**APPROVERS UNDER INDIAN CRIMINAL LAWS: A BROAD OVERVIEW AND MISSED OPPORTUNITIES**

*"An Approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court."*[1]

## 1. INTRODUCTION

'The statement of an approver who has been tendered pardon ought to be viewed with a great deal of circumspection', has been the consistent view of the Hon'ble Supreme Court of India in a series of judgments ranging from the time when the Code of Criminal Procedure, 1898 was in force and thereafter under the Code of Criminal Procedure, 1973 (the "**CrPC**") till the coming into force of the Bharatiya Nyaya Suraksha Sanhita, 2023 (the "**BNSS**"), which would be in effect from July 1, 2024.

Tendering of pardon and statements of approvers have been at the center of much debate and attention in recent times. This article aims to give a broad overview about the provisions relating to tendering of pardon, evidentiary value of such statements, their need and relevance, the practical challenges and limitations faced while dealing with approvers; while highlighting some of the missed opportunities which ought to have been addressed in the BNSS, in the opinion of the authors.

## 2. OVERVIEW OF PROVISIONS

Sections 306 to 308 of the CrPC deal with the procedure and powers of grant of pardon and broadly deal with tender of pardon to an accomplice[2], tender of pardon by a Court of Session[3], and consequences and procedure on failure to comply with the conditions of pardon[4] respectively. The BNSS has been drafted along the same lines as the CrPC and contains *pari materia* provisions in the form of Sections 343 to 345[5].

The evidence of an approver is also dealt with in two provisions of the Indian Evidence Act, 1872 (the "**Evidence Act**") namely Section 114 Illustration (b) and Section 133. The said provisions have also been mirrored in the Bharatiya Sakshya Adhiniyam, 2023 (the "**BSA**") (as Section 119 Illustration (b) and Section 138 respectively). While Section 133 of the Evidence Act states that an accomplice shall be a competent witness and a conviction shall not be illegal solely for the reason of being based on the uncorroborated testimony of an accomplice, Section 114 through Illustration (b) provides that the Court may presume that an accomplice is unworthy of credit unless his testimony is corroborated in material particulars. Hence, the appreciation of the testimony of an accomplice would fall between these two extremes. A conjoint reading of the two provisions thereby provides that, while the testimony of an accomplice ought to be taken with a pinch of salt, it is not impermissible for a court to rely on the same, and if found worthy, credible and corroborated, even a conviction can be based solely on the same. Since the language adopted in the BSA is identical, it is safe to presume that the law on the admissibility of approver statements will stand as it is.

## 3. NEED AND RELEVANCE OF TENDER OF PARDON

The need for tendering of pardon to certain accused and in turn make them an approver stems from the fact that there may be cases where crimes are committed with such meticulous planning and precision that the investigative agencies find it impossible to get to the root of the matter and collect evidence in support thereof. One of the major justifications / considerations for tendering of pardon is that in a crime where there are many players, not all of them play an equal role, and in such a scenario, the State / investigating agencies / prosecution should be able to successfully establish the guilt of the persons who had the gravest role to play in the crime. Whilst there can be no straitjacket formula for determination of the mode and manner of ascertaining when and to whom tender of pardon should be accorded, in the opinion of the authors, the above consideration should be of paramount importance.

It is further important to understand that though the power to tender pardon to an accomplice is vested with a judicial authority, be it a Magistrate or a Court of Session, however, this power cannot be exercised by the said Court on its own accord. It is incumbent for either the prosecution or the accomplice / proposed approver to move the Court with a request for tender of pardon. This also flows from the fundamental principle that the Court stands at the center of the prosecution and the defense, and in the interest of fairness and equity, it cannot lean towards either side. Furthermore, even upon the accused moving an application for tender of pardon, it is incumbent upon the Court to supply a copy of the said application to the prosecution / investigating agency and elicit their response thereupon. Despite a request being made by the accused, the prosecution / investigating agency is at liberty to assess whether it requires any corroboration by way of the statement of the approver, and it is not bound by any such request. Thus, the onus of determining the rationale, necessity, and desirability of the statement of an approver vest with the prosecution / investigating agency, which must be decided basis the facts of the case and the evidence already collected during investigation. However, the Court, while deciding an application, is not to act as a mere post office and tender pardon mechanically in all scenarios where both the prosecution and proposed approver seek tender of pardon but must apply its judicial discretion based on the overall facts of the case[6].

The Hon'ble Supreme Court has, in a catena of judgments, held, that the evidentiary value of an approver would have to be put through rigorous tests to determine its reliability. In addition to the test of credibility of the approver as a witness, the approver must also qualify the test of corroboration of his statement on material particulars. The second test is necessitated due to the tainted nature of the evidence of the approver since he himself was a party to the commission of the offence[7]. It has also been held that even when an approver is tendered pardon but his evidence before the Court is not trustworthy, no reliance can be placed upon it despite certain corroborative factors[8].

## 4. OTHER CHALLENGES FACED DURING THE TENDER OF PARDON

Despite the objective behind the grant of pardon being to bring the real culprits to face consequences as per law, the mode and manner in which this discretion is being used by the investigating agencies leaves much to be desired[9]. This is for a plethora of reasons, from being motivated at attaining a conviction (a trend which goes against the fundamental aim of policing i.e. arriving at the truth, and not securing a conviction), being vindictive and politically motivated, being unduly delayed, being induced / influenced by undue gains assured in lieu of preferable statements etc. Further, the law does not contain enough safeguards and has certain critical flaws which make it more prone to misuse. The most glaring instance thereof is the provision as enshrined in Section 306(4)(b) of the CrPC and replicated in Section 343(4)(b) of the BNSS, which mandates that a person who accepts a tender of pardon shall, unless he is already on bail, be detained in custody till the termination of the trial. Given that a criminal trial in our country lasts almost as long as the maximum term of sentence for which the accused may be punished, if proven guilty, this provision makes it illogical to become an approver unless there is a tacit agreement that he will be released on bail prior to the tender of pardon. Whilst the same may not seem too problematic at first glance, it needs to be remembered that no inducement ought to be given to any person to maintain the fairness of the judicial process and to lend credibility to the statement of such person, whether it be a witness or an accomplice.[10]

Another interesting aspect of the tender of pardon and recording of statements of approvers is the effect such statements have on the co-accused persons against whom the approver makes his statement as a witness.

While the aim of the scheme of grant of pardon and recording of statement of approver before a Magistrate may be an attempt to bind the approver to his statement, it comes with its own set of problems. In a series of cases, it is seen that while an accomplice may tender a statement at the behest of extraneous considerations in order to shed the status of an accused and get a temporary reprieve, such approvers turn turtle at a later stage (while being examined as a witness during the trial) leading to an elaborate procedure of separation of their trial, and the investigating agency / prosecution losing the supposed benefit that they were to gain by showing leniency to one accused for the purpose of proving the case against the so-called bigger fish (co-accused).

The other aspect, less spoken about, is that in any case wherein there are allegations of several persons acting in concert or in furtherance of a conspiracy, there exist several differentiating factors amongst the alleged accused persons. For instance, four accused persons (two employers and two employees) commit an offence against the complainant and consequent thereto, an FIR is registered. At some time during the investigation, since the prosecution is unsure that it would be able to establish the guilt of all, it seeks to make one of the employees an approver without the knowledge of the other accused persons. The approver seeks bail and after getting bail, makes a statement narrating a version benefiting the prosecution, and thereby accepts the tender of pardon. Upon the release of the employer on bail a few months later, the employer comes to know of the employee having become an approver, uses his dominant position as an employer by exerting social, financial or any other influence to get the approver employee to turn hostile while deposing as a prosecution witness[11]. Upon the approver coming forth to depose during the trial against his co-perpetrators, he tenders a statement contrary to the one given by him earlier. In such a scenario, while the approver is liable to be prosecuted again as an accused with the possible added charge of giving false evidence, in the larger scheme of things, the purpose for which the approver was tendered pardon would be completely lost, with the co-accused escaping conviction *sans* the evidence of the approver. Upon a broader overview of the entire scenario, the whole purpose of tender of pardon can possibly be frustrated by unscrupulous accused persons and the entire legal system taken for a ride.

## 5. MISSED OPPORTUNITIES

In the opinion of the authors, the following material issues relating to the tender of pardon could have been addressed in the BNSS:

### 5.1 Approver to stay in jail till the conclusion of the trial (unless already on bail)

As per Section 306(4)(b) of the CrPC, any person who is tendered pardon and made an approver must stay in custody till the conclusion of trial. Whilst the broader aim of the provision may have been to eliminate any chances of the approver being subject to undue influence to change his testimony, it could have been suitably achieved, by perhaps stating that once the statement of the approver is recorded as a Prosecution Witness, he may be entitled to bail. This fact has also been observed by the Hon’ble Supreme Court in

*Suresh Chand Bahri*[12] that once statement of approver is recorded as a prosecution witness, there should not be any difficulty in him being released on bail.

5.2 **Harsher penalties for approver turning hostile were the need of the hour**

Whilst an approver who resiles from his testimony must face trial for the original offence for which he was tendered pardon, practical experience should have guided the legislature that in a country like ours, where protracted litigations are the norm, some harsher penalties or a faster trial for such persons could have been included. A mandate that the approver shall be examined expeditiously at the beginning of the trial and a summary trial for the offence of perjury, if the approver resiles from his testimony at the time of tender of pardon, could have been considered, which might possibly have had a deterrent effect on the rampant practice of approvers turning hostile.

5.3 **Requirement of leave of the High Court to try an approver for the offence of false evidence, an avoidable burden?**

Section 308 CrPC / 345 BNSS deals with a person who has not complied with the terms of pardon. In such a scenario, the second proviso to these provisions states that no person shall be tried for the offence of giving false evidence without the sanction of the High Court. This is an elaborate and cumbersome procedure, which could have been done away with or at least could have been simplified, as it creates an unnecessary burden on both the prosecution as well as the judiciary.

5.4 **Safeguards and procedures to avoid extraneous considerations as a factor in tendering pardon could have been incorporated, especially in cases where the accused is in custody**

While there may not be any fool-proof way to keep greed and personal benefits of individuals taking decisions at bay, some safeguards could have been incorporated in the statute to prevent any inducement being given, either by the proposed approver or the prosecution during the process of tender of pardon. Some of the harsher penal statutes, wherein confessional statements of an accused are recorded and deemed admissible, have the necessary safeguards such as ensuring that the investigating agency does not have the custody of the accused immediately prior to the tendering of the statement, giving time to the accused to reflect on the statement given by him *et cetera*, which would have been a step forward to ensure that the process of tender of pardon appears to be and is fairer.

5.5 **Approver during investigation versus approver during trial, a necessary distinction**

In our view, the time was ripe for a distinction to be made between the procedure and manner of tender of pardon during the investigation and post investigation. While the version of an approver recorded during the investigation could open several new avenues of evidence collection *qua* the other accused persons, the statement of an approver during trial would be limited to the evidentiary value of such statement, which in any case has been held to be circumspect in nature. Given the much wider import and impact that the statement of an approver could have during the investigation, some distinction ought to have been drawn up between the two.

## 6. CONCLUSION

Upon a conspectus of the overall impact of the questionable nature of the testimony of a witness, the often-misused nature of process and manner of tendering of pardon, the frequency with which such approver statements are later resiled from, had made a compelling case for an overview of the provisions in the opinion of the authors. The authors with their experience of having seen this contentious law from the side of the accused, the prosecution as well as from the bench feel that this is one of the many missed avenues which could have been revisited and addressed while drafting the BNSS.

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**DISCLAIMER**



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[1] Ravinder Singh v. State of Haryana, [(1975) 3 SCC 742]

[2] **306**.Tender of pardon to accomplice.—(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

[3] **307**. Power to direct tender of pardon.—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 condition to such person.

[4] **308.** Trial of person not complying with conditions of pardon.—(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence.

[5] **343**. (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 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.

**344**. 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 condition to such person.

**345**. (1) Where, in regard to a person who has accepted a tender of pardon made under section 343 or section 344, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence.

[6] CBI v. Ashok Kumar Aggarwal, [AIR 2014 SC 827]; Somveer Singh v. State of Haryana, [2023: PHHHC: 080791]

[7] Sarwan Singh v. State of Punjab, [AIR 1957 SC 637]

[8] Abdul Sattar v. Union Territory, Chandigarh, [1985 (Supp) SCC 599]

[9] Somveer Singh v. State of Haryana, [2023: PHHHC: 080791]

[10] **24**. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding —A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

**163.** No inducement to be offered —(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in section 24 of the Indian Evidence Act, 1872 (1 of 1872). (2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will: Provided that nothing in this sub-section shall affect the provisions of sub-section (4) of section 164.

[11] Directorate of Enforcement v. Rajiv Saxena, [Neutral Citation: 2020: DHC:2043]

[12] Suresh Chandra Bahri v. State of Bihar and Ors., [AIR 1994 SC 2420]