

TENDOR OF PARDON TO AN ACCOMPLICES

“A complex evidentiary process”

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“Be careful whom you went to; A listening Ear could Also be a running mouth. After all, loose lips might sink ships - Mo. A. M. Khan

“Discovering witnesses is just as important as catching criminal” - SIMON WIESENTHAL

ABSTRACT

Every criminal trial is a voyage of discovery in which truth is the quest. The pardon to an accomplice in the concept where the information regarding the severe offence can be found out. But the court needs to apply is judicial mind to see whether the accused should be granted a pardon or not.

KEY WORDS

Criminal Justice System, Tender of Pardon, Trial, Investigation, Approver, Code of Criminal Procedure (CRPC) Offence, Accomplice, Revocation of Pardon.

INTRODUCTION

Justice is the quintessence of the right to life with dignity. In criminal justice administration across the globe, proving culpability beyond a reasonable doubt by the prosecution is an essential prerequisite for punishing guilty and for securing a conviction. In the modern era of smart Criminals equipped with the latest technology, proving the infallible chain of events in commission of crime becomes a daunting task. It further necessitates additional evidence tools to strengthen the judicial system ensuring that criminals may not slip from the clutches of the legal process. In the concept of tender of pardon to an accomplice an additional testimonial evidence, permits an accomplice to realise and assist the investigation and judicial process to ensure justice. In the Code of Criminal Procedure the term “accomplice or approver” is neither defined not used, however, sections 306 to 308 of the Code deal with tender of pardon to an accomplice. In this research paper, the attempt have been made to deliberate upon legal requirements for making an accomplice or approver, its reliability and efficacy ;and to delve into the globe perspective of this extraordinary evidence in criminal administration. The Apex court in *Ravindra Singh vs State of Haryana* has succinctly described the nature and scope of an accomplice in criminal justice process. An accomplice is a most unworthy friend if at all and he having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had been taken place. The story if given of minute details according to reality is likely to save it from being rejected brevimanu. Secondly, once that hurdle is crossed, the story given by an accomplice so far as the accused on trial is concerned, must implicate him in such a manner as to as given rise to a conclusion of guilt beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstance and

situations governing particular case, conviction based on the uncorroborated evidence of an accomplice confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an accomplice 's statement has to be corroborated in material particular bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an accomplice pertaining directly to an accused, it reliable by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based.

Sections 306,307 and 308 under Chapter 25 of Code of Criminal Procedure,1973 deals with granting and revocation of pardon to an accomplice. The corresponding provisions for tender of pardon to an accomplice were enshrined under section 337 to 339 of the Code of Criminal Procedure, 1898(3). A comparative account of the provisions for tender of pardon to accomplice were enshrined under section 337 to 339 of the Code of Criminal Procedure, 1898 and the code ,1973 reveals that they are, in all germane respects, in parimatetria, and the provisions for granting pardon under the code, 1898 would also apply, mutalis mutandis, to section 306 to 309 of the Code, 1973.The Prevention of Corruption Act,1988 has enabling provisions under section 5 for tender of pardon to facilitate justice in graft cases.In the recent past, the issue of approver has been in the limelight in some significant cases like the INX Media graft case and the August Westland casewarranting in depth discussion on this procedural legal dogma.

OBJECTIVES

- To Analyses the provisions relating to tender of pardon to accomplice under Code of Criminal Procedure,1973.
- To determine the scope and challenges in tendering pardon to an accomplice, for strengthening justice delivery.
- To ascertain the extent of authenticity as well as admissibility of the accomplice in the court of law.

HYPOTHESES

The concept of tender of pardon to an accomplice is a complex but significant procedural aspect to fill the missing links of evidence.

RESEARCH METHODOLOGY

This is a doctrinal research and all data collected is secondary data.

WHO IS AN ACCOMPLICE?

The term has not defined statutorily under crpc. But describe the various categories of persons to whom pardon may be tendered includes –

A person who directly or indirectly participated, or concerned in the commission of the offences e.g. as abettor, or Who was privy to the commission of the offences.

Sections 133 of India Evidence Act, 1872 also talk about an accomplice witnesses as-

Accomplice is a competent witness to the crime, who is connected with the crime by any unlawful act or omission, also includes Principle, co-accused, an accessory, abettor, a person in some way connected with the offence.

An accomplice, who is tendered pardon and gives evidence in favour of prosecution against other participants in the commission of the crime, is popularly called an approver. We can try to understand the term in this way an accomplice, after a tender of pardon becomes approver, however, term approver nowhere defined under the Indian laws. In ancient English law, an accomplice in felony, who save himself confesses to the fact and charged or accused any other person as principal or accessory, against whom he is aware of the secrets behind the crime. Every approver may be called an accomplice, but all accomplice cannot be termed as the approver. The Apex court in *R K Dalmia vs Delhi Administration 1962 AIR 1821* has explained an accomplice as under -

An accomplice is a person who participates in commission of the actual crime charged against the accused. He is to be a particeps criminis. There are two cases, however, in which a person has been held to be an accomplice even if he is not a particeps criminis. Receivers of stolen property are taken to be accomplice of the thieves from whom they receive goods, on a trial for theft. Accomplices in previous similar offences committed by an accused on trial are deemed accomplices in the offence for which the accused is on trial, when evidence of the accused having committed crime of identical types on other occasions be admissible to prove the system and intent of the accused in committing the offence charged.

CATEGORIES OF AN ACCOMPLICE

- Principal Offender:
The principal Offender is the person who actually commits the crime or abets the crime.
- Before the fact:
People, who abets, incite or procure for the commission of a crime and do not participate in the crime.
- After the fact:

People who protect the person who have committed the crime or help them to escape from the location. They are also considered as the participants of the crime.

ACCOMPLICE AND CO ACCUSED

The confession of a co accused (section 30) is not treated in the same way the testimony of the accomplice because –

1. The testimony of an accomplice is taken on oath and is subjected to cross examination and so of a higher probative value .
2. The confession of a co accused can hardly be called substantive evidence as it is not evidence within the definition of Section 3. It may be taken into consideration along from the basis of a conviction. While the testimony of an accomplice alone may be sufficient for conviction.

PRINCIPLE TO BE FOLLOWED FOR THE GRANT OF PARDON

Principle to be followed for the grant of pardon are as follows –

1. Trial must be initiated.
2. Guilt shall not be approved,
3. An Accomplice shall agree to be approved, there must be an agreement to be approved.
4. The approver become the witness if the pardon by the Court.
5. If he violates these terms, no pardon shall be granted.
6. He shall not be released before the decision or order.

DUTY OF MAGISTRATE

It is the duty of every Magistrate to record

- The reason for doing so.
- Whether the person to whom tender was made has accepted it or not
- To furnish the copy of record free of cost to the accused

A person accepting a tender shall be examined in court of the Magistrate taking the cognizance of an offence as a witness. He is detain in custody until the disposal of the trial or unless he is already on bail.

TENDER OF PARDON TO AN ACCOMPLICE UNDER CODE OF CRIMINAL PROCEDURE

The provisions relating to tender of pardon to an accomplice under Code of Criminal Procedure, 1973 is contained in chapter 8, Section 306 to 308. These sections lay down the procedure for-

- Tender of pardon to an accomplice;
- Conditions for granting pardon, and
- Effect of pardon on the accused person.

The important points of these provisions includes:

*The application for seeking pardon must be filed before the Magistrate of the First Class by the Investigating officer or by the accomplice (section 306(1) Crpc).

*Tender of pardon may be considered by the Magistrate at any stage of investigation or inquiry; or the trial of the offences (section 306(1) Crpc).

* The person must have been directly or indirectly concerned in or privy to the offence in question (Section 306(1) Crpc).

*This legal provision applies to any offence triable exclusively by the court of sessions or by the court of special Judge (Section 306(2)(a)Crpc), or the offence punishable with imprisonment which may extend to seven years or with more sever sentence (Section 306(2)(b)Crpc).

*The Magistrate shall record his reasons on application for tendering a pardon (Section 306(3)Crpc).

*In case a tender of pardon is accepted, the accomplice shall be examined as a witness (Section 306(4)(b) CrpC; and he shall, unless already on bail, be detained in custody until the termination of the trial (Section 306(4)(b)Crpc).

* Where a person has accepted a tender of pardon made under section 306(1) and has been examined under section 306(1) and has been examined under section 306(4), the Magistrate shall, without making any further inquiry, commit it for trial either to the Court of Sessions (Section 306(5)(a)(first)Crpc), or to a court of special (Section 306(5)(a(second) Crpc), or in other case make to the Chief Judicial Magistrate (Section 306(5)(b) Crpc).

Authority of the Court to grant a pardon is a judicial function, but cannot be exercised **SUO MOTO** It is contained upon the request of either prosecution or the accused person because the court can have no interest whatsoever with any party or In the final decision of the case. The Apex court held that while proceeding and considering of granting pardon, co-accused has no right to be heard.

PURPOSE AND OBJECTIVE OF PARDONING

With the 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 sections applies. These provisions is aimed at encouraging an accomplice person to disclousethe truth and assist the prosecution in the investigation and trial of a criminal offence.

CONDITIONS FOR TENDERING OF PARDON

- full and true disclosure of circumstances of the offence within his knowledge related to the offence and to give information regarding the person whether as the abettor or the principal who is related to the offence.
- No influence to induce disclosure or to withhold any matter with his knowledge (u/sec 316 Crpc).
- Accomplices may or may not accept the pardon.

CONSEQUENCES OF ACCEPTANCE OF PARDON

1. Accomplice no longer remain an accused person .
2. He is now called an approver(*Prosecution witness*).
3. He is to examined as a witness (*Section 306(4)*).

CONSEQUENCES OF NON-COMPLIANCE TO THE CONDITIONS OF PARDON

Once an accused is granted a pardon under the provisions of the Code and is made a approver, his status changes from the accused to a prosecution witness, and he is duty bound to speak truth to facilitate the process of justice. Violation of the condition of tender of pardon by an approver, irrespective of the pardon granted under section 306 or 307 of the Code, meets the same fate as

envisaged under section 308 of the Code. Section 308(1), enable the judge to conduct the trial of a person not complying with the conditions of the pardon, if the Public Prosecutor certificate that such person either by wilfully concealing anything essential or by giving false evidence, not complied with the conditions on which the tender was granted, or for any other offence in which he appears to have been guilty in connection with the same manner, and also for the offence of giving false evidence.

After the public prosecutor filed such certificate under section 308(1), the inexorable and inevitable consequences would be that the approver would cease to be an approver, and would become an accused. Consequently, he could never be regarded as a witness for the prosecution during the core trial. The Apex court has observed that in case the public prosecutor has not taken any step to proceed against the approver in case he is willfully suppressing material facts or is giving false evidence.

WHO MAY TENDER PARDON TO AN ACCOMPLICE UNDER CODE OF CRIMINAL PROCEDURE 1973

The following Judicial officers are entitled to exercise the power of pardon to an accomplice –

- Chief Judicial Magistrate,
- Metropolitan Magistrate,
(Both at any stage of investigation or inquiry or trial of the case).
- Judicial Magistrate first class (at any stage of inquiry or trial but not during investigation of the caseu/section 306(3).

Under Article 72 of the Constitution of India President and under Article 161 Governor also have pardoning power. However, both of these pardon are different from the tender of pardon as there's no *QUID PRO QUO*.

OFFENCES FOR WHICH PARDON CAN BE TENDERED

This sections applies to –

- Any offence tribal exclusively by the court of Session (as specified in the Schedule first of the Crpc,1973)
- Offence tribal by special Judge under the Criminal law (amendment)Act ,1952
- Any offence punishable with imprisonment which extends to 7 years or with more severe sentence (U/ section 306 (4) of Crpc 1973).

REVOCAION OF TENDER OF PARDON DURING INVESTIGATION : A LEGAL CONUNDRUM

The legal conundrum arose before the Courts many times that whether the concept of “revocation of pardon” does exist. Under the Indian legal lexicon and also whether pardon once granted be revoked, cancelled or withdraw at the stage of investigation and before recording the statement of an accomplice under section 306(4) of the Crpc. It is seems that number of times court observed and held thatthe issuance of a certificate under section 308(1) had to be

necessarily preceded by recording of the statement of the accomplice as enshrined under section 306(4). However, the court refrain from entering into a debate as whether “revocation of pardon “exists as a vital legal challenge, which needs to be deliberated by the constitutional courts of India. In the view of authors, the legislature or the Apex court may consider to introduce the legal provisions for revocation of a tender of pardon, if approver or accomplice is wilfully not disclose true facts, which may likely to help other accused. This amendment may compel the accomplice to abide by the conditions of pardon and to collection, which is the baseline for fair trial.

EVIDENTIARY VALUE OF AN ACCOMPLICE EVIDENCE

In *Mahla vs Crown AIR 1930* the High court observed that “The fact, however, that an approver appears to the court to be an untrustworthy witness does not absolve the court from complying with the statutory provisions.” The Apex court of the India, In *Sarwan Singh vs State of Punjab*³⁷ held that “The appreciation of an approver’s evidence has to satisfy a doubt test. It must show he is reliable witness and that his Evidence receive sufficient corroboration. The Magistrate, while recording the statement of proposed accomplice under section 164 of the Code for considering as approver, must ensure that “the mind of the accused person should be completely free from any possible influence of the police and he must not be sent to jail custody and given adequate time to consider whether he should confess at all.

Ordinarily, he must be given at least 24 hours to decide”. The court must evaluate two interconnected and inseparable aspects, firstly considering the evidence of the approver with the corroborated piece of testimony, and secondly, it if appears to be untrustworthy. The court must ascertain that confession is purely voluntarily and discloses the true facts of commission of the crime . It is essential to compare the disclosure with the rest of evidence and probabilities of chain of incidence. In *R vs Baskerville, (2016) 2 KB 658* Court held that “It has been a rule of practice at common law for the judge at trial of a person for a criminal offence to warn the jury of the danger of convicting the prisoner on the uncorroborated evidence of an accomplice “. It is not necessary that the accomplice provides every detail of the accomplice provides every detail of the crime with direct evidence, it is sufficient if the evidence is merely circumstantial in nature.

The rule which seems to emerge from the foregoing discussion and judicial decisions is that the necessity of corroboration must be clearly present to the mind of the judge.

CONCLUSIONS

The approver is an extraordinary legal dogma to punish the heinous criminal, otherwise they may have escaped from the clutches of the legal process. However, it is a slippery slop especially when prosecution build a case predominantly on an edifice of sole testimony of the approver, without credible corroboration. The judge must be extra cautious about holding a guilty, since in India social milieu false allegations due to extraneous factors like personal enmity cannot be ruled out. This legal provisions may be considered for extraordinary cases like terrorism, big-ticket corruption and economic offences, or diabolic and gruesome bodily crimes. Further, admission of guilt by a proposed approver may be corroborated in term of recovery of vital items

related to crime such as case property or documents or weapon etc. under section 27 of the Indian Evidence Act,1872 or any significant disclosure which otherwise remained unknown during investigation or trial. Indeed , an approver is a double edged sword, which must be used by the court with due attention and utmost caution.

REFERENCES & TABLE OF CASES

- Section 133 of India Evidence Act,1872 deals with “Accomplice “ but the term is not defined in the law . However, an accomplice means “ a partner in crime “ or “ a guilty associate”. Section 133 laid down that an accomplice shall be a competent witness against an accused and conviction is not illegal merely because uncorroborated testimony of the accomplice against the accused .
- Code of Criminal Procedure 1973 Section 306 to 308.
- 1975AIR 856; 1975 SCR(3) 453
- Santosh Kumar Satish bhushanbariyar vs State of Maharashtra (2009) 6 SCC 498.
- CBI vs Ashok Kumar Agarwal (2014) 14 SCC 295.
- Emperor vs ShandinoDhaniparto AIR 1940.
- Renuka Bai alias Rinku alias Ratan vs State of Maharashtra (2006) 7 SCC 442.
- BipinBihari Sarkar vs State of West Bengal.
- Emperor vs Imamshah AIR 1944.
- State through CBI, Chennai vs Atul Kumar (2016) 11SCC 733.
- Indrani Mukherjee (Sheena Bora murder case accused) turn approver in INX Media case Available at [https://www.business-standard.com/article/pti-stories/Delhi-court-allows-indrani Mukherjee-to-turn-approver-in-inx-media-case](https://www.business-standard.com/article/pti-stories/Delhi-court-allows-indrani-Mukherjee-to-turn-approver-in-inx-media-case).
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- Mahavir Singh vs State of Haryana AIR 2001 SC 2503.
- Lord Mansfield ‘s “Percept of public policy”.
- State of Maharashtra vs Yuvraj 2014 SCC Online Bom 1978.
- Holmon vs Jhonson (1775) 1 Cowp 341,343.
- Suresh Chandra Bahri vs State of Bihar AIR 1994 SC 2420.