Chapter-V

RENOUNCING PROSECUTION

A Public Prosecutor may not always seek for judicial determination of the guilt or innocence of the accused. Sometimes, he may consider it expedient to withdraw from prosecution or for some overriding reasons he may seek for conditional pardon to the accused person in respect of his alleged involvement in the crime and drop the prosecutions against him or he may find it advisable to go for plea bargaining with the accused instead of pursuing the path of prosecution or he may also let the parties compound the offence and drop the prosecution. In effect in all such instances, the Public Prosecutor, directly or indirectly, renounces his right to prosecute the accused. This chapter traces the statutory ply afforded to him in scuttling the trial by a court and discovers the areas where the prosecutor was ignored and not involved and seeks to justify the need for reform in this vital area concerning the role a Public Prosecutor could effectively play in the criminal justice system.

WITHDRAWAL FROM PROSECUTION

In all the prosecutions pursued by the State, before any court of Magistrate or Sessions Judge, at any time during pendency of trial and before the trial judge pronounced the judgement, the prosecutor in charge of that case can apply for withdrawal from prosecution. If the court consents for it, the accused will be discharged or acquitted depending upon the nature of the trial and the stage at which withdrawal occurred. Prosecutor has no right to withdraw at the appellate stage of a case. The withdrawal in the trial court can be against one or more or all the accused standing for trial in that case.
The withdrawal can be concerning one or more or all the charges against the accused. If the withdrawal is for some among many charges, the prosecution continues for the remaining charges. If the withdrawal is against some among many accused, the prosecution continues against the remaining accused. Section 321 Cr.P.C. provides the scheme governing the prosecutor’s withdrawal. The language of the section does not indicate the reasons which should weigh with the Public Prosecutor in exercising his discretion to withdraw from prosecution. The section does not also specify any requirement for the prosecutor to consult his client, before taking a decision to withdraw.

Unlike the judge, the Public Prosecutor is not absolutely an independent officer. He is an appointee of the Government. His appointment is to conduct prosecutions on behalf of the Government. So there is the relationship of counsel and client between the Public Prosecutor and the Government. He cannot act without instructions from the Government, cannot conduct a case absolutely on his own or contrary to the instructions of his client. Therefore, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instructions from the Government. In fact, Section 321 of Cr.P.C. does not lay any bar on the prosecutor to receive any instructions from the Government before he files an application under that Section.146

Thus, it is clear that the prosecutor’s decision to withdraw from prosecution stems from the decision of the Government. When the Government decides for withdrawal and directs the prosecutor to withdraw, certain duties then arise for the prosecutor. Being a good counsel to his client, the prosecutor is not to blindly follow the instructions of the Government. On receiving instructions from the Government, the prosecutor is expected

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to apply his own mind to the case and then alone shall take a decision to apply for withdrawal or not to apply for it. This much is clear from Section 321 of Cr.P.C., which empowers the prosecutor alone to apply for withdrawal and not the Government, though the Government is the client and pay master to its counsel. Therefore, when a prosecutor blindly moves an application for withdrawal without himself taking informed decision on the aspect of withdrawal, the courts would not grant consent and dismiss such applications\textsuperscript{147}. Thus failure of prosecutor in exercising his statutory discretion is not found favour with the courts.

There is the other extreme of a situation. For instance, the Government takes a decision to withdraw a case and informs it to the prosecutor, and the prosecutor fully applies his mind and finds that the Government’s decision is not in the interest of justice and it is actuated by political pressures and oblique motives and any withdrawal would impede the administration of justice. In such cases, the prosecutor is expected not to apply to the court for withdrawal and he shall convey to the Government about his disagreement. The authorities concerned should not coerce or pressurise the Public Prosecutor and any such behaviour is violative of the rule of law. If prosecutor allows himself to bend under such circumstances it amounts to betrayal of the authority of his office\textsuperscript{148}. Then the alternative left open to the prosecutor is to return the brief to the State and perhaps to resign for his office\textsuperscript{149}. Thus, there is this rare situation for prosecutor that in the interest of justice in one case, he should demit his office. Such prudery for prosecutors is a phenomenon which does not find a parallel in the branch of

\textsuperscript{147} V.Krishna Swamy v. SK Manoharan 1997 CriLJ 654.
\textsuperscript{148} Subhash Chander v. The State, AIR 1980 SC 423.
\textsuperscript{149} Sheonandan paswan v. State of Bihar, AIR SC 194.
Administrative law. It is hard to conceive that in these days of unemployment and rat race in the profession of advocates any Public Prosecutor would really sacrifice his office on finding that his perceptions of Justice in one case do not tally with the perceptions of justice held by the Government or the court. Therefore, what the prosecutors usually do is that they never disagree with the decision of the Government and file applications before the court and allow the court to refuse consent for withdrawal and dismiss the application. This game of ‘playing safe’ passes well with the prosecutors, since they do not earn the wrath of the Government and they need not demit their offices. Thus the great virtues of discretionary decisions projected into the office of prosecutor by the courts remain only a pious sermon.

The other sequence is that the Government intends to withdraw the prosecution and requests the prosecutor to attend to that. The prosecutor applies his mind and in his discretion he finds merit in withdrawal and applies to the court for it. The court, if satisfied, gives its consent and that result in withdrawal and the accused is acquitted or discharged as the case may be. This is the area where several configurations are found. The governing Section.321 of Cr.P.C., does not indicate the parameters for prosecutor’s discretion as well as grounds on which the court is expected to grant or refuse its consent. It is undeniable that when the case is in the court, no one shall bypass it and the formal orders of court are generally required. The idea to withdraw from prosecution may have originated from the Public Prosecutor or may have originated from the Government. In either case, consultations between prosecutors or the Government is necessary. The assessment of evidential sufficiency to prove the case against the accused beyond reasonable doubt certainly vests with the prosecutor in a pending trial case. In the usual
cases, the Government does not look into the case file to assess the sufficiency or deficiency of evidence in a case. In fact, the very fact that the Government filed the case before court presupposes that it was satisfied with the evidence and found it sufficient to successfully prosecute the accused. However during the trial phase as the prosecutor handles the case file, he may find that the evidence is insufficient or meagre and no useful purpose would be served by proceeding with the case against the accused. In such cases, after consulting with Government he can apply for withdrawal and the court normally consent for it\textsuperscript{150}. Sometimes it may happen that pending trial some more information was gathered and brought to the knowledge of the prosecutor and this new information would falsify the previous evidence available with the prosecution. In such situations, it is unreasonable to proceed with the case and hence prosecutor could apply for withdrawal and courts would grant consent\textsuperscript{151}.

There are situations which are relevantly in the comprehension of the Government and the Government is competent to decide the need for withdrawal and pass instructions to prosecutor. For instance, prosecutions may have arisen out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. To restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm, the Government may think it fit to withdraw cases since persistence to prosecute in the name of vindication of law may be utterly counterproductive. A sensitive and responsive government is competent to decide whether it is baneful or beneficial to continue the prosecutions. In such cases, the initiative comes from the Government since large and

\textsuperscript{150} State of Orissa v. Chandrika Mohapatra, AIR 1977 SC 903.
\textsuperscript{151} M.N. Sankaranarayana Nair v. P.V. Bala Krishnan (1972) 1 SCC 318.
sensitive issues of public policy are involved. In those type of situations, the Public Prosecutor with his limited resources and sources of information may not be in a position to take initiative. Once the court is satisfied it gives its consent for withdrawal\textsuperscript{152}. Thus it is clear that, whether the idea for withdrawal emanates from the prosecutor or the Government, the application can be moved by the prosecutor in the court. However, the ultimate exercise of discretion to withdraw is that of the prosecutor only and he cannot surrender it to someone else. The principles which the prosecutor should bear in mind while moving such application are not narrated in Section.321 of Cr.P.C., but explained by the courts consistently. It has always been said that the prosecutor must consider the available facts with him and see whether withdrawal would further the broad ends of public Justice, public order and peace. He may consider the unpolluted social, economic and political purposes in coming to his own conclusions. On all these aspects, if the prosecutor applies his mind as a free agent, uninfluenced by irrelevant and extraneous considerations and then concludes that it is a fit case for withdrawal he is said to have acted according to law. It is his duty to see that the executive decisions do not abuse or misuse the administration of criminal justice by the courts. Here the prosecutor should remember he is an officer of the court.

For some time, it was thought the Government need not assign reasons before instructing the Public Prosecutor to take steps for withdrawal since there is no such postulation in Section.321 of Cr.P.C\textsuperscript{153}. It is quite logical that if the Government does not give reasons for withdrawal, the prosecutor cannot be in a position to record reasons for

\textsuperscript{152} Rajender Kumar Jain v. State through Spl Police Establishment 1980 CriLJ 1084
\textsuperscript{153} K.V.V.Krishna Rao v. State of A.P, 2003 (1) ALD (Crl) 457 (AP).
withdrawal in his application to court. That makes the court to take it to understand that the prosecutor has not applied his mind to the facts of the case in taking decision to withdraw. On the other hand, if the prosecutor mentions some reasons in the application, it is quite obvious that he could not justify and show as to how they tally with the facts and reasons assessed by the Government in its decision to withdraw. In both situations, the court could not accede to the request of the prosecutor. Every administrative decision can be subject to judicial review and an administrative decision without reasons would be patently understood as arbitrary and it would not muster support from courts of law. Since reasons are fundamental to systems governed by rule of law, unreasoned decisions are condemned. The reasons for the withdrawal must be arrived at on certain facts and circumstances. Therefore, the Public Prosecutor while deciding to withdraw from prosecution need to satisfy the court that he looked into the facts and circumstances and on satisfaction alone he decided to apply for withdrawal. In Veerappan’s case, he was a forest brigand who lived in forests of State of Karnataka and Tamilnadu. He and his brigade were for decades engaged in several illegal and unlawful activities including terrorism, smuggling of precious sandalwood and poaching of elephants. Veerappan once kidnapped a famous film star of Karnataka by name Mr. Raj Kumar. Veerappan bargained with the State Governments that they should withdraw cases against his associates in return of the kidnapped cine actor. The Government had the intelligence reports from police that if any harm were to be caused to the cine actor Raj Kumar, it would lead to problems between linguistic communities viz., Kannadigas and Tamilians and therefore. It conceded to the blackmailing of the kidnapper Veerappan and passed orders for withdrawal of cases against associates of Veerappan and instructed the Public
Prosecutor to apply to the court for withdrawal. Accordingly prosecutor made applications before the designated court where the cases were pending and the court gave consent. Challenging the decision matters were carried to the Supreme Court of India. The Supreme Court reversed the lower courts orders holding that the application for withdrawal from prosecution moved by the prosecutor indicates that the prosecutor was ‘informed’ by the Government about the precarious situation revealed by the intelligence reports. Courts found that the prosecutor himself did not physically peruse the said intelligence reports. Thus the prosecutor did not verify the primary material to arrive at a decision and merely acted upon the information sent by the Government. Since the prosecutor failed to consider the material and failed to produce the material which he considered, before the court, the court would not be in a position to find whether the withdrawal from prosecution would serve the public interest or not. Finally, it found that withdrawal would thwart or stifle the process of law or it would cause manifest injustice and hence did not accord its consent for withdrawal.\(^{154}\).

Thus courts insisted that the prosecutor must personally consider the primary material, must briefly and concisely set out in the application or affidavit about that material which he considered in deciding to withdraw and produce the primary material before the court to convince the court that the material he considered reasonably led him to conclude that the withdrawal would serve the public interest.

The courts have not spelt out whether prosecutor has to adopt the theory of subjective satisfaction or objective satisfaction. But the court’s approach of giving consent or refusing to give consent discloses only the court’s subjective satisfaction.

While courts adopt the subjective rule, they ought not to delve deep into prosecutorial discretion as to how prosecutor arrived at his decision to withdraw. Otherwise the court’s discretion of subjective satisfaction replaces the prosecutor’s choice and nullifies his role in Section 321 of Cr.P.C. proceedings.

However, when only some of the charges are sought to be withdrawn the above norms were not pressed by the courts. For instance, in a case, where Terrorists hurled bombs at police picket killing some of the police and damaging public property, accused were charged for penal code offence and also under the Terrorists and Disruptive Activities (Prevention) Act, 1987. The State Government after considering the case record and various aspects of the matter decided to waive TADA offences alone and requested the prosecutor for withdrawal from prosecution of TADA charge alone. It is to be noted that in its request the Government has not recorded reasons but only stated that it scrutinised all aspects. While the trial court refused to grant consent, the Supreme Court granted consent stating that since the Government scrutinised the record, it cannot be said that the prosecutor had filed the application without consideration of relevant facts. From what is mentioned in the judgement one can reasonably deduce that the prosecutor would not have accessed the primary material which led the Government to waive the charges nor would have given his reasoning concerning the reasons on which the Government took decision, since the order of the Government is not supported by reasons excepting that it scrutinised evidence, reports, letters. Though in principle there is no difference in the decision to withdraw from prosecution of all charges or only some of the charges, the exercise of prosecutor’s discretion is seriously under scrutiny of court

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when it is for the whole of the case and is quite light when it is only concerning some of
the charges. It is not yet known whether the difference in approach of courts is more
attitudinal than legal or not.

In the Magistrate courts, law has provided private prosecutions as one stream and
public prosecution of police case as another stream. Private prosecutions need not be
notified to Public Prosecutor or to any state agency dealing with criminal administration.
The Code of Criminal Procedure has not made any provision empowering the Public
Prosecutor to take over a private prosecution or a private prosecutor taking over a public
prosecution. But the courts had on some occasions dealt with those aspects and their
approach is not uniform. It can be said that the law in this regard is still fluid and not yet
settled. The Kerala High Court held that the prosecutor can take over private case and
apply for withdrawal from prosecution even without the consent of the complainant.156
Whereas the Patna High Court held that a private case cannot be withdrawn by the Public
Prosecutor.157

One aspect of the matter is clear. In a State prosecution, the victim cannot seek
withdrawal from prosecution.158 This principle is in harmony of the general rule for
public prosecutions. In India, the public prosecution of cognisable offences is not
dependant on the consent of the victim for prosecution of offenders. The State has right
to initiate prosecution irrespective of the willingness of the victim of crime. Any person
can notify to police about the crime and the police are competent to investigate and the
prosecutor is competent to pursue the prosecution. The reason underlying this principle

156 Saramma Peter v. State of Kerala, 1991 CriLJ 3211
is that notionally, it is the society and the State which are aggrieved of a crime, though the injury is to the person or property of an individual. Therefore, while the prosecutor is holding a case, it is theoretically impermissible to allow a private person, to seek for withdrawal. However, if the public prosecution is withdrawn by the Public Prosecutor against the wishes of the victim, the aggrieved victim can challenge the decision while the prosecutor’s application is pending for consideration of the court or can file a revision if the lower court allowed the prosecutor’s application. Besides that, the aggrieved person can launch private prosecution against the accused after the court allowed the Public Prosecutor’s withdrawal from prosecution\textsuperscript{159}. Fundamental questions of Jurisprudence do arise in such situation and the courts in India have not addressed those aspects yet. When the State, the Public Prosecutor, the court have arrived at a consensus that it is in the larger interest of administration of justice and not to disturb public peace that settled in and allowed the withdrawal of prosecution to uphold the broad ends of justice, any liberty to allow the private prosecutions in such cases, runs counter to the entire philosophy that was spelt out in all the leading cases under Section 321 of Cr.P.C. In principle, it is alleged that the concept of public prosecution is fundamental in the system to prevent the aggrieved from launching vexatious prosecution to wreak private vengeance. Moreover, it is settled law that Section 321 of Cr.P.C. is virtually a step by way of composition of the offence by the State. The State is the master of the litigation (in the very Sheonandan Paswan’s Case, 1987). If private prosecution is to be allowed after Prosecutor’s withdrawal from prosecution, then there could be no need for the courts to spell out huge philosophy concerning the broad ends of Justice and thrust on the Public Prosecutor so many principles to observe and comply. If really the courts intend to allow the private

\textsuperscript{159} Sheonandan Paswan v. State of Bihar, 1987 CriLJ 793.
prosecution they could in one word allow the Public Prosecutor from withdrawing any case without asking him to give any reasons for his withdrawal holding that it is the absolute right of the prosecutor to withdraw. The courts have read too many principles into Section.321 of Cr.P.C., which the legislature itself have not thought necessary to mention in the provision.

One reason for this confusing state of affairs can be attributed to the literal construction of a certain words used in Section.321 of Cr.P.C. In the title to the section as well as in the body of the section, what is referred is “withdrawal from prosecution”. The High Court of Andhra Pradesh interpreted these words saying that it is not “withdrawal of prosecution” and therefore, it is only withdrawal of appearance from the prosecution or refraining from conducting or proceeding with the prosecution160. The Patna High Court held that in those cases where the court does not give consent to withdraw; the prosecutor has to choose whether to withdraw from the case or to continue. If he continues the prosecution, the case may proceed under him. If he refuses to conduct the case, the court may appoint anybody to conduct the case161.

This approach of courts is contrary to the scheme of prosecutions provided by law. The Code of Criminal Procedure provides two different streams of prosecution to be elected by the victim or the complainant. The choice for the victim to pursue a private complaint mode or to pursue a Police report mode is over when once recourse to one stream of prosecution is taken. In Police report mode, Criminal Procedure Code does not contemplate his role independently. For instance, if the case is before Sessions Court and Prosecutor’s move for withdrawal was not consented by court but the Public Prosecutor

161 The King v. Parmanand, AIR. 1949 Pat 222 (FB).
does not appear to conduct the case how can in the teeth of the bar contained in Section.225 of Cr.P.C., anybody else could conduct prosecution. Same predicament arises when the court granted consent but the private person wants to prosecute the case. Moreover, it is settled law that a private advocate cannot be permitted to replace a Public Prosecutor\(^\text{162}\).

It is also useful to find that in the famous *Kissa Kuriska* case,\(^\text{163}\) when a contempt of court petition was pending before the Supreme Court, the Union of India filed petition to withdraw. It was there observed that there is a marked difference between a complaint made by an individual for wrong done to him and a case of contempt committed against court. It was held that State cannot withdraw contempt cases. It is another matter ultimately in that case, the Supreme Court allowed the withdrawal of contempt case sought for by the Union of India. The marked difference enunciated above between those two sorts of cases unmistakably allows one to infer that in case of wrongs committed against private individuals, the State’s power to withdraw prosecutions is complete, however subject to the rules indicated already.

Indian Judiciary has not gone full-fledged in deciphering the complete role of a Public Prosecutor. He is made a non-entity at the entrance of a public prosecution but considered him to be a pivotal player at the exits of a case. In the terms of Section 173 of Cr.P.C., it is said, the prosecutor has absolutely no discretionary power to decide about launching prosecutions but he is pivotal in withdrawing prosecutions. The Prosecutor has absolutely no role in deciding to launch a prosecution or not to launch a prosecution on a


\(^{163}\) *Shri Amrit Nahta v. Union of India* 1986 Cri.LJ.806 at 807.
case investigated by Police. The Police are not under a statutory duty to consult the prosecutor in initiating prosecutions before the courts. The decision to file a case before court is with police\textsuperscript{164}. A case that came up to court without any scrutiny on part of the prosecutor has to be so meticulously scrutinised by the prosecutor if the case is to be withdrawn. For insufficient evidence, the prosecutor cannot advise the police not to file a charge sheet but on the same ground he can seek withdrawal from prosecution after it is filed before the court. Even if the State does not want to prosecute a pending trial case, the prosecutor has to conduct prosecution if court does not give its consent for withdrawal.

Then, there is certain disinclination on part of the courts not to allow withdrawals disregarding some really important factors and putting faith only in the abstract doctrine of Justice. It is a common concern that cost of criminal litigation is huge considering the drain on financial resources of the State and the number of man-hours spent by every player in the Criminal Justice System. India is not an economical giant. It is relatively a poor country. Its ideals are high and the resources are poor. Doctrinaire approach of courts and law overshadowed the practical realities. American prosecutor takes decision on cost effective analysis of every case. That is absent in India. The Indian system has ‘compulsory prosecution’ policy. As a result of it, even if prosecutor wants withdrawal of a case on the ground that the material in the case would result in inevitable acquittal of accused and continuance of prosecution would be a waste of public money, the Bombay High Court did not consent for withdrawal\textsuperscript{165}. Even in those cases where prior sanction of Government is required for prosecuting the accused and the Government has not

\textsuperscript{164} Mc.Mehta v. Union of India, AIR 2007 SC 1087.
\textsuperscript{165} Navnit Das v. Kandalik Rao, 1979 CriLJ 1242.
accorded sanction and the case if already taken up by the court it would not grant consent to the prosecutor’s application for withdrawal, though the case is liable to be dismissed and accused be acquitted for want of sanction\textsuperscript{166}. Even if the accused is not available for a very long time and his whereabouts could not be traced and in the mean time the memory of witnesses could have faded out or some evidence might have been lost still the prosecutor cannot withdraw the case\textsuperscript{167}.

The victim is the principal witness but the summons could not be served on him, since not reachable for a long time. The accused has to attend the court though case does not progress and there is no possibility of progress. Yet it is not permissible for prosecutors to apply for withdrawal\textsuperscript{168}. In all those cases accused pleaded not guilty and the prosecutor wants to withdraw the case. The interests of prosecution and defence merged but still the trial process goes ahead. There is no justification in flogging a case that remained a carcass. If prosecutor does not produce any evidence in those cases for ever, the court has to acquit the accused. It has no duty to coerce for witnesses\textsuperscript{169}.

One is not at wrong in thinking whether the costs incurred by maintaining a system of criminal trials is justified in the above situations. Moreover, the ultimate judgement on conclusion of such delayed trials is far removed from the minds of public who long back experienced those crimes. Such judgements do not serve any public purpose of deterrence nor would they help in bringing reformation in the offender. Rigid adherence to some theory may not achieve in practice a perfect balance between the

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\item\textsuperscript{166} State v. M.But, 1973 CrilLJ 881.
\item\textsuperscript{167} State of Kerala v. Md.Ismail, 1981 CriLJ 1553.
\item\textsuperscript{168} Rex v. Krishnan, AIR 1940 Mad 329.
\item\textsuperscript{169} The Excise Sub Inspector, Pamidi represented by Public Prosecutor v. Mune Naik 1978 (1) ALT Reports, 178.
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competing interests of the public and the individual. Nation cannot afford to have costly trials for cheap crimes especially when the result is almost predictable.

Irrespective of the words in the written law, the legal philosophy adopted by courts would guide the growth of law in a direction that might not have been ever contemplated by the legislature. Forays into foreign position would help to theorise a few aspects. To terminate a case pending before the courts, the Attorney General in England could file a writ of *nolle prosequi*. He could do so in the exercise of a reviewing authority over the private prosecutor. He used it to intervene and dismiss charges if they were frivolous or insubstantial, or if they might somehow interfere with a crown prosecution.

The all powerful American prosecutor adopted the power of *nolle* and used to dismiss cases at will without any trial and without review by others. This led to the evil of selective prosecutions by him. Resentments on this wide power brought legal change which introduced some form of judicial control. The courts were empowered to grant or deny consent for the *nolle* motion of the prosecutor. But this did not bring any remarkable impact in this area. The courts did not often ask explanation or examine carefully those that were given by the prosecutors. This judicial reluctance was based on several factors. The very important among them was that the courts feared that they might be drawn into administrative considerations beyond their competence, and they felt themselves constrained by the constitutional doctrine of separation of power.

In India, the law is that the responsibility to maintain the rule of law lies on all individuals and institutions. Much more so on the three organs of the State. Our constitution has separated and demarcated the functions of the legislature, the executive
and the judiciary. Each has to perform the functions entrusted to it and respect the functioning of the others\textsuperscript{170}. This shall justify reshaping the concept and restatement of law in India.

**PLEA BARGAINING**

Plea Bargaining, in simple terms, refers to negotiations between the prosecution and the defence by which the accused agrees to plead guilty in exchange for certain concessions by the Public Prosecutor. In a well executed plea bargain case the prosecutor is relieved of the long process of proof, legal technicalities and long arguments and revisional excursions to higher courts. The accused is relieved of the agony of long drawn trial, huge expenses in the hierarchy of the Justice system, ignominy of prison confinement, gets out of the criminal process early in the day and feels free to pursue his legitimate avocations. The court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less. The victim gets re-compensated in some measure and feels that his rights are vindicated.

The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a concession to an accused that has by his plea aided in ensuring the prompt and certain application of correctional measures to him. In India, the arrival of plea-bargaining was preceded by disfavour of the concept by the courts and enthusiastic invitation by the academics and committees and commissions. This is in contradiction to US situation. There academics have frequently argued that the system of plea bargaining is inherently flawed and unfair to accused person while policy

makers and politicians argued that plea bargaining is a necessary part of the Criminal Justice System.\textsuperscript{171}

The Supreme Court said that it is contrary to public policy to allow conviction to be recorded against an accused by inducing him to confer to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty, he will be let off very lightly.\textsuperscript{172} Such a procedure would be clearly unreasonable, unfair and unjust and would be violative of Article 21 of the Constitution of India. Criminal case has to be dealt according to the procedure prescribed by law. Liberty cannot be curtailed except according to the procedure prescribed as per Article 21 of the Constitution. At the time of the above ruling, there was no procedure prescribed for plea-bargaining. Therefore, its practice was held violative of the Indian constitution. Now that the procedure for plea-bargaining is prescribed and therefore the above ratio loses its significance.

The Supreme Court of India said that it is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtained in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences this practice intrudes on society’s interest by opposing society’s decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law.\textsuperscript{173}

Now that under Section.265-A Cr.P.C.,\textsuperscript{174} plea-bargaining is not applicable to offences that affect the socio-economic condition of the country. The Central

\textsuperscript{172} Kasambhai Abdul Rahmin Bhai Shaik v. State of Gujarat, AIR 1980 SC 854
Government can notify such offences for exclusion. By notification Nos.S.O.1042(E) dated 11-7-2006 published in Gazette of India, extraordinary, Part-II, Section 3(ii) No.721, dt.11-7-2006 Nineteen Acts were notified under this exclusionary category. Therefore the fears allayed by the courts are taken care of by the legislature.

On the other hand, 111th Report of Department Related Parliamentary Standing Committee on Home Affairs dt.18-2-2005, and the Law Commission of India in its 154th Report, Malimath Committee on Reforms of Criminal Justice 2003, realised that the Criminal Justice System in the country is besieged by huge pendency of Criminal Cases and inordinate delay in their disposal and very low rate of conviction. Therefore, they recommended for introduction of the concept of plea-bargaining.

In the above context, the concept of plea bargaining, in the characteristic Indian style, arrived in this country. Two important precautions are borne out from the Indian law on plea bargaining as contained in Section 265A to Section 265-L Cr.P.C. -- Voluntariness of accused and compensation to victim. During the investigation phase, the plea negotiations are not provided with. In all police cases, after the report has been forwarded to court narrating the offences alleged to have been committed, the case is ripe for plea-bargaining. It is pertinent to note that it is significant if police forward charge sheet the court need not have taken cognisance of offences based on the report.

It is significant to appreciate that the literal construction of Section.265-B Cr.P.C., disclose that the initiative for plea bargaining could not be from the Public Prosecutor or the victim and invariably it is from the accused who has to file an application for plea bargaining in the court. With this application the accused shall file a sworn affidavit containing the facts of the case and his knowledge of punishment provided for those
offences and about his voluntariness to participate in the negotiation. After that the court informs by a notice to the Public Prosecutor about the plea proposed by the accused. Thus the plea negotiations invariably commence by court proceedings and not otherwise. If the court finds at this stage that the plea of the accused is involuntary, it does not permit negotiations and puts the case for trial process. At the trial or in any other case concerning that accused, the facts stated by the accused and his plea shall not be used\textsuperscript{175}.

On inquiry with the accused by the court, in camera, and in exclusion of all others, if the court finds the plea of the accused is voluntary, then it permits the accused and the Public Prosecutor to work out on their own a mutually satisfactory disposition of the case. In the negotiations the Public Prosecutor, the police officer who has investigated the case, the accused and the victim are to participate. The advocates for the victim and the accused could join the group if their respective clients so desire\textsuperscript{176}. Once such a satisfactory disposition among participants is arrived at, a report of it shall be prepared and signed by every participant and the judge of that court. Then the court shall first of all award the compensation to the victim as arrived at in the disposition. Then it is sentence hearing.

The court shall hear both parties to consider the aspects of feasibility to adopt the following methods: admonition and release of him, release on probation of good conduct, imposition of sentence\textsuperscript{177}. Thus in plea bargaining cases the law has recognised the right of audience for the Public Prosecutor at this stage of the case. This is in contrast to

\textsuperscript{175} Section.265-1 Cr.P.C.  
\textsuperscript{176} Section.265-C Cr.P.C.  
\textsuperscript{177} Section.265-E Cr.P.C.
contested trials and initial guilty pleas where the Code of Criminal Procedure has not specifically granted a right of audience for the prosecutor at the stage of sentence hearing.

Plea bargaining is not allowed if the accused is a juvenile\textsuperscript{178}, if the accused has repeated the same offence and on the earlier occasion he was convicted by a court for that offence\textsuperscript{179}, if he has committed an offence against a woman, or a child below the age of fourteen years or has committed an offence affecting the socio-economic condition of the country falling within the notification of the Central Government, or has committed an offence punishable with death penalty or life imprisonment or imprisonment for a term exceeding seven years\textsuperscript{180}.

Quite unwittingly a few problems do arise in disposal of the case on plea bargaining. Take the case on the plank of probation. For instance, under section.306 I.P.C., if any person commits suicide on the abetment of another person, that abettor is liable for punishment with imprisonment for a term, which may extend to ten years and fine. Such accused is disentitled for plea-bargaining since the punishment prescribed is more than seven years of imprisonment. But such offender is entitled to be released on probation under Section.4 of the Probation of offenders Act, 1958 which allows probation since the offence is not punishable with death penalty or life imprisonment. In a deserving case, even if the offender repents for the offence committed and intends to admit it for plea bargain he cannot be permitted. Therefore, the case has to be necessarily put to trial process. Similarly, cruelty of a husband against his wife is punishable with imprisonment up to three years under Section.498-A I.P.C. Since it is an offence against

\textsuperscript{178} Section.265.L.Cr.P.C.  
\textsuperscript{179} Section.265-B (4) (b) Cr.P.C.  
\textsuperscript{180} Section.265-A Cr.P.C.
a woman, not fit for plea-bargaining, though the husband and wife come to terms with each other. This offence is amenable for probation. Therefore, the course open is trial of the case. In this way, there are several offences under the Indian Penal Code and other penal enactments which are fit for being dealt with for probation but not available for plea bargain. Therefore, for huge number of cases the Public Prosecutor could not motivate the accused for plea-bargaining. It could be much better if plea-bargaining is permitted for all the offences where Probation of offenders Act is applicable. That would cover most of the cases pending before the courts. The Public Prosecutor has lesser chance for an accused who pleads not guilty at the beginning of a case to convince the judge during trial that the case is fit for probation. On the other hand, Prosecutor has brighter chance for an accused who pleads guilty during plea bargaining to convince the judge for probation. After all probation is a suspended sentence and if the offender fails to keep good conduct and misbehaves during probation period, he could be sentenced for the offence he committed and was already found guilty. Here law permits the offender to aid himself leading to ultimate prison sentence where he would be put to correctional process. When that being the case, it is more in tune with realities of life and philosophy of law that an offender who admits guilt in plea negotiations and paid compensation to victim is likely to be a better subject for being dealt with for probation. His candidness and repentance are the two sure indicators justifying as to why probation has to be applied to him more generously.

Coming to imposition of sentence during a successful plea bargaining, the court may sentence the accused to one-fourth of the punishment provided or extendable. Thus a straight jacket rule of sentence is provided limiting the powers of the court not to
impose less than one-fourth of the punishment provided in the penal statute. While in deserving cases the court is competent to impose more than one-fourth of the punishment, it cannot award less than that one-fourth prescribed here. Thus, the bargaining powers of Public Prosecutor are gravely crippled. It is understood that saving powers of court under Section.265-H Cr.P.C., do not help the situation since they relate to powers exercisable under the code of criminal procedure and connected sentence prescription provided in the substantive penal statues and provisions.

The above analysis is one part of the explanation as to why plea bargaining in India has not evoked absolutely any response from the defence bar and the Public Prosecutors. During all these years after its arrival, no one has witnessed even a few cases processed for plea-bargaining. This remained a dead letter law.

Even within the given parameters of plea bargaining provisions the clogs for its use fundamentally lie in ignoring the vital role that could be played by a Public Prosecutor. The most conspicuous failure is that it does not permit initiation for plea bargain by the prosecutor, which it ought to have, for many good reasons mentioned hereafter.

In police cases only after the police report is filed plea bargain can take place. It has already been noticed that during investigative phase of the case the prosecutor did not talk to the victim or witnesses and did not talk to the accused. The only occasion for him to listen to the case of accused is during bail hearing if the police arrested the accused. The legal culture in India is that in majority of cases defence plea is not put forwarded in bail applications. Law has not prescribed any rule for the accused to compulsorily spell out his line of defence. Thus, the Public Prosecutor has no knowledge of the version of
accused and has not gained any first-hand knowledge of his own case. He is dependent on police record and nothing else. When the police finalise a case and send report to court it is not scrutinised by prosecutor. He has no occasion to find out whether the case to be filed into court has enough material to sustain the charge or not. He has also not got any opportunity to finalise as to which charges are applicable to the facts of the case. Thus on factual aspects and legal charges the prosecutor is without any control. The strength or weakness of a case depends upon the quality of investigating officer who is not a law graduate and who has no knowledge of rules of evidence that operate in the court. It is common knowledge that a well prepared case file is likely to succeed in proving the case against the accused. Only such good investigations bring more convictions to the guilty accused. High probability of conviction makes the option of a deal generally more attractive to the accused, for plea-bargaining. The glaring truth in India is very low percentage of convictions that signify erratic evidence collection, coupled with absence of legally trained persecutor’s advise to investigating officer and essence of prosecutor’s assessment of the case to decide whether the evidence collected attained a quality that deserve the case to be sent to court for trial. In such a situation, the Prosecutor is handicapped to negotiate a bargain either on facts or on charges. The accused is very optimistic that in all probability he would win the contest in trial and gets acquitted since that is what is happening in most of the criminal cases in every court day in and day out. Therefore, accused is not threatened by facts and charges brought out by slipshod investigation. Moreover, the accused cannot bargain with prosecutor on fact or on charges since the prosecutor has no power to offer him anything to bargain with. Not assigning any role to the prosecutor during investigative phase of the case and not
permitting plea bargaining earlier to filing of police report into court rings death knell to the concept of plea-bargaining. Therefore plea bargain in India is dead when it was born.

Docket explosion in courts is what impelled the legislature to introduce plea bargain in India. The present framework is totally unsatisfactory. It failed to comprehend the basics for successful bargains. Unless prosecutor is vested with powers to use both sticks and carrots to persuade the accused to contest the case and obviate the need for trial, there would be no case negotiated in the existing set up. If the accused is able to compensate the victim and they arrive at a compromise they compound the offence in all those cases provided in Section.320 Cr.P.C. In that event, there is discharge or acquittal of the accused. Therefore, such cases would never come up for plea bargain since the end disposal in plea bargain results in probation or prison term. Obvious choice for accused is compromise and not plea bargain. The option of plea-bargaining should provide the prosecutor with greater flexibility in disposing of his criminal caseload. Plea bargaining must form part of pre-trial process. Elsewhere in the world plea-bargaining is seen as negotiation in which an accused agrees to plead guilty to a criminal charge in exchange for concessions by the prosecutor. In the existing framework of criminal justice system, the Public Prosecutor cannot offer any concessions what so ever to the accused.

When there are two or more charges against the accused, during plea negotiations, the prosecutor may suggest that if the accused pleads guilty for some of the charges, he would drop the other charges against the accused. This concession works as an incentive to the accused since it significantly reduces the length of sentences to undergo. There is nothing inherently wrong in this approach since dropping of charges against a proven
guilty offender is available during trial process. Section 224 Cr.P.C., provides that where a charge containing more heads than one is framed against the accused and when a conviction has been had on one or more of them, the Public Prosecutor may withdraw the remaining charge or charges and if court consents for it, the accused is acquitted of those charges.

When there is a single charge of serious nature, the prosecutor must be made competent to negotiate with the accused that if he pleads guilty to a less serious charge, he would drop the serious charge in exchange. Thus the legal framework should provide that if the accused pleads guilty, the prosecutor must be in a position to exchange for him by reducing the level of the charge or the number of charges.

Sentence bargaining refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea. To encourage the accused to forego his right to trial, the prosecutor must offer powerful incentives. The present legal framework does not stipulate any such leverage to the prosecutor. Successful negotiations would result in imposing one-fourth of the punishment provided. If the offence is provided with minimum punishment, the guilty person would be sentenced to half of such minimum punishment. Legal terminology adopted in all penal statutes and the code of criminal procedure in Section 29 authorising the court to impose a sentence indicates the maximum length of sentence that can be inflicted. They use words such as, imprisonment for a term which may extend to three years, imprisonment for a term not exceeding three years. However, the terminology used in plea-bargaining is different. For instance Section 265-E(d) Cr.P.C. says the court “may sentence the accused to one-fourth of the punishment provided or
extendable”. Thus in contested trial cases the court may impose any length of sentence within the permitted range. For instance, for an offence punishable with three years imprisonment the court can impose a sentence of a day’s imprisonment or any number of days but not beyond that three years maximum. But in plea-bargaining cases that flexibility is not provided and the court has to invariably sentence him for one-fourth of the maximum provided. Thus in a case of three years punishable offence the offender shall be sentenced to undergo nine months imprisonment. What need attention are the usual sentencing patterns of Magistrates in India. In most of the contested cases also, the normal range of sentence in cases of three-year term offences is to impose a sentence between six months to one year. The average comes to nine months which is equivalent to the sentence to be undergone by the plea bargaining offender. Therefore, there is absolutely no incentive that could be offered by the prosecutor to the accused. No carrot is with the prosecutor to offer, neither is there a stick with the prosecutor.

Procedural law must specifically permit the prosecutor to bargain with the accused on the length and nature of sentence he should propose to the court, and the courts must normally honour that as satisfactory disposition mutually arrived at between the prosecutor and accused except, of course, preventing trade out between parties harming public interest. Flexibility in imposing sentences must be given to courts in plea bargaining cases.

The present scheme is plain. It allows initiation for plea bargain only from the accused. It is mysterious as to why the negotiation shall not be permitted to be initiated by the prosecutor. Milton Heumann points out that whether a case is to be viewed as serious or non-serious depends on factors other than formal charges. For example, the
degree of harm done to the victim, the amount of violence employed by the accused, the prior record of the accused, the characteristics of the victim and the accused, the motive of the accused. They are all somewhat independent of formal charge and yet weigh heavily in the prosecutor’s judgement of the seriousness of the case\textsuperscript{181}. Thus, the prosecutor is the fittest person to assess the offender for a plea of guilty and negotiate with him and chalk out a course of action. Prosecutor possesses mere information about the accused, the degree of contributory culpability of the victim, than the judge possesses. Things can be discussed between prosecutors and defence counsel which won’t be said in the open court and on the record\textsuperscript{182}. Recognition of these ground realities permitted the US law for initiatives by prosecutors also. The result is that the prosecutor is key power broker in the bargaining process and about 90\% cases are decided by plea bargaining in America\textsuperscript{183}.

Early quick settlement is the clue. Delays make it stale. When compromises and compounding of offences is permissible even during investigative phase why shall not law permit plea bargains also during that phase. Everyone knows that criminal activity outpaces the growth in prosecutorial resources. No court system could try all of its cases within any time stipulations. Trials consume more time than realistic increase in personnel levels could manage. One complex trial could back up other cases for even moths. Thus there is potential backlog in every jurisdiction. It often happens that a truthful case may be a weak case evidentially. It may be dependent on one witness and the witness on interview appear to be a flop if testifies in court. If prosecutor feels

\textsuperscript{181} Mark R. Pogrebin, Ed. \textit{Qualitative approaches to criminal justice perspectives from the field}. University of Colorado, Sage publication, 2003 at page 212.

\textsuperscript{182} \textit{Ibid.} pp. 215, 217.

\textsuperscript{183} \textit{Ibid.}, p. 204
accused is really guilty but the witness is really bad, it is a good case for prosecutor to initiate for plea-bargaining as otherwise case fails in court\textsuperscript{184}. Convictions are guaranteed in plea bargains. More criminals are more quickly removed from the streets. Less time spent on each case means that more cases can be handled. Public confidence in the system rises accordingly. Time and money for everyone is saved.

In United States, the prosecutors are guided by the U.S Attorneys Manual 1999 and also the U.S sentencing commission guidelines manual. In India, so far such guidelines have not surfaced. There is dire need to orient the prosecutors in many ways. The guidelines must check overzealous prosecutors from trampling certain fair practices. For instance, the prosecutor shall not withhold favourable evidence from the accused, shall not fabricate evidence, shall not act vindictively if the accused refused to bargain and opts for trial. Plea-bargaining brings forth the need to redefine the goal and role of the prosecutor. His professional responsibility is not merely an adversary to a crime and playing the role of a lawyer in the court to prove the case. Now the prosecutor must be trained in negotiation skills too and convince the accused, his lawyer and the victim to bring a satisfactory disposition. Ethical reorientation with proper monitoring of plea bargains by the Directorate of prosecutions and the courts is an essential prerequisite for the new scheme of plea-bargaining brought to Indian law and Criminal Justice System. Safeguards must reside within the legal rules and the internal working cultures fostered by training and management within the institutions such as police, prosecutors, defence bar including legal aid lawyers and the courts. At the present law appear to permit plea bargains at any stage of the case in the court. It must specify clearly that an earlier plea

\textsuperscript{184} \textit{Ibid.}, p. 214.
attracts greater discount. It is necessary because if the case is set for trial and witnesses are brought from far off places with great expenses and the time of the court is set apart for that case and then the accused moves application for plea bargaining, the whole schedule collapses. In such cases, only lesser discount should be allowed to the offender.

To the critics of plea bargains the poser is that the system does not have ability to test the claims of guilt or innocence at acceptable cost with adequate expertise. Should we have costly trials for cheap crimes? A well guided regime of law would bear fruit by way of satisfactory dispositions. Best of the criticism is both pedantic and abstract ignoring the simplicity of normal criminal and normal victim. The researcher believes that most people would not think justice had been compromised if the prosecutor makes the accused to realise his fault and the Judge took the remorseful confession of the accused into account in imposing sentence.

Enjoin the Public Prosecutor, the right to offer plea bargain to the accused. Empower the prosecutor to bargain at the earliest phase of case itself. Allow him to bargain on the charges and on the sentence recommendations. Provide guidelines to the prosecutors, courts and defence lawyers for legal and ethical practices to be followed in the negotiations. Train the players in the system, orient them, bring attitudinal changes in accepting the legal reality of plea-bargaining. Amend the law to allow much bigger offences to be processed in this manner.

**COMPOUNDING OF OFFENCES**

Trial of a criminal case gets discontinued when the case is compounded. Condoning an offence for money; forbear prosecution of felony from private motives; settle a matter by mutual concession are the lexical meanings for compounding of
offences. In legal theory, a crime is a wrong against the society and the state. It is the
duty of every State to punish criminals. Therefore, there cannot be a settlement between
offender and victim compounding an offence and abstaining from prosecution.
Compounding an offence is an offence. However, the law views certain offences as
very private in nature and not very serious and permits them to be compounded. Fifty
Six Penal Code offences of such nature are tabulated in Section 320 of Cr.P.C. Rest of
the offences is a matter for each of those enactments. Since these offences are lawfully
compoundable, it is not an offence to compound them.

Any person may set the criminal law in motion, but it is only the victim who can
compound the offence. No offence shall be compounded except as provided by Section
320 of Cr.P.C. The composition of an offence can take place between parties at pre-trail,
trial, post-trail stages of a case. Once the offence is compounded, the accused has to be
acquitted. As of now composition is a matter between victim and accused and the duty
of the court is only to see whether the composition was arrived at or not. For thirteen
offences mentioned in the Table of Sub-Section (2) of Section 320 of Cr.P.C., the
permission of the court is required to compound the offence. If the case is in appellate
court, leave of the court is essential to compound any of the compoundable offences.
Experience shows the permission is accorded as matter of routine by trial courts and
appellate courts.

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186 Sections 213, 214 of Indian Penal Code, 1860 provide punishments forgiving and taking gratification
with a view to abstain from prosecuting the offender.
187 Exception suffixed to Section 214 of Indian Penal Code.
188 Section 320 (8) Cr.P.C.
Section 320 of Cr.P.C. operates equally in private complaint cases and public prosecutions launched on police reports. Though for every criminal court there is a prosecutor appointed for conducting cases on behalf of the State, his participation is totally ignored in the proceedings for compounding of cases. It is noteworthy that a Public Prosecutor who is in charge of a criminal case is completely kept in dark and without his knowledge and without any notice to him the case gets terminated by composition. It is amusing to see that in cases of defamation (Section 500 I.P.C.) of high dignitaries like President of India, it is the complaint of the Public Prosecutor filed in the Court of Session (Section 199 (2) of Cr.P.C.) that puts the criminal law into motion. In such cases also, the compounding is done without the knowledge of the prosecutor though compounding has to be only with the permission of the court. Section 320 of Cr.P.C. does not mention about the voluntariness or free will of the victim in such compositions. In a public prosecution, the victim has no separate counsel except the Public Prosecutor. The accused has his own counsel to advise and defend. Given a role, the Public Prosecutor would properly advise and guide the victim in settling the dispute for compounding it. As of right now the victim stands alone without legal guidance. What happens practically is that the victim and his well-wishers obtain a letter from the accused that he would not commit further such offences against the victim and they simply intimate the court about settlement and the court merely records the order of acquittal without any reference to the terms arrived at between parties. Victims are put to an erroneous belief by the accused that if any violation of their terms of compromise is committed by the accused he could be prosecuted for the self same offence which is compounded. In law, such a thing is not possible and once the accused is acquitted, he
could not be prosecuted for that offence once again even if he had violated the compromise terms. This situation amplifies the need of prosecutorial advice to the victim at the right time. Such participation of the Public Prosecutor would really assure an informed and voluntary composition.

Cases of corporate cheating have been the order of the day. Accused are prosecuted for the offence of cheating after a painstaking and expensive investigation. Victim is permitted to compound such offences without knowledge of the Public Prosecutor. Unless the Public Prosecutor is afforded an opportunity to tell the court that in the interest of public, it is not a fit case for granting permission to compound, the court would not be in a position to visualise the magnitude of the criminality of the accused. Therefore, it is high time to assign a role to the Public Prosecutor in the best interest of the victim as well as Society at large. The endeavour of the high profile Malimath Committee remained by recommending many more offences to be brought within the fold of Section 320 I.P.C. and no attention was paid to the relevant role to be attached to the Public Prosecutor.

In a criminal case the accused appears on receiving summons from the court and his lawyer files authorisation such as Memo of appearance or Vakalat for him to represent the accused in the court. Before trial commences the court physically sees the accused on at least two or three occasions. However, the court does not get opportunity to physically see the victim until the stage for recoding of his evidence comes up. If the case is compounded before the evidence recording stage, difficulty arises for the court about the physical identity of the victim. If Public Prosecutor is put to notice of the factum of compounding, he would assure the court about the identity of the victim and
endorses it on paper. Otherwise, there could be impersonations leading to invalid orders. Thus to obviate possible mischief prosecutor should be assigned with proper role and the law shall be suitably amended.

**PARDON**

Every accused is presumed to be innocent until his guilt is proved by the prosecution. On the evidence collected during investigation, the proof of guilt would be sought to be established by the Public Prosecutor. Every accused enjoys the constitutional right to remain silent on the culpability. No influence by means of any promise or threat shall be used to an accused person inducing him to disclose any information or matter within his knowledge\(^\text{189}\). Provisions in the Evidence Act contained in Sections 24, 28, 29 about confessions of accused also support this premise. However, the practical wisdom compels to seek exceptions to the basic principles adumbrated above. One such exception is the concept of pardon to an accomplice. Pardon is a legal term for the forgiveness of a crime. The mechanics of tendering pardon to an accused and acceptance of it by the accused and the manner of proceeding with it are provided in Sections 306, 307, 308 of Cr.P.C.

For crimes punishable by more than Seven Years imprisonment and all the cases exclusively triable by courts of Session these powers are used during investigation, inquiry, trial. Judicial Magistrates and Session Judges are competent to tender pardon. Where grave offences are committed by several persons and lot of evidence is collected but found to be insufficient to prove their guilt, the alternative available is to make one of the accused as a witness against the rest of the accused as this accomplice knows more

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\(^{189}\) Section 316 Cr.P.C.
about the crime than any other witness. In reward to the help rendered by the approver, the court grants pardon to him and the criminal proceedings against that approver would be brought to an end and he would not be punished for the crimes committed by him. He is then presumed to be discharged and he can be examined as a witness. With the aid of his evidence and that of the other evidence, the guilt of the remaining accused would be proved. The pardon can be tendered to such a person on the 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 the principal or abettor in the commission thereof. The court must record reasons for tendering pardon. If the person accepts the tender of pardon, the court shall record his evidence and thereafter during trial this accomplice gives his evidence in the court where the trial is held. The whole idea is to get the true state of facts before the court concerning the crime. This is allowed at the risk of letting off the smaller catch for the bigger sharks. The whole exercise of pardoning is an exception to Sections 306, 307 of Cr.P.C. gives impression that the initiative for tendering pardon shall emanate from the court. But in practice, the initiative comes from police and is represented by the prosecutor and that gets translated into the tender of pardon through the court. It is also the usual situation that the court on its own does not initiate the move for tender of pardon on the fear of being branded as holding bias in favour of one accused as against the other accused, especially when this power is to be exercised during trial. Dilating on these aspects, the Supreme Court of India took the occasion to state that though 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. That is the prosecutor’s job\textsuperscript{190}.

The question of initiative for the tender could be taken up even by the accused himself and he could make an application offering his interest to secure pardon. The initiative could also come up from the prosecutor. In those cases, where the prosecutor takes initiative, there would naturally be no problem for the judge to consider the application and pass a decision. The difficulty arises when the accused makes an application for pardon. It is one such context the Supreme Court of India had to deal with. Where an accused makes an application, the court must first refer the request to the prosecuting agency. It is not for the court to enter the ring as a veritable director of prosecution. The power which the court exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request. The proper course for the court is to ask for a statement from the prosecution on the request made by the accused. The Judge or the Magistrate must not take on himself the task of determining the propriety of tendering pardon for himself\textsuperscript{191}.

Thus, it is in the fitness of things, to leave the initiative to the prosecutor who has to determine the sufficiency of strength of the case he intends to prosecute or is prosecuting. As such, necessary amendments are needed to Sections.306, 307 of Cr.P.C and the role play has to be legislatively shifted from court to that of Public Prosecutor resting with him the power to initiate proceedings for pardon during investigation, inquiry or trial of a case.

\textsuperscript{190} Jasbir Singh v. Vipin Kumar Jaggi, 2001 AIR SCW 2958.
If the approver fails to comply with the conditions on which pardon was granted to him, the procedure is prescribed in Section 308 of Cr.P.C. It provides for trial of a person pardoned when that person has not complied with the conditions on which the tender of pardon was made. He can be tried for the following offences:

1. The offence for which pardon was tendered to such person; or
2. any other offence of which such person appears to be guilty in connection with the same matter; and
3. the offence of giving false evidence.

For prosecuting him, the Public Prosecutor should opine and certify that such person has not complied with the condition on which the tender of pardon was made, either by wilfully concealing anything essential or by giving false evidence. If such person has resiled from his statement recorded by the court before granting pardon, it can be *prima facie* said that such person has given false evidence. Trial of person not complying with conditions of pardon requires prior, sanction of the High Court in terms of Section 308 of Cr.P.C. However, the scheme provided therein leaves a few queries unanswered.

1. It is not clear as to whether it is to the police or to the court the public prosecutor should send the certificate regarding the non-compliance of the conditions of pardon.
2. Who should move the High Court for sanction U/s.308 Cr.P.C. Whether it is the High Court Public Prosecutor or trial court Public Prosecutor or police.
3. Section 308 (1) of Cr.P.C in general terms says that the pardoned accused may be tried for the offence for which such person was granted pardon when he
has not complied with the conditions of pardon. Whether the concerned Police should file a separate charge sheet or file an application before the committal court, or file an application before the trial court where other accused were tried. Whether police or Public Prosecutor, who should initiate action. By the time, the stage comes for giving opinion and certificate to prosecute, if Public Prosecutor lays down his office whether his successor can do the same.

If the prosecutor finds a need for the approver’s evidence, but the expected approver is not charged with pardonable offences provided in Section.306 (2) of Cr.P.C. the prosecutor cannot take recourse to pardon procedure. In such cases, the prosecutor is competent to seek withdrawal from prosecution under Section. 321 of Cr.P.C. as against that accused and after that he could examine him as a witness in that case.

To sum up what the law preaches in regard to withdrawal from prosecution and pardon is diametrically opposite to how the law is practised before the law courts. In compounding of offences and plea bargainings though Public Prosecutors could play effective role law failed to recognise any kind of role what so ever to the Public Prosecutor.

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