

Approver: A Confused Entity in Criminal Proceedings

G.V.Mahesh Nath, B.A., LL.M.,
Civil Judge* , A.P. Judicial Services

Accomplice, a partner in crime has a vital role for prosecution case when he turns against his co-accused and voluntarily comes up with a confession of guilt affecting himself and his partners in crime. Evidence of accomplice is tolerated as necessity, because it may be impossible to get sufficient evidence in particular crimes unless some of the participants or at least one of them discloses the circumstances within his knowledge. The evidential value of accomplice evidence is dealt under the Indian Evidence Act, 1872.¹ Whereas the Code of Criminal Procedure, 1973 (for short referred as Cr.P.C herein after) deal with the procedure of tendering pardon to the accused and also consequences for non-compliance of conditions of grant of pardon under Ss.306 – 308.

This article aims to bring the ambiguous position of the approver before the court of law, and in such an endeavor it is thought better to divide this paper into three parts, Part I- Understanding the framework of tendering pardon, Part II- Procedure for granting Pardon and Part III- Whether approver before the court of law stands as “an accused or a witness”?. The conclusion suggests the possible solutions with a thought to answer the confused position of the approver before the court of law.

* Presently working as Junior Civil Judge, Bodhan, Nizamabad District, Andhra Pradesh. The author can be reached at Email ID: gv.maheshnath@indianjudiciary.gov.in

¹ The conviction based on accomplice evidence sustains under Indian law. It is settled law that section 133 prevails over section 114 [**K. Hasheem V State of Tamil Nadu 2005(1)SCC 237**]

Part I- Understanding the framework of tendering pardon

Section 306 Cr.P.C. provides the terms on and the machinery by which the pardon for the purpose of giving evidence can be granted by the Magistrate.² The object of this section is to obtain true evidence of offences by the grant of pardon to accomplice so as to prevent the escape of the offenders from punishment for lack of evidence.³ The aim of the court in granting pardon to an accused is only to obtain his evidence as a witness. This section comes into effect only when the offence is one which is:

- (i) punishable with imprisonment of seven years or upwards; or
- (ii) triable exclusively by the court of Session; or
- (iii) triable by a Special Judge under the criminal Law Amendment Act, 1952⁴

Authorities who tender pardon: The power to grant pardon to an accused is with Chief Judicial Magistrate or a Metropolitan Magistrate at the stage of investigation or inquiry into, or the trial. Further, Judicial First Class Magistrate inquiring into or trying offence, at any stage of inquiry or trial may tender pardon. The thin line of difference between former class of magistrates and latter class is

² Harihar Sinha and Ors. Vs. Emperor AIR 1936 Cal 356 (361) (Para 22).It is to be noted that s.337 of Criminal Procedure Code, 1898 (Old Cr.P.C.) correspondent to S. 306 of Criminal Procedure Code, 1973 as such interpretation given to S.337 of old code would be useful to understanding S. 306 Cr.P.C.

³ Alagarisami Naicken Vs. Emperor (1910) ILR 33 Mad 514, 517 (Para 2)

⁴ See S.306 (2) of Code of Criminal Procedure, 1973 which reads as: 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.

that former class has power at the stage of investigation and even it is not a requirement that such class of magistrate must try and inquire into the matter wherein accomplice evidence is sought to be tendered. Whereas, in case of latter class of magistrates, they do not have role at the stage of investigation, adding to it, a rider is added under the section that such magistrate must try or inquire into such matter in which the accomplice evidence is tendered. The power provided under s.306 to Magistrate is also provided to the Court of Session under s. 307⁵ where the case is committed for trial.

Stages at which pardon is tendered: The power under section 306 Cr.P.C is exercised-

(a) Where the offence is under investigation, inquiry or trial, by the Chief Judicial Magistrate or a Metropolitan Magistrate;

(b) Where it is under inquiry or trial, by the first class magistrate inquiring into or trying the offence.

Under section 306, a Magistrate, duly empowered may grant pardon at any stage of the investigation of the offence. All that the section requires is that there should be an investigation regarding an offence coming within the section. The wordings of section 306, in so far as inquiry is concerned being, very general, it must follow having regard to the definition of "inquiry" in the Code that the power to grant pardon can be granted by a Magistrate in the course of an inquiry under section 202 also.⁶ A pardon may be tendered at any stage of the inquiry or trial. There is

⁵ Section 307. At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same conditions to such person.

⁶ B. Lamba v. State, 1971 Cr LJ 1357 (All).

nothing in section 306 to prevent a pardon being tendered to a person after a charge has been framed against him.

Whereas under Section 307 Cr.P.C, the power to tender pardon is vested with the Court of Session, the Special Judge or the Chief Judicial Magistrate. Pardon under this court can be tendered not only during a trial but also before trial. Where pardon is granted by the court to which the case has been committed for trial, compliance with the provisions of s. 306(4)⁷ Cr.P.C. is not necessary.⁸ The Supreme Court has held that s. 307 is invocable at the post committal stage while s. 306 is invocable at the pre-committal stage. The court further said that while granting pardon under s. 307, the trial court has to comply with the requirements of s. 306 (1)⁹ and not those of s. 306 (4).¹⁰

Who moves an application for tender of Pardon: The sections are silent on the aspect as to who shall move an application for tender of pardon. However,

⁷ S. 306 (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.

⁸ A.Deivendran v. State of T.N. 1998 Cr L J 814= AIR 1998 SC 2821

⁹ S. 306 (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.

¹⁰ Jasbir Singh v. Vipin Kumar Jaggi (2001) 8 SCC 289= AIR 2001 SC 2734

it could be inferred that it is for the prosecution to decide whether there is necessity for a pardon. If the prosecution so decides, the court has to agree to it. It is held by Supreme Court that, although the power to actually grant the pardon is vested in the court, obviously the court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused as such it is prosecution which decides the necessity of moving an application for pardon to accomplice.¹¹ But the accused can also directly apply to the court for grant of pardon. In that case the court must first refer the request of the accused to the prosecuting agency and ask for a statement on the request of the accused. Prosecution would agree to the tender of pardon if it considers it to be in the interest of successful prosecution of the other offenders.¹²

To whom pardon can be tendered: Under sections 306 and 307, it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence mentioned in the section. All that is requisite is that the person to whom pardon is tendered should be supposed to have been directly or indirectly concerned in, or privy to, such an offence with which another person is charged. It is not necessary that he should be an accomplice or that he should have implicated himself in the offence.¹³ The expression "any person supposed to have been directly or indirectly concerned in or privy to the offence" in section 306 is a very wide one and includes others besides an accused.

The meaning of the words "any person" in section 306(1) appears to be abundantly clear, being subject only to the qualification expressly laid down in the said provisions themselves, *viz.*, "supposed to have been directly or indirectly concerned in or privy to the offence" and not in any way otherwise circumscribed

¹¹ Ibid

¹² Konajeti Rajababu v State of A.P., 2002 Cr.LJ 2990 (AP)

¹³ Autar Singh and Anr. Vs. The State 1960 Cr LJ 989

to denote a person who has actually been made an accused. There is no other qualification in the provision excepting a condition that he would make "a full and true disclosure of the circumstances, etc."¹⁴

The accomplice must make a full and true disclosure before the committing Magistrate as well as before the Session Court. He cannot withdraw it after making it once.¹⁵ However, the tender of pardon to an approver has to precede and not to follow on the making of full and true disclosure.

Part-II - Procedure for granting Pardon:

The procedure for granting pardon is seen from s. 306 (3) to (5) Cr.P.C.

Recording reasons for grant of Pardon (Sub-section (3)): The magistrate shall record his reason for tendering pardon and also record whether such person accepted the tender. He furnishes a copy to the accused free of cost. This procedure casts obligation on the magistrate to record his reasons for tendering pardon to the approver however failure on the part of the magistrate to record his reasons is merely an irregularity which does not affect the right of the accused to be tried by the session judge.¹⁶ The provisions of this section presuppose that the pardon which was tendered to a person was accepted by him.

Approver to be examined as witness, Effect of non-examination [Sub-section 4 (a)] - The mandate under sub-section 4 (b) to examine approver as witness cannot be deviated by the magistrate, because failure to comply with provisions of section 306(4) is an illegality and not a mere irregularity in procedure and makes a trial void.¹⁷

¹⁴ Santosh Saha v. State, 1973 Cr LJ 968 (Cal).

¹⁵ Alagirisami Naicken Vs. Emperor (1910) 33 Mad 514

¹⁶ Bawa Faquir Singh Vs. Emperor ,40 Bom LR 1254 (Para 12)

¹⁷ Kalu Khoda v. State, 1962 AIR 283 (Guj).

The committal proceedings and the order would be illegal if, in breach of sub-section (4) of section 306, the committing Magistrate commits an accused to the Court of Session without the prosecution examining the person who has been tendered pardon and who has accepted the same.¹⁸

When section 306 is read no doubt is left that in a case where there is already pardon tendered to an approver, it is not open to a Magistrate to commit the accused in the case for trial before the court of session, unless he has in the course of that enquiry recorded the evidence of that approver. Where the approver was not examined in the course of the enquiry for commitment, there was clear contravention of the mandatory provision as laid down in section 306, rendering the proceeding and the order illegal.¹⁹

The committal proceedings would be illegal if, in breach of section 306, the committing Magistrate commits an accused to the Court of Session without the prosecution examining the person who has been tendered pardon and who has accepted the same. The commitment order being illegal, the sessions trial is contrary to law and the judgment is a nullity and must be set aside. There is no provision of law that on account of the delay in not examining the approver, the court would quash the prosecution.²⁰

Whether the case is to be committed or made over, it is mandatory that the Magistrate having cognizance of the offence shall examine the person accepting a tender of pardon made under sub-section (1) of section 306. In other words, the examination of the approver is a condition precedent for the committal. Any violation of the mandatory provisions of section 306, sub-sections (4) and (5) by

¹⁸ State of Bihar v. Laxmi Paswan, 1993 (3) Crimes 212 (Pat)

¹⁹ P. Apparao v. State, 1967 Cr LJ 904 (Ori).

²⁰ State v. Bauri Bissoi, 1969 Cr LJ 1419 (Ori).

the Magistrate taking cognizance of the offence clearly amounts to an illegality which would vitiate the entire committal proceedings.²¹

Detention in custody until termination of trial [Sub-section (4)(b)].-

Sub-section (4)(b) of section 306 declares that an approver, unless he is already on bail, shall be detained in custody until the termination of the trial. The object requiring an approver to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, to prevent him from the temptation of saving his erstwhile friends and companions and to secure his person to await the judgment of the law.²² The word "already" refers to the time when the Magistrate tenders a pardon. He has power under sub-section (1) to section 306 to tender a pardon at any stage of the trial or investigation. If the accused to whom he tenders a pardon is already on bail, there is no necessity for the approver to be remanded to custody thereafter, but if he is not on bail, the Magistrate is bound by the provisions of sub-section (4)(b) to retain the approver in custody until the termination of the trial. An approver who was in remand when a pardon was tendered and accepted by him, must be detained in custody under section 306(4)(b) till the termination of the trial if committal ensues or till termination of the inquiry if the committal does not ensue.

Commit the case for trial (Sub-section 5(a)):- If a Magistrate, who takes cognizance of an offence and grants conditional pardon to an approver, is satisfied that there is a *prima facie* case against the accused, which is exclusively triable by the court of session he is bound under this sub-section to commit the case to that court for trial. Under section 306(5), the Magistrate who has tendered pardon has no power to try the case himself, even if he is otherwise competent to do so.

²¹ In re, Ramaswamy, 1976 Cr LJ 770 (Mad).

²² A.L. Mehra Vs. The State: AIR 1958 Punj 72 (Para 7)

Where a Magistrate tries a case and frames a charge under section 395, I.P.C., he is bound under this sub-section to commit the accused to the Court of Session. He has no further jurisdiction left and cannot record an order either of acquittal, or of conviction under section 395, I.P.C. He cannot retain or assume jurisdiction by reducing the charge to one under section 384, I.P.C.²³

Non-compliance with conditions of pardon (S.308): The person accepting pardon may be tried for offence in respect of which the pardon was tendered or for any other offence of which he is guilty in respect of the same matter and also for the offence of giving false evidence, if the public prosecutor certifies that he has (a) by willfully concealing any essential thing, or (b) by giving false evidence, not complied with the conditions on which the tender was made. He is not tried jointly with other accused and is entitled to plead that he has complied with the conditions. The prosecution must then prove that such conditions have not been complied with. The statement made by the accused, while accepting the tender of pardon, may be given in evidence against him. But prosecution for giving false evidence in respect of such statement is not entertained without the sanction of the High Court. The court trying such person shall (a) in the case of a court of session, before the charge is read out and explained to the accused, and (b) in the case of a magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made. If the accused so pleads, the court records the plea and proceeds with the trial. The court finds whether or not the accused has complied with conditions of the pardon. If it is found that he has, the court acquit him²⁴.

²³ Public Prosecutor, Peshawar Division Vs. Sh. Muqarrab and Ors. AIR 1933 Pesh 3. (Para 1)

²⁴ The Code of Criminal Procedure, Rantanlal & Dhirajlal, 14th Edition, Wadhwa & Company Nagpur at Page 752

Part – III - Whether approver before the court of law stands as “an accused or a witness”?

With the brief understanding of the procedure for tendering the pardon to accomplice and consequence for non-compliance with conditions of the pardon, the moot question that lingers in the mind of a critic is the stand of the approver before the court of law – whether he is an accused or a witness. There is no doubt that approver when he breaches the conditions of the tender of pardon would again be relegated to the position of the accused on the certification of the prosecution. And a separate trial would commence against such an approver. But, in other cases where no breach is reported and approver adhere to the conditions of tender of pardon, the position of approver is that of a witness for prosecution. Law contemplates that committing Magistrate has to examine the approver as a witness at the request of the Investigating Agency or the Prosecution, as the case may be before committing the Accused to the Court of Session and to the respective Courts. In some cases, after committal of the Accused is over, in such circumstance, if the accused wants to disclose anything and everything about the crime and about the participation of all including himself, then also the Court of Session can tender pardon. At that juncture, examination of Approver before Committal Court is prohibited.

Detention of Approver in custody – Whether justified?

Now the question to be decided is when Accused of an offence is examined in the capacity as a witness basing on the tender of pardon given to him by Court of Law, should he be treated as a witness alone or he should play dual role as a witness and the Accused till the disposal of the case. This issue assumes significance since s. 306 (4) (b) states approver should be kept in prison till his examination is over before Court of Sessions or in such cases till the termination of Trial. This restriction on the liberty of accused/witness (“any person”) has to be viewed in the light of s.306 (1).

The wordings of section 306(1), do not contemplate that the permission to tender pardon must only relate to a person who is an accomplice or has implicated himself in the offence. What the section requires is to obtain statement of any person who is supposed to be directly or indirectly concerned in or privy to the offence and such a person can be granted pardon on condition of his making a full and true disclosure of whole circumstances within his knowledge relative to the offence. A person who applies for pardon under sections 306 and 307, can be assumed to be directly or indirectly concerned in the offence. The assumption does not mean that he is party to the offence. Therefore, inculcation of the approver in the commission of a crime is not a necessary condition for being pardoned under sections 306 and 307.²⁵ Therefore, it is not the requirement of law that person tendered pardon must be an accused, if it be the case, then how can such person be curtailed of his liberty in view of the stipulation under s. 306 (4) (b) mandating detention of such person in custody (if not on bail already) till the termination of trial²⁶.

Further, it is held that neither the inquiring Magistrate nor the Sessions Judge has got the right to set at naught the mandatory provisions of section 306(4)(b) based on very salutary principles of public policy and public interest, and release an approver who is not on bail at the time of his acceptance of the tender of pardon, after the approver has deposed any, in the committing Magistrate's court, that is, in the course of the preliminary inquiry, and before the inquiry has ended, and if committal ensues before he has deposed at the trial in the session court truly and fully the matters within his knowledge. An approver cannot be placed in the same position as an accused and the provisions of sections 437, 439 and 440, cannot apply to him. Even if sections 437, 439 and 440, apply it would not be a fit case for releasing an approver on bail in a murder case. Besides an approver has to be kept in safe custody till the conclusion of the trial or inquiry if

²⁵ State v. Ramasi Devasi Bhal, 1991 Cr LJ 2801 (Guj).

²⁶ P. Ramanatha Aiyar's Code of Criminal Procedure, Seventh Edition

no committal ensues must be read as an exception to the general provisions contained in old sections 497 and 498.²⁷ Sub-section (4)(b) should be interpreted as obligatory only on the Magistrate granting the pardon requiring him to detain the accomplice in custody and as in no way affecting the powers of the superior courts. But the discretionary powers of superior courts to grant bail to approvers should be sparingly exercised.²⁸ The precedents even do not recognize the bail rights of an approver²⁹.

Conclusion:

In the ultimate analysis, the position of the approver before the court of law remains in ambiguity. How the approver can play dual role as that of an Accused and a witness. Can a witness be kept in prison especially after his examination is over. In the Committal Court his name is included in the list of witness filed along with charge-sheet or in the subsequent charge-sheet as the case may be. The object of detaining approver in the custody is to safeguard and to protect him from the wrath of the confederates, he has chosen to expose. However, he cannot be put to sufferance by subjecting his liberty merely for rendering help to the prosecution case and assisting court of law in arriving at truth. Therefore, the probable answer to the questions raised above can be suggested as below:

- a) The wordings under s. 306 (4) (b) commence as "shall, unless he is already on bail, be detained in custody until the termination of trial". The crux phrase under the provision is "unless he is already on bail", therefore the approver till the acceptance of pardon, stands in the shoe of accused, as such he has

²⁷ Karuppa Servai Vs. Kundaru alias Muniandi Thevan AIR 1952 Mad 833 (Para 2 &3): (1952) 1 MLJ 270 :

²⁸ Mahomed Abdul Majid Vs. Emperor AIR 1927 Sind 173 (Para 11)

²⁹ The author made search for the Supreme Court decision on the issue but could not find.

bail rights under Chapter XXXIII. Therefore, prior to acceptance of pardon if the approver/accused applies for bail, such bail may be granted to the approver/ accused. The object of s. 306 (4) (b) is to protect approver from co-accused rage, however if the approver himself applies bail before acceptance of condition of pardon it would imply that the approver is able to protect himself. As such a suitable amendment is required to be brought to the provision, directing the Magistrates to inform the approver about his bail rights prior to acceptance of pardon, let the approver make a decision about his protection. In the evolving bail jurisprudence, bail rights of an accused are positively recognized by the courts, in such scenario why an approver should be subject to curtailment of his liberty.

- b) Ongoing with the above line of suggestion, s.306 (4) (b) mandates that approver if he is not on bail, he shall be detained in custody until the termination of trial. The purpose of detaining approver in custody is two-fold, one to protect him and other to make him depose "full and true disclosure of facts" within his knowledge at the time of trial. If these two purposes are taken to be legislative intention, suggestion above under clause (a) will meet the first situation. As to second purpose of detaining approver till termination of trial is concerned, the question as to what need is to detain the approver after his examination is over before the trial court, emerges. Shouldn't the approver be released from custody after his examination is over for the simple reason that the purpose of securing the truthful evidence is served. The approver may be given a right to decide as to whether he still wants to remain in the custody for his protection or want to let go from the custody. Therefore suitable legislative amendment in this regard is required in the interest of approver.

With this understanding, on the position of approver, is it not the time to think of alternative arrangements for safeguarding the interest of an approver – a confused entity in criminal proceedings?