttagi stayed in Ankita Hotel till the murder was over. Further on 13-06-2016 through Somashekar Nyame Gowda (A-21 Personal Secretary of A-15 Vinay Kulkarni) communicated to Basavaraj Muttagi for executing the murder of Yogesh Goudar. **These facts disclosed by A1 establishes that A1 has**

coordinated the murder of Yogesh Goudar and the task of executing the murder of Yogesh Goudar has been communicated to A1 by A-21 on behalf of A15.

9. During May 2016, Vinay Kulkarni provided 3 country pistols and Rs.15 lakhs cash to A1 for the purpose of utilizing the same for the commission of Yogesh Goudar murder. Further, A15 while handing over the pistols to A1 has specifically stated that Chandu mama brought 3 country pistols. **These facts disclosed by A1 establishes the role of Chandu Mama @ Chandrashekar Indi in providing pistols to A15 for the purpose of conspiracy relating to commission of murder of Yogesh Goudar.**
10. On 16-06-2016 around 7.30 a.m. in the morning Yogesh Goudar came to the Gym. After commission of the murder it was informed to Basavaraj Shivappa Muttagi that Santosh Savadatti put chilli powder in Yogesh Goudar's eyes. Ashwath hit Yogesh Gowda on the head with a machchu and other accused persons namely Harshit, Dinesh, Nutan, Shahnawaz, Nazir, Sunil were attacking Yogesh Goudar. **These facts disclosed by A1 establishes that A7 to A14 are the real assailants of Yogesh Goudar's murder and also prove the execution of commission of murder.**
11. After commission of the murder Basavaraj Shivappa Muttagi, Vinayak Katagi and Keerthi Kumar Kurahatti, Vikram Bellari came by Chevrolet Car in front of the Gym at 7.42 a.m. on 15-06-2016 to confirm the execution of Yogesh Goudar's murder. **These facts disclosed by A1 and above accused establishes their role for**

confirming the murder of Yogesh Goudar.

12. After the commission of murder all the accused persons stayed in different destinations for the purpose of hiding themselves. **These facts disclosed by A1 prove the conduct of the accused after the murder of Yogesh Goudar.**
13. After the commission of the murder Basavaraj Shivappa Muttagi met Vinay Kulkarni Chandrashekar Indi (A-16), Somashekar Nyame Goudar (A-21), Vijay Kulkarni, Kempegowda Patil in Bangalore and appraised about the murder of Yogesh Goudar to them. Further they requested to surrender the associates of Muttagi belonging to Dharwad before the police as for the same arrangements was taken place. **These facts disclosed by A1 prove the role of the above accused as to the arrangements done by them for surrendering A1 to A6 in place of real offenders A7 to A14.**
14. Asst. Commissioner of Police received Rs.2 lakhs from Basavaraj Muttagi through Mahesh Shetty and Inspector Tingerikar brought the required weapons (which are not the real ones used for the murder and the panchanama was made by him). All the 6 persons belonging to Dharwad including A1 surrendered before the Police. **These facts disclosed by A1 prove that weapons recovered in the Yogesh Goudar murder case is not the real weapons used for the murder and also proves the role of A19 and A20.**
15. During the trial of Yogesh Goudar murder held at Dharwad Court, all the eye witnesses were taken to Vinay Kulkarni's farm house

and further they were taken to Goa by Basavaraj Shivappa Muttagi, Babu Logender, Amit Doddamani and Nitin Shetty. Further from Goa all the eye witnesses were taken to Rashi Farm, Dharwad. **These facts disclosed by A1 prove the role of A15 that he has threatened the witness in Yogesh Goudar case.**

16. At the instance of Vinay Kulkarni the Public Prosecutor of Yogesh Goudar's case namely Shaila Angadi was transferred. **These facts disclosed by A1 to prove the role of A15 in transferring the public prosecutor (who conducted trial in Dharwad Court) of Yogesh Goudar murder case.**
17. The above facts disclosed by Basavaraj Shivappa Muttagi not only strengthen the prosecution case in various aspects but it proves the entire connecting evidence of the prosecution case and also proves the role of A1 to A21. Hence, Basavaraj Shivappa Muttagi has disclosed entire facts before the Hon'ble Magistrate. Hence, prosecution is giving consent for granting tender of pardon to A1 and for giving the status of approver to accused No.1 Basavaraj Shivappa Muttagi."

It is verbatim reproduction of the communication. Based on the said report, it was always open to the Court to consider and pass necessary orders. But, the present order foundations itself completely on Section 164 statement. Even the additional response refers to 164 statement. Therefore, the order that has a ***veneer*** of illegality covered on it, cannot be sustained. The recording of

Section 164 Cr.P.C. statement for the purpose of consideration of grant of pardon under Section 306 of the Cr.P.C., is an action unknown to the mandate of the statute. Therefore, the action is illegal and contrary to law. The issue is answered accordingly.

Issue No.4:

Whether the co-accused have a right to question the order granting pardon?

24. The learned counsel for the respondent has also contended that a co-accused cannot challenge the order of grant of pardon to another accused to transpose himself as a witness. The said submission is also refuted by the learned senior counsel representing the petitioners. The submission and contra submission need not detain this Court for long or delve deep, as the issue bears consideration in the judgment of **KAILASH NATH AGARWAL** itself, wherein the Apex Court holds as follows:

"....

8. Mr Rana, learned counsel for the State, has raised three contentions:

"(1) The power under Section 337 of the Criminal Procedure Code exercisable by the various Magistrates mentioned therein is concurrent and the District Magistrate in the circumstances of this case was competent to grant pardon to Respondent 2.

(2) The Revision filed by the first respondent before the Civil and Sessions Judge against the order of the District Magistrate was incompetent.

(3) In any event, the grant of pardon by the District Magistrate is only an irregularity, which is cured by clause (g) of Section 529 of the Criminal Procedure Code, and as such the High Court was in error in interfering with the said order."

...

...

.....

23. This decision of the Delhi High Court was challenged before this Court in Criminal Appeal No. 109 of 1968. In its judgment dated September 16, 1968, this Court on merits agreed with the High Court that the tender of pardon was proper. The question of the nature of the power exercised in granting pardon and the other question whether an order granting pardon was revisable by a superior court, were, however, left open. We have indicated earlier that an order granting pardon is open to revision, but whether the court whose powers are invoked for that purpose will interfere or not, is a matter depending upon the circumstances of each case. Accordingly, we hold that the first respondent's revision before the Sessions Court was competent and reject the second contention of Mr Rana."

(Emphasis supplied)

The Apex Court holds that the order granting pardon is open to revision. It is the discretion of the Court to interfere or not. The Apex Court also observes that revisional Court can exercise *suo*

motu powers to consider the order of grant of pardon. This Court now, in the present petition is exercising jurisdiction, under Section 482 of the Cr.P.C., and these are inherent powers which ostensibly are on a higher pedestal than that of revisional powers. But the co-accused will have a right to question procedural illegality in granting pardon, and not the order granting pardon on its merit. The issue is answered accordingly.

25. As observed and circumstances narrated hereinabove, this Court cannot and has not tied the hands of accused No.1 to file an application seeking pardon or otherwise. The Court has only found fault with the procedure adopted by the concerned Court. It is now necessary to notice the serious objection taken by the learned senior counsel Sri C.V.Nagesh for averments made in the statement of objections, with particular reference to paragraphs 18 and 19. For considering the said objection, the objectionable paragraphs need to be noticed and they read as follows:

"....

18. It is urged by the petitioners that the application under Section 306 Cr.PC is not maintainable.

18.1. It is submitted that a bare perusal of Section 306 would make it abundantly clear that the wording used in the section enshrines that "at any stage of the investigation or inquiry into or the trial of" which makes it evidently clear that the application under Section 306 can be filed even at the stage of trial. The aforesaid principle is cemented by a catena of decisions by the Hon'ble Apex Court wherein it has held that the application under Section 306 can be filed at any stage before the judgment is passed. Therefore, the ground urged by the petitioners does not hold water.

19. It is submitted that the conduct of the petitioners in approaching this Hon'ble Court at a belated stage after a delay of almost 15 days since the passing of impugned order is only a thwarted attempt to delay the trial. The purpose of criminal trial is to unearth the truth and it is a journey or a voyage towards discovery of the truth which is its ultimate object. The petitioners have made all the attempts at their disposal to delay the culmination of trial in spite of this Hon'ble Court's direction to conclude the trial expeditiously preferably within a period of three months."

The objection of the CBI is that every now and then the petitioners are approaching this Court which has contributed to gross delay in the proceedings. This statement is completely contrary to all the orders of the concerned Court which is repeatedly passing orders against the prosecution in delaying completion of trial. The observations are as follows:

"....

It is rather unfortunate to note that inspite of providing sufficient opportunities the prosecution are

unable to furnish appropriate details of the witnesses they are intending to examine. Repeatedly the chequered history of the case indicates that case was posted for FDT and there after some witness list were being filed by the prosecution without ascertaining the list which they had fled earlier.

In other words there should be some sort of continuity in conducting trial which unfortunately is found lacking. Though this court had fixed the date of trial continuously much progress is not being seen which is causing lot of inconvenience to the court since the court is unable to take up other cases.

Accordingly, the HOB, CBI is hereby directed to look into the matter and strictly instruct the concerned to conduct the trial in accordance with law and as contemplated under the law.

Without there being any other alternative the court has reluctantly once again posted the case for FDT since on the last stretch of dates majority of the witnesses were not examined by the Prosecution.

For FDT, call on **22.11.2024**.

Sd/- 16.11.2014
 (Santhosh Gajanan Bhat)
 LXXXI ACC & SJ, Bengaluru (CCH-82)
 (Special Court exclusively to deal with
 criminal cases related to elected former and
 sitting MPs/MLAs in the State
 of Karnataka)"
 (Emphasis added)

... ..

"Case called out.

Accused No.2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20
 and 21 are present.

Accused No.1 Basavaraj Muthagi is given pardon.

Other accused are absent. EPs are filed and allowed for the day.

Learned SPP is present.

The learned SPP has filed a memo along with list of witnesses to be summoned. In the said memo it is noticed that the prosecution is intending to summon CW-153 Dr. Kumuda Rani, who is an handwriting expert in order to prove the letter allegedly received by deceased Yogesh Goudar prior to his murder which would be deposed by Mr. Basavaraj Muthagi.

It is relevant to note that the Hon'ble High Court of Karnataka by its kind order has deferred the recording the evidence of approver Mr. Basavaraj Muthagi. As such after recording the evidence of CW-153 the court will have to defer the cross examination since the evidence of Basavaraj Muthagi is yet to be recorded.

That apart CW-13, CW-14 are stated to depose about motive in the above case. It is pertinent to note that some of the witnesses who are examined already by the prosecution speaks about the motive. For instance PW-2 has already deposed about the motive and intention and even his cross examination is deferred. On that day a submission was made that some of the witnesses were to speak about motive. The court today had posed a question to the learned SPP that how many witnesses cited in the charge sheet would speak about motive and intention.

The learned SPP submits that there are some other witnesses apart from the one mentioned above to depose about motive and intention to commit the murder.

Under such circumstances, it is observed that once again the case will be deferred for cross examination since corroboration would be required.

Unless a particular type of witnesses viz., eye witnesses, witnesses who speak about motive and intention, expert witnesses are flocked together and examined effective cross examination will not be conducted by the defence wherein the learned counsels for accused have also made a submission that for the purpose of corroboration they have to be examined together.

As such the list of witnesses proposed to be examined is not conclusive and inspite of granting a weeks time to the prosecution they have not come up with proper list. It is not the duty of the court to remind the prosecution to file a proper list of witnesses to conduct effective trial...."

(Emphasis added)

Therefore, the delay has not occasioned due to the petitioners approaching this Court every now and then, but the prosecution has also contributed the delay. In that light, I again reiterate expeditious conclusion of trial and at any rate within 2 months from the date of receipt of a copy of this order, if not earlier. Needless to observe that parties would cooperate with the conclusion of trial expeditiously.

SUMMARY OF FINDINGS:

- (a) The second application seeking pardon under Section 306 of Cr.P.C. is maintainable, only on changed circumstances, as also, in the kind of circumstance that is projected in the case at hand.
- (b) Recording of a statement under Section 164 of Cr.P.C., prior to grant of pardon, is illegal and such procedure cannot be adopted in any case, while granting pardon.
- (c) The procedure of examination and cross-examination will be only after grant of pardon, as is held by the Apex Court *supra* and not any time earlier to the grant of pardon.
- (d) The co-accused do have a right to question the order granting pardon under Section 306 of the Cr.P.C., only insofar as it pertains to any procedural aberration and not the order granting pardon on its merit.

26. For the aforesaid reasons, the following:

ORDER

- (i) Criminal Petitions are allowed.
- (ii) The order dated 30-10-2024 passed by the LXXXI Additional City Civil Judge and Sessions Judge, Bengaluru in Special C.C. No.565 of 2021 stands quashed.
- (iii) The concerned Court shall endeavour to conclude the trial within an outer limit of 2 months, if not earlier.

Pending applications if any, also stand disposed, as a consequence.

Sd/-
(M. NAGAPRASANNA)
JUDGE

Bkp
CT:MJ