CHAPTER-VIII

PARDON AND PROSECUTION

This chapter deals with the provision of Criminal law regarding information gathered from Accomplice and Co-Accused on the basis of Pardon granted to them. The established principle of Criminal Jurisprudence is that the responsibility or exemption from criminal liability to a person should always be made in accordance with the procedure established in criminal law for the time being in force. Thus, though an accomplice has become entitled for exemption from criminal liability, yet, the pardon to him should be made according to the provisions of Indian Constitution Article 72 and Article 161 and Section 432 to 435 of Code of Criminal Procedure 1973, in this regard. In this chapter an effort has been made to deal and discuss the procedure for pardon and prosecution of an accomplice when he has violated the terms and conditions of granting him pardon under Sections 306 to 308 and 432 to 435(A) of the Code of Criminal Procedure 1973. The provisions under Section 337 to 339 of the Code of Criminal Procedure, 1898, have also been discussed as many cases were decided under these sections before the enforcement of the new Code of Criminal Procedure, 1973.

1. Meaning and Definition of Pardon:-

In law, a pardon is the release from guilt or remission of punishment. In criminal law the power of pardon is generally exercised by

the chief executive officer of the state. Pardons may also be granted by a legislative body, often through an act of indemnity, anticipatory or retrospective, for things done in the public interest that are illegal.

A pardon may be full or conditional. It is conditional when its effectiveness depends on fulfillment of a condition by the offender, usually a lesser punishment, as in the commutation of the death sentence.

The effect of a full pardon is unclear in some jurisdictions. In England it is said that a full pardon clears the person from all infamy, removing all disqualifications and other obloquy, so that a pardoned person may take action for defamation against anyone who thereafter refers to him as a convict.

In the United States the matter is much less clear, although the Supreme Court has held that a pardon blots out guilt and makes the offender "as innocent as if he had never committed the offense." Some states in the United States have held that a pardon does not remove the disqualification from holding public office and that a pardoned offender may still be refused a license to engage in a business or profession. The difficulty stems from lack of differentiation between pardons granted for reasons of clemency and those granted from a belief in the accused's innocence. Continental European and Latin American countries generally have detailed statutory provisions governing the law of pardon.

Parden means:-[1]

a. A release, by a sovereign, or officer having jurisdiction, from the penalties of an offense, being distinguished from amnesty, which

1 Utah Criminal defence Cal (435) 789-5433 (Aggressive Criminal Defence).

is a general obliteration and canceling of a particular line of past offenses.

b. An official warrant of remission of penalty.

c. The act of pardoning; forgiveness, as of an offender, or of an offense; release from penalty; remission of punishment; absolution.

d. The state of being forgiven.

e. To absolve from the consequences of a fault or the punishment of crime; to free from penalty;- applied to the offender.

f. To remit the penalty of; to suffer to pass without punishment; to forgive; - applied to offenses.

g. To refrain from exacting as a penalty.

h. To give leave (of departure) to.

i. to release (a person) from punishment; exempt from penalty: a convicted criminal who was pardoned by the governor.

j. To let (an offense) pass without punishment.

k. To make courteous allowance for; excuse:

According to the Bouviers Law Dictionary 'Pardon' means-

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. Every pardon granted to the guilty is in derogation of the law;

if the pardon be equitable, the law is, bad; for where legislation and the administration of the law are perfect, pardons must be a violation of the law. But as human actions are necessarily imperfect, the pardoning power must be vested somewhere in order to prevent injustice, when it is ascertained that an error has been committed.[2]

Before the Constitution came into force, the law of pardon in India was the same as the one in England since the sovereign of England was the sovereign of India. From 1935 onwards, the law of pardon was contained in Section 295 of the Government of India Act which did not limit the power of the Sovereign. The result was up to the coming into force of the Constitution, the 'exercise of the King's prerogative was plenary, unfettered and exercisable as hitherto.'

In the Constitution of India, the power of Presidential Pardon is found in Article 72. It empowers the President to grant pardons, reprieves, respites or remissions of punishment in all cases where the punishment is for an offense against any law to which the executive power of union extends. The same is also available against sentences of courts- material and sentences of death. A parallel power is given to the Governor of a state under Article 161. A pardon may be absolute or conditional. It may be exercised at any time either before legal proceedings are taken or during their pendency or after conviction. The rejection of one clemency petition does not exhaust the pardoning power of the President.

Occasionally when grave offences are committed the law finds it

2 Bouvier's Law Dictionary, Revised 6th Ed. (1850)

necessary to enlist the assistance of some of the offenders in order that the rest may be brought to justice. This happens when one of several persons who have committed a crime makes a confession, which is believed to be true and which it is considered would help to secure a conviction of the rest. So, all persons who are suspected to be involved in the commission of an offence have to be booked and made to stand their trial. And as the evidence of accomplices is necessary in certain cases and as an accomplice is a competent witness, the law provides for the procedure that is to be adopted for obtaining the evidence of an accomplice in a criminal court. The provisions are contained in Sections 306 and 308 of the Criminal Procedure Code. These sections provide the terms and the machinery by which pardon can be granted by a magistrate or a judge to an accomplice for the purpose of obtaining his evidence in a criminal trial.[3] These sections deal with granting of pardon in some serious offences specified in Section 306 Cr.P.C[4]

A pardon is said by *Lord Coke* to be a work of mercy where by the king *"either before attainder, or conviction or after ,forgiveth any crime,offence, punishment "and the king's Coronation oath is " that he will cause justice to be executed mercy "*[5] *A pardon is as an act of grace, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.*

It is in substance and effect, a contract between the State on the one hand and the person to whom it is granted on the other. As the greater

3 CWN 876 FB.
4 C W N 468: AIR 1929 Cal 310, G.v. Raman v. Emperor
5 Inst 233

includes the lesser, a general power to grant pardon carries with it the right to impose conditions limiting the operation of such pardon.[6] As has been observed by the Supreme Court in *K.M. Nanavati v State of Bombay*[7] ,"*Pardon is one of many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty might be. The sovereign power to grant a pardon has been recognized in the Constitution of India in Arts 72 and 161 and also in Secs.432 and 433, Criminal Procedure Code, 1973. These provisions relate to the grant of pardon after sentence has been removed and the tender of pardon to an accomplice under certain conditions as contemplated by Secs. 306 and 307, Criminal Procedure Code. There is no doubt that the ;grant of pardon, whether it is under Art,161or Art. 72 of the constitution or under Secs. 337, 338, 401 and 402 of old Criminal Procedure Code, is the exercise of the sovereign power.*[8] *In United States v. George wilson,*[9]*Marshall, CJ.observed: " A pardon is private, thought official act of the executive Magistrate, delivered to the individual for whose benefit it is intended and not communicated officially to the Court."*

2- Aim of Tendering Pardon:-

Crimes are secretly committed by an organized body of criminals that it becomes impossible to connect the crime with any of them except by getting information from some of their own members. In such a case, one of the accomplices is offered a conditional pardon on the term of his

6 A.L. Mehra v. State AIR 1958 Punj 72.
7 AIR 1961 SC 112.
8 M.M. Kochar Vs State 1969 Cr.. L.J. 45.
9 (1883) 30-33 USSCR 149

giving evidence against other criminals. This accomplice is called approver and his evidence is called State evidence. When a criminal is admitted to bear testimony against his accomplice he is then said to turn "State evidence". Apart from the information, which is obtained through this course in certain types of crime, the only direct evidence that can be offered under the circumstances is that of an accomplice. Therefore the reason for granting a pardon is to obtain the evidence of a person supposed to be involved in an offence, in the trial of another person involved in the same offence. As held by the Punjab and Haryana High Court in *Sarbjit Singh v. State of Punjab*[10] the object of pardon is that the fear of, prosecution is removed. A person to whom pardon is granted though privy to the offence may feel to give true evidence and make a full disclosure of the events about the crime. The tender of pardon is in other words, quid pro quo. The very object of the provisions contained in Sec. 337 (1) of the old Cr. P.C. is to allow pardon to be tendered in cases where a grave offence is alleged to have been committed by several persons so that, with the aid of the evidence of the person pardoned, the offence can be brought home to the rest.[11] So the subsequent stopping of the trial for some reason will not affect the pardon already granted. In re Dagdoo Bapu[12], an accomplice was given a conditional pardon under Section 337, old Cr. P.C. The principal offender having absconded the trial could not go on. The trying Magistrate referred the case to the High Court to have the order of pardon cancelled on the ground that it was invalid, as it was not tendered

10.Hasmukhlal Nvakilna v. Bhairav Nath Singh, ITO, 1972 Guj LR 811.
11 46 Bom 120
12 46 Bom 120

for the purpose of an inquiry, but for the purpose of securing evidence under Section 512, old Cr.P.C. Held, that there was no ground for revision of the Magistrate's order under Section 337, old Cr. P.C., inasmuch as the principal offence was under inquiry and in order to secure the approver's evidence as to the offence, a pardon was tendered and the proceeding under Section 512 was only ancillary to that inquiry.

3. Who can grant Pardon:-

The close analysis of the provisions under Code of Criminal Procedure Code, 1898, namely sections 306, 307, 308 of the Code of Criminal Procedure, 1973, and study of the cases[13] reveals that the Court of Session (for offence triable exclusively by Sessions Judge) Special Judge, Chief Judicial Magistrate, and Magistrate of the First Class and Metropolitan Magistrate (in Metropolitan area), at any stage of the trial are competent to tender pardon. The High Court at the time of revision, may also order to grant tender of pardon if in the interest of justice, it find it necessary. But the condition precedent for granting tender of pardon is that the Magistrate or Judge must record the reasons in writing for doing so, and the copy of the record of reasons shall be furnished to the accused on application. No police officer of any rank has been authorized in this behalf.

The power to grant pardon is determined with reference to the

13 Faqir Singh v. Emperor, AIR 1938 PC 266; State of U.P. v. Kailash, A. 1973 S.C. 2210 (para 15); Cf. State of U.P. v. Kailash, A. 1973 S.C. 2210 (para. 15), L Kailashnath, A 1973 SC 22101; In re Chinnappa, A 1967 M 351; Pir Imam, A 1944 S 184; Amar, sup., State of U.P. v. Kailash Nath Agarwal, AIR 1973 SC 2210; Sumer Singh v. State (1962) 2 Cr LJ 672 (Madh Pra); Ravindran Nair v. Superintendent of Police, Special police Establishment 1981 Cr. LJ 1424 (Ker); Sumermal Jain v. Union territory of Tripura (1964) 2 Cr. LJ 209;

offence in respect of which the investigation is being made or the inquiry or trial is held, and is not affected in any manner by the subsequent alteration of the charge or offence or by the ultimate result of the investigation, inquiry or trial[14], and a valid pardon, once having been validly given, is not affected by the fact that after the pardon the Sessions Judge at the trial altered the charges from those framed by the Magistrate to some other offences.[15] When some offences fall under Sec. 337, Criminal Procedure Code (now Secs. 306 new Criminal Procedure Code) and others do not, a pardon can be tendered for the offences mentioned in the section and the fact that there may be other offences not mentioned in the section which were being inquired into will not invalidate the pardon granted in respect of the offences mentioned in the section. Once the pardon is tendered, the approver is an approver in respect of the whole case and not with regard to some of the accused only.[16]

The Magistrate should exercise a sound judicial discretion.[17]

Neither the Criminal Procedure Code nor the Prevention of Corruption Act recognizes the immunity from prosecution given to the accused and granting of pardon by police officers. The tender of pardon being a judicial function the Magistrate empowered to exercise such function cannot delegate it to a police officer or to a subordinate Magistrate Grant of pardon is not in discretion of police authorities.[18]

---

14 Sardara vs. R. (1921) 22 Cr. L.J. 676.
15 Kauromal vs. R. (1924) 25 Cr. L.J. 1057.
16 Ismail v. R. (1920) 26 Cr. LJ 1045 (Nag.) See Haruomal v. R. (1915) 16 Cr. LJ 632; Balmokand v. R., (1914) 16 Cr. LJ 354.
17 Nga Po Aung. (1872-1892) Low Bur Rul 246.
18 P. Sirajuddin, A 1971 SC 520.

Therefore where a police officer granted amnesty to persons who were to be examined as prosecution witnesses, it was held that it would be highly irregular. They must either obtain pardon in accordance with S. 306 or discharge or acquit under S. 321[19]. The government can however hold out a promise not to prosecute.

When the Government notified that persons giving evidence in a bribery case against a judge would not be prosecuted, the evidence of persons who gave evidence is admissible.[20] The Government has power to refrain from prosecuting a person and such person is not incompetent as a witness though it may affect his credibility.[21]

No Police authority has the power to grant pardon under the present section or any immunity from prosecution to any prosecution witness.[22] Likewise, Government cannot grant pardon to an accused to obtain his evidence as prosecution witness, though it can withdraw from the prosecution against him, having the effect of discharge or acquittal, under s. 321. That power has to be exercised through the Public Prosecutor and with the consent of the Court (S. 321).

4. To whom Pardon may be granted:-

This section (Section 306 (1)) does not use the word accomplice, but describes the various categories of person to whom pardon may be

19 45a. Lakhmandas, A 1968 B 400
20 Har Pd, 45 A 226, 229.
21 Anant A 1925 N 313; P Sirajuddin v. State of Madras, Cr. LJ 523: AIR 1971 SC 520; Sirajuddin V. Govt. of Madras. AIR 1968 Mad 117.
22 AIR 1971 S.C. 520 (Para: 26)

tendered.

i) A person who directly participated[23] in the commission of the offence to which the (investigation or) inquiry or trial relates.

ii) A person who was indirectly concerned in the commission of the offence, e.g., as abettor.

iii) A person who was privy to the commission of the offence. The word, privy' possibly suggests the category of 'accessory after the fact'. Under English law, a person, who, though not a participant in the principal offence, aided it subsequently, e.g., as a receiver of stolen property, on a charge of theft against the accused.[24] If any of the foregoing tests is satisfied pardon may be tendered to such person though he may not have been arraigned as an accused. Nor is it necessary for the application of the section that such person must expressly state that he took an active part in the commission of the offence; it is enough if his statement clearly shows that he was a privy to or abettor of the offence.

The word 'accomplice', which is used in s. 133 of the Evidence Act, includes a principal, an accessory, abettor, a person in some way connected with the offence and would comprise all those persons who are described by the wide language in the present section of the Code. An accomplice, who is tendered pardon and gives evidence in favour of the prosecution against other participants in the commission of the crime, is popularly called an 'approver', though that term, too, is not used in the present

23 Cf. Sbeshanna v. State, A. 1970 S.C. 1330.
24 Dalmia v. Delhi Admn. A. 1962 S.C. 1821 (para. 141)

section.

It is enough if such person is supposed to have been concerned as above. He need not be one who has been charged with an offence mentioned in Sec. 306 Criminal procedure Code or who has been sent up by the police, as an accused person. It is not even necessary that he should be an accused in the case.[25] In order to grant permission under Sec. 306 (1) Criminal Procedure Code, it is not a pre-requisite condition that the statement of a person on whose behalf pardon is sought must be in the nature of confession or must implicate himself in the offence. It is not necessary that the person pardoned should be an accomplice.[26]

The expression "any person supposed to have been directly or indirectly concerned in or privy to an offence" etc., in Section 306 (1), Cr.P.C., is a very wide one and includes others besides an accused who has been sent up for trial by the police. So on account of this clause, a person who has been actually convicted of the crime in question, cannot be held to be included in the category of person to whom pardon could be granted. But it may be observed here that an accused who pleaded guilty, but who was not convicted, is not excluded from the class of persons to whom a valid pardon can be granted.[27]

The expression includes all socious criminis, such as; abettors and accessories before or after the fact. However a person who has already been convicted of the offence is excluded from this category though a

25 R. v. Andal, (1912) 13 Cr. LJ 33: Kashiram v. R. (1922) 24 Cr LJ 366: Autar Singh V. State AIR 1960 Punj 364; 1960 Cr. LT 989.
26 Maosi Nainsi Jain v. State of Maharashtra 1985 Cr. LJ 1818 : 1985 Mah LJ 469
27 7 All 160. R.v. Kallu (1884)

person who confesses the guilt and pleads guilty to the charge but is not convicted, is included within its meaning.

The person pardoned need not be an accused in the case. All that is required is that he should be supposed to have been directly concerned in the offence with which another is charged.[28] The real culprit should not be left out in the hope of obtaining evidence against other.[29]

The words "concerned in or privy to the offence" are wider than the words "concerned in or privy to the commission of the offence". An associate in the crime though not a perpetrator or abettor of it may thus be pardoned. It should also be remembered in this connection that where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act (Section 33, IPC).

The Meaning of the words "any person" in Sec. 337 (1) Old. Cr.P.C.[30] is subject only to the qualification expressly laid down, viz, "supposed to have been directly or indirectly concerned in or privy to the offence" and not in any way otherwise circumscribed to denote a person who has actually been made an accused.[31] There is no other qualification in the provision excepting a condition that he would make a full and true disclosure of the circumstances, etc.

As observed by B.K., Patra, J., in *Republic of India v. Harihar*

28 R. v. Kallu (1884) ILR 7 ALI. 160; R. v. Bhagya (1895) Ratanlal, 750
29 Kashirant. A 1923 N 248: 24 Cr. LJ 566.
30 Sheobhajan A 1921 P 499.
31 (Shri) Santosh Saha v. State AIR (1972-73) 77 Cal WN 495.

Paikarai,[32] the object of Secs. 337 and 338, Criminal Procedure Code (now sec. 306 and 307, new Cr.P.C.), is to tender pardon to a person to obtain from him valuable information in a case where without such information, it is not usually possible to secure valuable evidence. In every case, it cannot be insisted upon that the person to whom pardon is tendered should implicate himself to the same extent as the other co-accused person, because such condition would defeat the very purpose for which the pardon has been granted in some cases. It is, therefore, not necessary that the person to whom pardon is tendered should always be an accomplice.

Section 337, Criminal Procedure Code (now Sec. 306, new Cr. P.C.) does not warrant the inference that the person to whom pardon is tendered should be an accused in the particular case in which he is sought to be examined. The section does not lay emphasis on the word 'case' but it emphasizes on the word 'offence'. Therefore, whether a person to whom pardon is tendered should be a co-accused in the particular case in which he is sought to be examined is immaterial.[33] Pardon can only be tendered with respect to an offence, which falls in one of the categories mentioned in Sec. 337(1) [now Sec. 306 (2), new Cr.P.C.] An offence under Sec. 5 of the official Secrets Act read with Sec. 120 B of the Indian Penal Code does not fall within any of these categories. So where the proceedings were with respect only to an offence under Sec. 5 of the Official Secrets Act read with sec. 120-B of the Indian Penal Code, Sec. 337 of the Code of Criminal Procedure (now sec. 306 new Cr. P.C.) would not apply and no

32 (1970) 1 CWR 641.
33 K. Venkata Reddy, In re, 1970 MLJ (Cr) 66: (1970) 1 Andh WR 56

pardon could be tendered to any person.

Section 339 (now sec. 308, new Cr.P.C.) deals with a different contingency altogether, namely, whether the conditions for the pardon had been complied with. It is to be remembered that a pardon tendered under Sec. 337 (now Sec. 306, new Cr.P.C.) is a protection from prosecution. Failure to comply with the conditions on which the pardon is tendered removes that protection. All that Sec. 339 (new Sec. 308, new Cr.P.C.) says, provided the requisite certificate under that section is given by the Public Prosecutor is that the person to whom the pardon is tendered can be prosecuted for the offence for which the pardon was tendered as also any other offence of which he appears to be guilty in connection with the same matter. This would be just the same as if Sec. 339 (now Sec. 308, new Cr.P.C.) merely stated that, on failure to comply with the conditions of the pardon, such pardon would be forfeited. The words of Sec. 339 (now Sec. 308, new Cr.P.C.) therefore are of no help in construing Sec. 337 (now Sec. 306 new Cr.P.C.) in deciding whether a pardon could be tendered for an offence under Sec. 5 of the Official Secrets Act read with sec. 120-B of the Indian Penal Code. On reading Sec. 337 (1) [new Sec. 306 (1) and (2), new Cr. P.C.] it is perfectly clear that pardon can only be tendered under that provision with respect to the three categories of offences mentioned therein and none other. As Sec. 5 of the Official Secrets Act read with Sec. 120-B of the Indian Penal Code, does not fall within any of these categories no pardon can be tendered with respect to that offence. Therefore a person to whom pardon has been tendered, cannot be

examined as an approver in the proceedings which are concerned with an offence under Sec. 5 of the Official Secrets Act read with Sec. 120-B of the Indian Penal Code.[34]

It is true that it is the duty of an approver to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and that a person who fails to fulfill condition on which tender was made to him may be tried not only for the particular offence in respect of which the pardon was tendered but also for any other offence which he appears to have committed in connection with the same matter but these facts would not lead necessarily to the conclusion that he is an approver in regard to offences in respect of which pardon has not been granted to him. An approver is an approver only for the purpose of the case in respect of which pardon was granted and he can be detained in custody till the termination of the trial of the said case. He is not an approver for the purposes of the case under Sec. 5 of the Official Secrets Act and he cannot be kept in confinement till the termination of the trial of the said case.[35]

5. Stage at which Pardons may be tendered:-

The provision of Sec. 306 Criminal Procedure Code makes it clear that a pardon may be tendered at any stage of an investigation[36] or trial[37] or injury[38] even though the principal offender is absconding[39] or after framing

34 AIR 1960 SC 360.
35 AIR 1958 Punj. 72.
36 Ismail, 26 Cr LJ 1115; Uma Krishna, A 1956 Ajmer 57,
37 Kochar, A. 1969 D 21,
38 s2 (g)
39 Dagdu, 46 B 120

a charge.[40]

Chief Judicial or Metropolitan Magistrate specified in sub-sec. (1) are competent to tender at any stage of-

i) the investigation.

ii) any inquiry prior to the trial;

iii) during the trial itself. This means that the power under s. 306(1) can be exercised at any time after a case is received for trial and before its conclusion.

A Magistrate of the First Class has no power to tender pardon during investigation. He would be competent only during the inquiry or trial he is himself holding.

Further, this section does not require that a trial or an enquiry should be in progress when the pardon is tendered. The fact that a criminal case is temporarily postponed under Section 526 (8) of the old Cr.P.C. does not in any way affect the power of the Magistrate in charge of it to grant a pardon to the accused under this section.[41] However, a pardon should be granted at as early a time as possible. Inordinate delay in granting pardon may be a matter which goes against the prosecution. In one case an approver himself was convicted for 7 years rigorous imprisonment. But in appeal, the conviction was set aside by the High Court due to certain defects and irregularities in the proceedings, and it remanded the matter for fresh disposal according to law. It was at that stage pardon was tendered to the

40 Mangu, 22 Cr. LJ 225, Umakrisna v. State of Ajmer. AIR 1957 Ajmer 57; Shera v. Emperor AIR 1943 Lah 5: 44 Cr LJ 62.
41 Ismail Panju v. King Emp, AIR 1925 Nag 337.

person referred to above and he was made an approver.

Held that at that stage pardon should not have been granted to the accused and the testimony given by the approver under those circumstances was unreliable.[42]

Where application seeking pardon was made by the accused in 1975 but was not disposed of till 1977 and in the meantime some evidence was recorded in the case and the grant of pardon in 1977 by the Magistrate[43] was set aside by the Session judge on the ground that the accused did not submit another application in 1977, it was held by the High Court that no fresh application was necessary and that in assessing the evidence in the case the fact, that the application was made in a late stage of the case can be taken into consideration.[44]

That the approver had denied his complicity in the crimes during the earlier stages of investigation does not show that the evidence given by him in the Court of Session was false. In such cases prisoners make a full and true disclosure of the whole of the circumstances within their knowledge relating to the offence under investigation when they are assured the pardon.[45]

The role of prosecutor under Section 307 is distinct and different from part he is called on to play under provision of Section 321 of Code.[46] The pardon under this section can be tendered not only during a trial but

42 49 All 181
43 Angamkala Singh V. Manipur State, AIR Manipur 2: 1954 Cr LJ 148
44 Aftab Ali V. State of Rajasthan, 1981 Cr. LJ (Raj) 604.
45 Kesar Singh v. State, AIR 1954 Punj. 286: 1955 Cr. LJ 86.
46 Jasbir Singh v. Vipin Kumar Jaggi 2001 Cri LJ 3993 (SC)

also before trial. S. 307 does not contemplate the recording of the statement of the approver twice. Firstly in the court of the Magistrate and secondly in the trial Court.[47] A special Judge under the Prevention of Corruption Act (1988), S5 (2) can grant pardon even at the stage of investigation, the co-accused cannot object to the exercise of the power.[48] A pardon can be tendered to an accused tried with others notwithstanding that he has pleaded guilty, but not to a person who has pleaded guilty and has been convicted on his plea.[49]

Where the application under Sec. 306, Criminal Procedure Code (Sec. 337 of Old Criminal Procedure Code) was moved after the investigation was closed, the charge sheet was filed and charges were framed but before the evidence could not recorded, it was held that the application was moved at any appropriate stage of the trial.[50]

Special Judge has power to grant pardon prior to filling of charge sheet as well as after filling of charge sheet for holding trial. The revisional Court possess jurisdiction to consider the correctness, legality or propriety of an order of pardon particularly as the tender of pardon is a proceeding of the criminal court and the revising authority can call for the records to satisfy itself as to the regularity of a proceeding of an inferior Court.[51] The recording of the statement of the accused under S. 164 Criminal Procedure Code is not a condition precedent for granting pardon under S. 307.[52]

---

47 Narayan Chetanram Choudhary v. State of Maharashtra, AIR 2000 SC 3352: 2000 Cr. LJ 4640
48 Ashok Kumar Agarwal v. Central Bureau of Investigation 22001 Cr LJ 3710 (3714) (Del.)
49 Kallu, (1884) 7 All 160.
50 Maosi Nainsi Jain v State of Maharashtra 1985 Cr LJ 1818: 1985 Mah LJ 469: (1985) 2 C LC 200: I.L.R. 1985 Bom. 2192.
51 Kailash Nath Agarwal, AIR 1973 SC 2210: (1973) 1 SCC 751 : 1973 Cr LJ 1196.
52 K. Anil Kumar v. State of Kerala, 1996 Cr. LJ 1942 (1950) (Ker-DB): State v. Bigyan Malik. 1975

The recording of statement of a person, who is to be pardoned, before granting him pardon is not illegal.[53] It is not necessary that the person to whom pardon is granted should have been arrayed as an accused.[54]

Power of Government to grant immunity from prosecution can be exercised at any time in course of trial but before judgment is delivered.[55]

6. <u>Offences in respect of which pardon may be tendered:-</u>

Pardon may be tendered under sub. Section (2) of section 306 Cr.P.C. with respect of three classes of offences:-

a) Offences triable exclusive by a Court of Session.

b) Any offence punishable with imprisonment which may extend to 7 years or with a more severe sentence.

c) Any offence triable under the Criminal Law Amendment Act, 1952.

A conditional pardon under section 337, Cr.P.C. can be granted only in the case of any offence exclusively triable by the High Court or Court of session, or any offence punishable with imprisonment which may extend to seven years, or any of the following sections of the Indian Penal Code namely Sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A.[56]

Now the offence exclusively triable by High Court or Court of

---

Cr. LJ 1937 (Ori-DB).
53 Krishna Lal Gulati v. State 1976 Cr. LJ 1825 (All)
54 Rabi Das v. State 1976 Cr LJ 2004 (Ori-DB) Giria v State of Orissa 91 (2001) CIT 639 (Ori)
55 Jasbir Singh v. Vipin Kumar Jaggi, 2001 Cri LJ 3993 (SC).
56 Bawa Faquir Singh Vs Emperor AIR 1938 PC 266.

Sessions are of a very serious nature, for example, counterfeiting of coins under Section 231, counterfeiting Government stamp under Section 255, murder under Section 302, culpable homicide under section 304, attempt to commit murder under Section 307, attempt to commitment culpable homicide under Section 308, causing miscarriage under section 312, causing grievous hurt to a public servant under Section 333, kidnapping or abducting in order to murder under section 364, kidnapping or abducting a woman to compel her marriage or to cause her defilement etc., under section 366, rape under section 376, decoity under section 395, dishonest receiving of stolen property knowing that it was obtained by decoity under Section 412, mischief by fire or explosive substance with intent to destroy a house etc., under Section 436, house trespass in order to the commission of an offence punishable with death, under section 449, and other offences of the Indian Penal Code specified in schedule II of the Cr.P.C. as exclusively triable by a Court of Session. The provisions of Section 337 before amendment by Act XXVI of 1955, applied to Section 211, IPC also when it relates to a false charge of offence made with intent to injure and the false charge has reference to capital offence, in which case punishment provided under the section is imprisonment for seven years.

Under the present section also, section 211, IPC when it has reference to a capital offence, pardon can be granted. The other offences specified in the section are the following: Section 216-A, IPC is the offence of harbouring robbers or decoits, Section 369, IPC relates to an offence of kidnapping or abducting a child with intend to take property

from the person of such child. This is an offence which is triable by a first class Magistrate also. Section 401; IPC deals with the offence of belonging to a wandering gang of persons associated for the purpose of habitually committing thefts (this offence is also triable by a first class Magistrate), under section 435, IPC is included the offence of committing mischief by fire or explosive substance with intent to cause damage to an extent of Rs. 100/- or upwards (this offence is also triable by a Magistrate of first class) and Section 477-A, IPC, deals with the offence of falsification of accounts, which is also triable even by a Magistrate of the first class. Forgery of record of court of justice etc. u/s 466, or forgery of valuable security u/s 467; deceitfully marring a woman u/s 493 are also covered under this section.

Under the old code, it was held[57] that no pardon could be tendered under the present provision [olds 337] in respect of an offence under the Official Secrets Act, 1923, since it did not come under any of the three categories of offences to which olds. 337 then applied. This decision had since been superseded by substituting s. 12 in that Act, by Amendment Act 24 of 1967, by which the present provision of the Code was extended to offences punishable under ss. 3,5,7 of the Official Secrets Act.

The validity of a pardon is to be determined with reference to the offence alleged against the approver alone and not with reference to the offence or offences of which his associates were ultimately convicted.[58]

7. Conditions of Pardon:-

57 State vs Hiralal AIR 1960 SC. 360.
58 State of A.P. Vs Ganeswara AIR 1963, SC 1850.

The grant of pardon carries an imputation of a guilt and on acceptance thereof a confession of it. A pardon is an act of grace which exempts the individual on whom it is bestowed from the punishment the law in fields for a crime he has committed. It is in substance and effect a contract between the State on the one hand and the person to whom it is granted on the other. It is open to the pardoning power to annex to a pardon any condition, precedent or subsequent. When a pardon is granted on a condition precedent, it does not become operative until and unless the prisoner performs the condition in question. If the condition is not performed the prisoner stands precisely as though no pardon had been granted. If the condition is satisfied the pardon and its connected promises take full effect.[59]

The mandate of law that an approver shall be examined both before the committing Magistrate as well as during trial is binding not only on the trial court and the prosecution but also on the approver as well. It is not open to the State to withdraw the pardon from the approver nor would it be open to the approver to disown and cast away the pardon granted to him before the last terminal stage of his appearing in the witness box in the trial court and it is only his not making full and true disclosure of all the facts relating to the case in the witness box in the trial court that the pardon can be said to have been withdrawn by the State and the approver having thrown off the pardon.[60]

Section 306. Cr. P.C. enjoins that the approver who is granted

59 1958 Cr. LJ 413.
60 Jagjit Singh vs State 1986 Cr. L.J. 1658.

pardon has to comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other concerned, whether as principal or abettor, in the commission thereof.

By the tender of pardon, there should be no temptation offered to serve for the truth. A tender of pardon on condition that the approver should have been present at the scene of murder and should profess to have personal knowledge of the circumstances is illegal, as such a condition is calculated to tempt the accomplice to strain the truth and is beyond the scope of this section.

The grant of pardon is conditional on the accomplice 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.[61]

According to the proviso to sub-section (1) to section 339 (now section 308) an approver is entitled to plead at his trial that he has complied with the conditions upon which tender was made. In that case the prosecution will have an opportunity to let in evidence to prove that such conditions have not been complied with. As per Section 339-A, an imperative duty is cast upon the High court or Court of Session while holding trial of the approver on commitment or the court of any Magistrate asking the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.[62]

61 Gangs 11A 79; Alagirisami, 33 M 514; Kulian, 33 33 M 173.
62 Harill, A 1940 N 218: 40 Cr LJ 956: All 5L 379: Itwari, 30 Cr. LJ 559.

The stage at which the High Court or the Court of Session should by itself question is the stage when the charge is read out and explained to the accused as per the provisions of Section 271 (1), Cr.P.C., and in the court of the Magistrate before the evidence of witnesses for the prosecution is taken. If the approver pleads that he complied with the conditions of his pardon, then the court shall record the plea and proceed with the trial, but before pronouncement of judgment in the case, a finding has to be given with regard to whether or not, the accused has complied with the conditions of pardon. If the finding is to the effect that the approver had complied with the conditions of the pardon, the court shall, notwithstanding the provisions to the contrary in the Cr. P.C., pass a judgment of acquittal. The provisions of this section are held to be compulsory and the failure of the court to comply with them vitiates trial of the approver.[63] There should be a clear finding as to whether the conditions of the pardon have been broken.[64]

A Magistrate cannot therefore promise a light punishment if the accomplice truly and fully disclosed all circumstances within his knowledge. Nor can he restrict the pardon to certain offences but must tender it for all offences charged and offences connected with the former. The pardon is granted not after disclosure but in anticipation of telling the truth.[65] But the Magistrate can previously ascertain what evidence the accused will give otherwise how could be decide whether pardon should be

63 Jagannath, 27 Cr LJ 768.
64 Horilal Mohanlal Gond v. Emperor, AIR 1940, Nag 77.
65 Harumal, 16 Cr LJ; Faqir 16 L 594; Horilal, 1941 Nag 372 A 1940 N 218.

granted.[66] Availability of other evidence and in abundance is no criterion by itself to reject the application under Sec. 306 Criminal Procedure Code. The prosecution has to prove its case and it is for the prosecution to decide which evidence should be led and in what manner and this right cannot be negative merely on the ground that other evidence is available at least at this stage of the trial.[67]

Whereas a Magistrate told the accused that he was liable to be prosecuted for the offence if he resided from his confession, it was a mere warning and not an illegal conditional pardon.[68] Person who has fulfilled the conditions of the pardon cannot be rearrested for the same offence or for any other offence inseparably connected with it[69], or for any other earlier offences which he admitted when making disclosure[70]. But the pardon is no bar to trial for an entirely different offence.[71]

An accused accepting Pardon can refuse it later and then he can be jointly tried with the other accused.[72] An accused violating the terms of pardon may be tried for the offence (s 308). But a Session Judge cannot on non-compliance with the condition, forfeit it without a fresh enquiry and commitment.[73] Magistrate tendering pardon cannot forfeit it and commit the person for trial with the other accused without a certificate under s 308. Where a special Judge directed that pardon will be granted only after the

66 Pir Imam, A. 1944 S 184.
67 Maosi Nainsi Jain v. Stae of Maharashtra, 1985 Cr. LJ 1818 : 1985 Mah LJ 469 : (1985) 2 Cr LC 200: IIR 1985 Bom. 2192.
68 Bhagavatha. A. 1946 M 271.
69 Shiam Sunder, A 1921 A 234; Ganga, 11 A 79.
70 Nilmadhab 5P 171: 27 Cr LJ 957.
71 Sardara 46 A 236.
72 Basiraddi. 25 Cr L 12 10
73 Nana Amrita, A 1935 B 70: 36 Cr LJ 499.

actual amount misappropriated is deposited by the accused and after the accused has shown his bonafide, the order was held perverse and contrary to law.[74] A pardon by Government is not granted under this section.[75] No conditional pardon can be granted by Government under ss. 306, 307[76]. Granting of amnesty by enquiring officer to persons who were to be examined as prosecution witnesses is highly irregular. A local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against other accused.[77] Though the legality of a local Government tendering a pardon can be doubted, yet there seems to be no authority for the proposition that the tender of such a pardon by the Government amounts to an illegal inducement or threat.[78] Here, we must also bear in mind, that if the pardon granted by the local Government was abused and he, who, confessed as a result of the pardon by the local Government, was again put up as an accused, the confession made by him cannot be used against him unless his case is covered by Section 30 of the Evidence Act.

"It is no doubt true that in a case where the accused is alleged to have committed the offence mentioned in Sec. 306 (1). Criminal Procedure Code and joined other offences not mentioned therein, the grant of pardon cannot be legally refused. But where it is likely to prejudice the accused, the grant of pardon cannot be held justified.[79]

---

74 Fatta. A 1946 A 71.
75 Agastin Chinaappan alias Chinnathambi Pillai v. State 1981 LW (Cr) 120.
76 Alladad 4 Cr LJ 252; Darya 25 Cr LJ 520.
77 Paban sup; Banu 33 C 1353.
78 Dy. Legal Remembrancer v. Banu, 5 Cr. LJ 224.
79 Badri Prasad v. State of U.P. 1970 AWR (HC) 867.

In cases where an accused person is sought to be prosecuted for some offences which are covered by Sec. 337 of the old Code along with other offences which are not so covered it would be proper to grant pardon for all the offences which arise out of the same transaction.[80]

As we have seen that pardon is offered upon two main conditions, first, that the accomplice shall make full information and second, true disclosure of all he knows about the crime. The pardon is forfeited by his failure to comply with these conditions in two corresponding ways, first by concealing some material fact, that is to say, by not giving a full account or second by giving a false account as by not making a true disclosure.[81] The words "false evidence" must be read subject to the limitation of their context, as defining one of the modes of non-compliance with the conditions of the pardon, and not in their fullest literal sense.[82] But while offering a pardon, the approver should not be induced by a temptation to swerve from truth. Thus a tender of pardon on condition that the approver should make disclosures in such a way as to show that he had been present at the scene of murder or that he should profess to have personal knowledge of the circumstances connected with the actual commission of the offence by the other accused person or persons is illegal, as such a condition is calculated to temp the accomplice to strain the truth, and is, therefore beyond the scope of this section.[83] An approver does not undertake to secure a conviction, nor is it a condition of his pardon that he

80 Hasmukhlal N Vakilna v. Bhairav Nath Sing, ITO 1972 Guj LR 811.
81 Dipchand A 1935 I. 799.
82 30 B 611 Per Beaman, J. Ramnath v. Emp.
83 R. v. Yakub (1892) Unrep. Cr. C. Bom. 612.

is to be believed. He is prima facie unreliable unless corroborated in material particulars. He is not to be bound over to any particular narration. The principle is that the law should be worked so that the temptation to the accomplice to strain the truth should be as light as possible.[84]

It has been held in *Ram Nath v. R*[85] that sub-section (2) of Sec. 339, Criminal Procedure Code [now Sec. 308 (2), new Cr.P.C.] makes, by necessary implication, a statement of the approver in his disclosure made before or at the inquiry or trial an exception to the rule of evidence enacted in Sec. 24 of the Evidence Act so far as that section excludes confession made as the result of inducement or promise but should it appear that it was extorted as the result of undue duress, such as threats or violence, the provisions of Sec. 24 would be applicable and the confessional statement would have to be ruled out. Section 339 (2) [now Sec. 308 (2), [now Sec. 308 (2), new Cr.P.C.] can only contemplate the admission of a full and true disclosure made upon the promise of a pardon and not a disclosure induced as a result of undue pressure. In the above case, it was also held that the fact that the approver had not been examined at the trial of the persons he had implicated, was not a breach on the part of the State of the condition upon which the disclosure was made and the pardon granted.

Where, in spite of being in police custody, an approver is neither subjected nor threatened to be subjected to any ill-treatment, the statement made by him will not become inadmissible under Sec. 24, Evidence Act.[86]

---

84 Winsor v. R. LR QB 312; R. v. Yakub, (1892) Unrep. Cr. C. Bom 612 at 613 Per Blackburn J.
85 ILR (1928) 9 Lah 608;
86 85 Inder Pal v. R (1936) 37 Cr. LJ 732.

It was so held in State of *M.P. v. Dalchand Hardayall*[87],, "Though Section 339, Cr. P.C. in terms declare that the approver has to be treated as forfeiting the terms of his pardon, if he refuses to give evidence on behalf of prosecution, his refusal to give evidence for the prosecution obviously tantamount to willfully concealing the facts for the disclosure of which pardon was granted to him. In this view of the matter, a person who is unwilling to step into the witness-box to give evidence on behalf of the prosecution forfeits his pardon and he can be tried for the offence in respect of which he is rendered pardon."

The question as to how far a pardon could protect an approver should not be treated in a narrow spirit. When a pardon has been tendered to one of the accused, and his evidence taken, he cannot be tried again for the offence in regard to which the pardon had been tendered, simply because his evidence was not corroborated, and the other accused therefore, discharged.[88] So also the mere fact that an accused person who is granted a pardon but who is evidently a man of low intellect, makes certain damaging statements in cross-examination but did not actually resile from his previous statement and again in re-examination sticks to his confession should not be held to justify the conclusion that he has deliberately broken the condition upon which pardon was granted.[89] Similarly, where the evidence given by the accused person to whom a pardon had been granted differed from the confession but it appeared that the alteration did not materially affect the result of the case and it further appeared that nearly

87 AIR 1960 M.P. 63.
88 11 A 39.
89 13 OLJ 663.

five months had elapsed between the date of confession and date on which evidence was given, it was held that the prosecution had not discharged the burden of proving that the pardon was forfeited.[90] But an approver who had screened one of his four accomplices, is liable to have his pardon forfeited notwithstanding that he helps to secure the conviction of the other three.[91]

The fact of non-compliance with the condition of the pardon may be proved like any other fact. One kind of the evidence to prove it may be the admission of the approver himself stating that his evidence was false. The fact may also be proved through his statements which if co-contradictory with each other may show that the evidence at the trial is false. If they are inconsistent with each other, the important matters, it may lead to the inference of falsity of his evidence. The falsity may also be established by independent evidence contradicting the fact in respect of which he is supposed to have made a false statement. If, as a result of the evidence indicated above, it is proved that the crime was not committed as stated by the approver or that his own part in the crime or the part attributed to his associates was greater or less than he has stated it to have been, he will be making a false statement. He will be wilfully concealing material facts if he intentionally conceals the name of some persons concerned in or privy to the crime or suppresses facts having important bearing on the crime.[92]

In this connection, it is well to remember that where the prosecution case is that the evidence of the approver is false as regards his own share in the crime, he must necessarily be acquitted of the original offence on the

90 1930 of MWN 773.
91 24 PR (Cr) 1918.
92 Srinop Vs R. (1830) 12 CLR 226.

ground that he had nothing to do with crime. In such a case, a prosecution for perjury is the only thing possible against the approver for making such false statement.

It was held in *Ramnath v. Emperor*[93], that every false statement of the approver does not, however, make him liable for prosecution for the original crime. Approver's disclosure of facts may be oral. It is not specifically laid down that the disclosure of facts by an approver should be reduced to writing. If such disclosure is made orally, the verbal testimony of the person to whom it has been made will be sufficient to prove the statement. As a rule of caution, however, the approver's statement is always formally reduced to writing.

In a case of the Lahore High Court[94], it was held that questioning an approver as to whether he pleads compliance with conditions of pardon after charge was framed, was held to be only an irregularity which could be cured under Section 337. In an earlier case, it happened that the Sessions Judge who tried an approver had come to a definite finding that the approver had failed to comply with the conditions of pardon but the Sessions Judge inverted the order of issues whereby he first discussed the question whether the approver was guilty of the offence charged and later took up the question whether he had complied with the conditions of pardon. Held, under the circumstances that the Sessions Judge has not committed any irregularity which would vitiate the trial, as the one question was closely connected with the other.[95] The view taken by the

93 1928 L 320.
94 Gurdit Singh Vs Emperor AIR 1939 Lah 66.
95 Anup Singh v. Emperor, AIR 1933 Lah 910: 35 Cr LJ 168.

Lahore High Court, it may be submitted, is not in conformity with the general principles that when mandatory provision of law are not complied with, prejudice to the accused has to be assumed. Generally speaking, the legislature enacts mandatory rules after considering pros and cons of a matter. When once the legislature enacts a mandatory provision, it means that provision and no other provision is considered by the legislature to be suitable to achieve the object in question. So breach of a mandatory provision can seldom amount to a mere irregularity, which could be cured under Section 537, Cr.P.C.

Before judgment is passed in the case, the court shall find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the court shall pass a judgment of acquittal (Section 339-A, old Cr.P.C.).

The pardon is forfeited if the approver suppresses anything essential or gives the false evidence.[96] or screens one of the offenders,[97] or resiles from his statement before the Committing Magistrate[98] or says that he knows nothing after making a disclosure and attributes everything to police pressure.[99] When an approver after accepting the pardon tendered refuses to give evidence for the prosecution it amounts to willfully concealing the facts essential for the prosecution and he can be tried in respect of the offence for which he was tendered pardon.[100]

---

96 Kothia, 30 BN 611, Mg Po 17 Cr. LJ 391.
97 Suraj Bhan, 19 Cr LJ 926.
98 Mullu 16 Cr. LJ 417.
99 Ramnath 29 Cr. LJ 413; Budhan 29 A 24.
100 I Dalchand, A 1960 MP 63 (Bassi Reddy, A 1924 M 391 disstd form)

Pardon is not forfeited by trifling discrepancies in cross-examination[101], or by resiling cross-examination from statements in examination in chief[102],or because he gave false evidence in the committing court when he makes a reliable statement in the Sessions Court.[103]

The grant of pardon to a man who implicates himself and others in a murder is not a mere incident in a case to be lightly agreed to as a means of saving further trouble. It is a serious slip to be taken on ample grounds and with a clear recognition of the risk which it necessarily involves of allowing an offender to escape just punishment at the expense of possibly innocent men. But where the circumstances justify that step the withdrawal of the pardon is an equally serious measure, the necessity for which cannot ordinarily be determined until the trial has been completely held.[104]

Since the grant of pardon involves allowing an offender to escape just punishment at the expense of the other accused, the exercise of that power vests no judicial discretion and the Magistrate or the judge should proceed with great caution. He cannot be said to have exercised sound discretion in tendering pardon to one of the accused if, besides the approver, there are many eye-witnesses to the crime who have given evidence in the case. Where it appears that he has not applied his mind to the facts of the case, the order granting pardon cannot be held to be judicially made and is liable to be set aside.[105]

---

101 Dipchand, 37 Cr. LJ 79.
102 Kothia, 30 B 611; Jagannath, 27 Cr. LJ 768.
103 Shahdino, A 1940 S 114 Axiz Begam v. Emperor AIR 1937 Lah 689: 39 Punj LR 394: 171 LC.
104 Elahee Buksh. In re (1866) 5 WR (Cr) 80 : Ghulam Muhammad v. R. (1903) Punj. Rec Cr. No. 4 P. 11.
105 Kashinath Krishna Bapat v.State of Mysore (1963) Cr LJ 547: 40 Mys LJ 935.

It should be noted, that Sec. 339 (2), Cr.P.C. [now Sec. 308 (2), new Cr.P.C.] presupposes a legal tender of pardon. Therefore, when the pardon has been legally granted to the approver, sub-section (2) does not apply but Sec. 24 of the Evidence Act applies; and in such a case, therefore, the confession made under a tender of pardon is not admissible against the approver.[106] The statement of an accused person who had been wrongly pardoned in a case when the offence was not pardonable is irrelevant and inadmissible.[107]

8. Acceptance of Tender and it effect:-

The tender of pardon by itself is not sufficient to convert an accused person as a witness. His acceptance is equally necessary. Until he accepts the tender of pardon; he continues to be an accused person. If he does not accept it, he cannot be examined to have been discharged and becomes a witness. No formal order of discharge is required.[108]

The accomplice must accept the condition in to he may not. He cannot accept it with a variation of conditions, which the law imposes.[109] Acceptance brought about by fraud, undue influence coercion or mistake of fact or misapprehension is no acceptance. A Magistrate when tendering pardon should therefore at the time of tendering ascertain whether the accomplice understands the conditions imposed by law and whether he is willing of his own accord to accept the tender. It is better to record the fact

106 R. v. Hanumantga IIR (1877) 1 Bom 610.
107 R.v. Asgharli, HR (1879) 2 All 260.
108 Peiris, A 19, 54 SC 616: 1954 Cr LJ 1638.
109 Contract Act S. 3 & 7.

of acceptance and to take the signature of the accomplice to such record.

A person cannot be said to accept a pardon tendered to him unless he actively assents to the conditions of the pardon and volunteers to make a statement with reference to the offence. If he express complete ignorance and states that he is indifferent as to whether a pardon was granted or not, he cannot be said to accept a tender of pardon.[110]

It is clear that the acceptance of a pardon by an approver need not be in writing or in any other specified manner. It can be gathered from circumstances. The very fact that the accused appeared before various Magistrates in the capacity of a witness, and not that of an accused person, is a clear indication of the fact that he had accepted the pardon tendered to him.[111] But in a Patna case it was held that there cannot be an implied pardon where the accomplice was never an accused in the previous case against persons whom he had implicated. Thus where a person was never an accused in the previous case and when he gave his evidence there could not have been any misapprehension in his mind that he was giving evidence in a case in which he was made an accused and subsequently discharged. Held that there was no implied pardon in his favor.[112] So it can be said that acceptance of a pardon by an approver is very important because it determines his capacity to give evidence as an approver. Further, a pardon without acceptance cannot be said to be covered by Section 339, Cr.P.C.[113]

---

110 Patali Raj v. R. (1924) 26 Cr LJ 336.
111 Bawa Faquir Singh v. Emperor, AIR 1938 PC 266.
112 36 Cr. L.J. 1935 P. 91.
113 Bepin Behari Sircar v. State of W.Bengal AIR 1959 SC 30.

It is not essential to withdraw the prosecution against accomplice in order to convert him into a witness. In *A.J. Peris v. State of Madras*[114] the accused admitted before the District Magistrate that the confessional statement made by him at Bombay a copy of which was read over to him was voluntarily made by him and that he accepted it as a true statement of all that transpired in connection with the conspiracy and also about the murder and disposal of the dead body of George. The District Magistrate thereupon passed the order that it was a fit case for tendering pardon to him under Sec. 337 (1) of the old Criminal Procedure Code (now 306 (1) new Criminal Procedure Code).

The objection that the tender of pardon was illegal in the absence of a formal order releasing Albert as an accused was never raised before the courts below. Held that the moment the pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be an accused and became a witness. From the moment a pardon is rendered with a view to obtaining a person's evidence, and it is accepted the accomplice becomes a witness qua the case in which he is to be examined and continues to hold that rule up to the time when he fails to comply with condition. In *re Khairati Ram*[115], during that period he is only a witness (so far as the case against the other accused is concerned) and cannot be viewed as an accused; there is no warrant either in principal or in statute for detaining a witness as such in police custody; it was accordingly provided by sub-section (3) Sec. 337 [now Sec. 306 (4) (b) of new

114 AIR (1954) SC. 616.
115 (1931) 32 Cr. LJ 913.

Criminal Procedure Code] that, unless he is already on bail, he should be retained in custody till the termination of the trial though some restraint has to be imposed on his liberty until he has satisfied the condition on which he has obtained the pardon.[116]

9. Effect of Pardon:-

A person who has been granted pardon under this section and who has fulfilled the conditions of pardon must be released, and cannot be rearrested in respect of the same offence or for any offence inseparably connected with it. Thus, in a decoity case, an accused was tendered pardon under this section. He made a full statement implicating himself and others, pointed out where he had a carbine and ammunition concealed, gave them up to the police and in all respects complied with the conditions of the pardon. At the close of the case he was released. He was then rearrested and tried under sec. 20 of the Arms Act in respect of the possession of the carbine and ammunition which he had given up to the police. Held that the possession of carbine and ammunition being an offence in connection with the matter of the decoity, and inseparable from his guilt as a decoit, his prosecution for such an offence, after he had fulfilled the condition in the decoity case, was improper and must be set-aside.[117]

In the case of *Queen-Empress v. Ganga Charan*[118], it was observed that the wordings of sub-section (2) of Section 337 [now Section 306 (4)

116 Haji Ali Mohammed v. Emperor (1931) 33 Cr. LJ 906 Per Milne JC.
117 Shiam, 22 Cr. LJ 693.
118 ILR 11 ALL 79.

(a) new Criminal Procedure Code] that every person accepting a tender under this section shall be examined as a witness in the case mean that for all purposes subject to failure to satisfy the conditions of the pardon as provided for by Sec. 339 (now Sec. 308, new Criminal Procedure Code) such a person ceases to be triable for the offence or offences under inquiry or with reference to Sec. 339 (now Sec 308, new Criminal Procedure Code) such a person ceases to be triable for the offence or offences under inquiry or with reference to Sec. 339 (now Sec. 308, new Criminal Procedure Code) for any other of which he appears to have been guilty in connection with the same matter. This question was considered by the Supreme Court in the case of *State v. Hiralala Girdharila Kothari*[119] while following the above decisions in *B.M. Lamba v. State of Uttar Pradesh*[120], O.P. Trivedi J. of the Allahabad High Court observed that having regard to the language of Sec. 339 (now Sec. 308 new Criminal Procedure Code) which provides the cure to the scope of the pardon granted under Sec. 337 (1) [now Sec. 306 (1), new Criminal Procedure Code] such a pardon protects the person concerned not only against prosecution for the any other offence in which the pardon was granted but also from prosecution for any other offence of which he appears to have been guilty in connection with the same matter.

As the granting of pardon to an accomplice and acceptance by him will have the effect of par to metamorphosing the accomplice from the position of an accused to a position of an ordinary witness.

---

119 AIR (1960) SC 360. WR (HC) 180 : 1968 All Cr. R. 133.
120 1971 Cr LJ 135.

The grant of pardon carried an imputation of guilt and an acceptance thereof a confession of it. In the leading case of *Ex Parte Garland*[121], the Supreme Court of the United States of America explained with admirable clarity the effect of a pardon thus:

"A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence of the guilt, so that in the eye of the law the offender is innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation; it does not restore offices forfeited or property or interests vested in others, in consequence of the conviction and judgment."

In State v. Hiralal Girdharilal Kothari[122]the Supreme Court held that a pardon tendered under Sec. 337, Criminal Procedure Code, is a protection from prosecution and that failure to comply with the conditions on which it is granted removes that protection. On acceptance of the pardon the approver is required to make a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gave evidence. The object of requiring such a thorough and complete disclosure on all the relevant facts, with a view to

121 (1971) 18 Law Ed. 366.
122 AIR 1960 SC 360.

ascertain whether any corroboration is available elsewhere, to the version given by him. In order that the approver may make a thorough and complete disclosure of all the relevant facts, it may not be correct to take a very narrow view of the effect of pardon with respect to offences which appeared to have been committed by the approver in connection with the mater giving rise to the offence or offences for which pardon was tendered.

In the American ease, the exemption indicated was that an approver cannot get back lost offices or property or interest vested in others, in consequence of the effect of the judgment in the case in which the approver gives evidence. In a decoity case, S was tendered a pardon under Section 337, Cr.P.C. He made a full statement implicating himself and others pointing out the place where he had carbine and ammunition concealed, gave them all to the police and in all respects complied with the conditions of the pardon. At the close of the case he was released. He was then rearrested and tried under section 20 of Arms Act in respect of possession of the carbine and ammunition which he had given up to the police. Held, that his illegal possession of the carbine and ammunition which were implements for committing certain acts in connection with the dacoities, and inseparable from his guilt as a decoit, his prosecution for such offence, after he had fulfilled the conditions of pardon, under the decoity case, was improper, and the conviction was set aside.[123] So it would seem that pardon once granted, will cover not only the offence which was committed by the approver and the accused persons who faced their trial of the offence, but also all offences which were committed,

123 22 Cr. LJ 699: 19 ALJ 717, Shiam Sundar v. Emp.

during the same transaction, when the offence for which trial was held was committed. The immunity of the pardon does not cover confession of an approver relating to the other separate and independent offences[124].

1. The Supreme Court has held that though the section does not expressly say as to what would be the effect on the status of an accused who has accepted a tender of pardon, sub-sec. (4) makes it clear that there is an implied discharge of an accused, the moment he accepts a tender of pardon. He at once ceases to be an accused and becomes a witness for the prosecution.[125]

2. A condition for discharge resulting from tender of pardon is that the approver must make a full disclosure of all circumstances relating to commission of the offence; if therefore, he refuses to give evidence for the prosecution or suppresses facts or gives false evidence, he would forfeit his pardon and become liable to be tried according to s. 308 (1)[126].

3. As a result of tender and acceptance of pardon, the approver cannot be tried in the case against the other accused, where he has been tendered pardon but by accepting the tender and by giving evidence as a witness under sub-sec. (4) he is not divested of his liability of making a full disclosure as prosecution witness. Sub. Sec. (4) (b), therefore, provides that the approver must be detained in judicial custody until the termination of the trial of

124 All 236 FB
125 Peiris v. State of Madras, A. 1954 S.C. 616 (620).
126 Prabhati v. State. A. 1970 Del. 264, State of M.P.v. Dalchand, A. 1960 M.P. 63.

the case in which is to be examined as an approver witness.[127]

4. Where he is subsequently tried under s 308 upon the certificate of the Public Prosecutor that he has violated the condition of pardon, but the court holds that he has not violated such condition the grant of pardon must result in an order of acquittal, under s. 308 (5).

5. The liability of the approver can be enforced only by a separate trial as envisaged by s 308 [old s. 339].[128]

The pardon, once granted, cannot be withdrawn. If the approver violates the terms of his pardon the only mode of proceeding against him is laid down in s 308 and unless the conditions laid down therein are fulfilled, there cannot be a valid prosecution of the approver. The sole basis of a valid prosecution is the certificate of the public prosecutor under s 308 (1). At such trial, his evidence under s 306 (4) may be used as evidence against him in s 308 (2).

6. The pardon, once granted and accepted by the approver, cannot be withdrawn by either the State or the approver, until he is examined as a witness for the prosecution both in the committing Court as well as in the trial court [s 306 (4)].

7. The approver may have resided from the statement made before the Magistrate in the committing Court and may not have

127 K.E. v. Jogeswear (1942) 44 Cr. L.J. 279.
128 Fatta v. Emp. A 1947 All 71.

complied with the condition on which pardon was granted to him, still the prosecution has to examine him as witness in the trial Court. It is only where the Public Prosecutor certifies that the approver has not complied with the conditions of the pardon that the approver may be freed under s 308, not only for the offence in respect of which the pardon was granted but also in respect of other offences. Hence, it is not competent for the approver to cast away the pardon granted to him and refuse to be examined as a prosecution witness in the trial Court.[129]

A valid pardon once given will not be affected in any way by the subsequent proceedings in the case or by the result of the trial. Thus for instance, as a result of the subsequent trial, the offence may be changed into one which is not mentioned in Section 337, or the charge may be altered to an offence not coming with the purview of Section 337, but even under such circumstances, the pardon that was already granted will not be affected.[130] So also the granting of pardon is not affected by the charges under which an accused person is committed to the Court of Session. In other words, it may be stated that the granting of pardon under Section 337, depends upon the question as to whether or not, the offence alleged against the accused person or persons, is one which is mentioned in the section. Thus where a police officer sends up a charge sheet against an accused under Section 477-A, I.P. Code, which is an offence expressly mentioned in Section 337, in addition to other offences, the committing

129 State v. Jagjit, A 1989 SC 598 (paras 8, 12)
130 Public Prosecutor, Peshawar Division v. sh. Muqarrab and others, AIR 1933 Peshawar 3:34 Cr.L.J. 212.

Magistrate, if he is one of the Magistrates mentioned in S. 337. has jurisdiction to tender pardon, although, he subsequently commits the accused to the Court of Session for offences not mentioned in section 337, Cr.P.C.[131]

The effect of tendering pardon is to bring about the discharge of the accused and end the status of the accused as far as the pardoned man is concerned. So it cannot be said that before tendering a pardon to an accomplice he should be discharged and if not so discharged, his evidence in the trial as an approver would be illegal.[132]

10. Examination of approver as witness:-

The provisions laid down in s. 306 of the Cr. P.C. do not exactly limit the time when the accomplice is to be examined. They of course clearly speak that the accomplice is at the first instance to be examined by the trial court.[133] Reading s. 306, Cr.P.C. it is clear that there is no obligation on the Magistrate to record a statement of the person concerned before he is tendered a pardon with regard to the offences coming within said section. The only condition which a Magistrate can place on the accused concerned before tendering a pardon to him is that he should make a full an true disclosure of all the facts within his knowledge with regard to the offence. It is not obligatory on the prosecution to record such a statement under s. 164, Cr.P.C. before or even after a pardon is tendered to him. If the prosecution thinks fit to get a statement recorded under s. 164,

131 Anilesh Chandra vs. State AIR 1951 Assam 122.
132 A.J. Peires vs. State of Madras AIR 1954 SC 611.
133 Gagu vs. State 1975 Cr LJ 670 (Guj.)

Cr.P.C. it would be at liberty to do so. But the prosecution cannot be compelled to get the statement recorded under s. 164 Cr.P.C. before he is actually examined by the Magistrate as provided in s. 306. Cr.P.C.

An approver is a person who is an accomplice in crime and who turns out a witness for the prosecution. Though accomplice evidence is admissible under Section 133 of the Evidence Act against a co-accused, being a particular in crime and therefore an infamous witness, his testimony is regarded with greatest distrust and fullest corroboration in material particulars is required for a conviction. He is no longer treated as an accused and is examined as a witness when it is absolutely necessary for the ends of justice. Where direct evidence is required but is not available, to examine an accomplice as a witness who is acquainted with every circumstances relative to the offence and with all or almost all persons concerned as principal or abettor in the commission of the offence, and who is willing to tell the whole truth and to conceal nothing should be selected. Soon after pardon is tendered to an accomplice (that is a person who is supposed to have been directly or indirectly concerned in, or privy to the offence), and the accomplice accepts it, he becomes an approver. By the pardon he is absolved from his guilt as he can be presumed to have been discharged. Thereafter he no longer is an accused person but becomes a competent witness.[134]

The Supreme Court of America described the position of an approver in the following way:- "The pardon reaches both the punishment

134 A.J. Peires v. State of Madras, AIR 1954 SC 616.

prescribed for the offence, and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence of the guilt, so that in the eye of law, the offender is as innocent as if he had never committed the offence. If granted before conviction it prevents any of the penalties and disabilities and restores him to all his civil rights; it makes him as it were a new man and gives him new credit and capacity. There is only one limitation to its operation; it does not restore offices forfeited or property or interests vested in others; in consequence of the conviction and judgment."[135]

The Criminal Procedure Code now insists that accomplices who have been tendered a pardon must be examined both in the committing court of Magistrate as well as at trial by the court of Session. This provision is inserted in the interests of justice and is not intended for the benefit of the approver. Its purpose is to ensure that all the evidence obtained from the accomplice is placed before the court so that justice may be done as between the State and the persons placed in their trial. It is not an ordeal through which an approver has to pass before he can win to safety.

The obligation to make a full and true disclosure would arise whenever the approver is lawfully called upon to give evidence touching the matter it may be in the Committing Court, it may be in the Sessions Court. But the obligation to make a full and true disclosure rests on the approver at every stage of which he can be lawfully required to give

135 Ex Parele Garland. (1871) 18, Law Ed. 366.

evidence. If at any stage he either willfully conceals material particulars or gives false evidence, he would have failed to comply with the conditions on which the pardon was tendered to him thereby incurred its forfeiture. Section 306, Criminal Procedure Code does not contemplate that the approver should be asked a disclosure at the very time of tender of a pardon [136]. The disclosure of facts by the pardoned accused may be oral. Sec 306 (1) Criminal Procedure Code nowhere lays down that the disclosure of facts shall be reduced to writing. As a rule of caution, however, approver's statement is formally reduced to writing, a practice, which it is very desirable to observe so that no dispute may subsequently arise as to what the exact terms of the statement were.

The credibility of the evidence of the approver should in any given case be judged by applying the usual tests, such as probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self exculpatory and so on and so forth. The Court should apply all these tests before acting upon the approver's evidence.[137]

The Court has, in addition , to ascertain whether his evidence has been corroborated sufficiently in material particulars[138]

The approver's evidence should be corroborated in material facts and the corroborative evidence must be such as to lend assurance to the mind

136 R.B. v. Bodhan (1900)13 CPLR (Cr)7; Emperor v. Pir Imamshah AIR 1944 Smd 184; ILR 1944 Kar 97; Horilal v. EMperor, AIR 1940 Nag 218

137 State of Andhra Pradesh v. Cheemalapati Ganeshwara Rao (1963) 2 Cr. LJ 671 : AIR 1963 SC 1950 : (1964) 3 SCR 297 : (1964) 2 SCA 38.

138 Sardul Singh v. State (1967) 69 Punj LR (D) 168

of the Court that the evidence of the approver could be relied on safely. But it is not necessary that the approver's evidence should be corroborated in every respect. The corroboration necessary for the appreciation of the approver's evidence is of two kinds:

i) First, the court has to satisfy itself that the statement of the approver is credible in itself, and

ii) secondly, the Court should seek corroboration of the approver's evidence with respect to the part of other accused persons in the crime and this evidence has to be of such a nature as to connect the other accused with the crime. The approver's evidence has to satisfy a double test. He evidence must show that he is reliable witness and that is a test which is common to all witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the case of weak or tainted evidence like that of the approver. The evidence of approver can only be accepted on its own merits and with sufficient corroboration.[139]

The basic rule of appraisal of evidence of all witnesses, whether approvers or not is that their versions must be shown to be credible. It is also a common rule to be applied to all types of evidence that sufficient corroboration of their versions should be found before accepting their evidence. The part of the evidence of an approver which is rejected as well

139 Saravanabhavan v. State of Madras 1966 Cr. LJ 949: AIR 1966 SC 1273 : (1966) I SCWR 840 : 1966 MWN 200 : (1966) I SCA 730 : 1966 SCD 561.

as the part which is accepted has to be subject to the aforesaid tests for appraisal of evidence, and in using that part of the evidence of an approver which has passed the test of credibility, as merely corroborative of the evidence given by other witnesses on the same aspect of the case, no rule of prudence or practice is violated. The maxim *falsus in uno falsus in omnibus* is not applicable to approvers or any class of witnesses in India.[140] Although under Sec. 308 (2) new Criminal Procedure Code, the statements of the approver may be admitted in evidence but the questions of the weight of such statements as against the approver still remains. If the proof of the falsity of such statement consists of earlier statement or confession of the approver and such statement or confession of the approver and such statement or confession is so contradictory to the statement under Sec. 337 (2) [now Sec. 306 (4) (a) of the new Code of Criminal Procedure Code, 1973] that one must be false as a matter of logic, still the admissibility of the evidence upon which a charge is founded and the truth of it should be considered before sanction is given because it may be that his statements in such confession were induced and that his evidence in the trial was true. There must, however, be evidence, circumstantial or otherwise to show that the earlier statement or confession was improperly induced. Similarly the second statement may be due to the yielding to the pressure of the police and the circumstances in which his self-incriminating statements appear shall have also to be considered.[141]

Previous to the amendment of the Code in 1923 there was a conflict

140 Devi Prasad v. State 1967 Cr. LJ 134 : AIR 1967 All 64.
141 R. v. Prabhu (1937) 38 Cr. LJ 1079 R. v. Mathur, II.R. (1934) 56 All 288.

of opinion as to the legality of joint trial.[142] of the approver with the other accused persons but the conflict has been set at rest by the proviso in Sec. 339 clause (1) [now the first proviso to Sec. 308 (1), Criminal Procedure Code] which now expressly provides that the approver shall not be jointly tried with any of the other accused.

The proper time for the trial of the approver, therefore, as after the trial of the other accused is over. Neither as a matter of reason or logic, nor as a matter of statutory interpretation, can it be said that Sec. 339 (1) [now sec. 308 (1), new Cr.P.C.] is dependent on or connected with Sec. 337(2) [now Sec. 306 (4) (a), new Cr.P.C.] in the sense that the approver must be examined both in the Committing Court and the Sessions Court before it can be held that he has forfeited his pardon. It is sufficient if he fails to perform the condition on which the pardon has been granted to him at either stage. In *re Arusami Goundan*[143], What is the position of an approver who has failed to comply with the terms on which a pardon was granted to him was considered in the case of *Emperor v. Shahdino Dhompatrow*[144]. The facts in that case were as follows:

On 19th July, 1936, a number of persons formed an unlawful assembly committed house-trespass and abducted a woman. On 7th August, 1936, the District Magistrate tendered a pardon to one of the accused named Shahdino. On 12th October, 1936, this man was examined as a witness in the court of the Committing Magistrate.1

142 R.v. Sudra (1889) IIR 14 All 336 : Contra R. v. Mulua. HR (1892) 14 All 502; Sashi Rajbunshi v. R. (1941) 19 CWN 295 Chanan v. R., IIR 1 Lah 218 Sec. also R. v. Jagat Chandra Mani ILR (1795) 22 Cal. 50.

143 AIR 1959 Mad 274: 59 MIJ (Cr) 503 : 1959 AWR 42: 1959 All Cr R 187 : ILR 1959 Mad 320.

144 AIR 1940 Sind 114 41 Cr. LJ 447.

In his evidence, he denied all knowledge of the offence. He was then sent back to the sub-jail in which the other accused were lodged. On 27th October, 1936, Shahdino applied through his advocate asking that the Magistrate should recall him and re-examine him explaining him that on 12th September, 1936, he gave the evidence he did because of his fear of the other accused who were in the same sub-jail. He also prayed that he be kept in custody in some other place. On 23rd December, 1936, the Magistrate discharged some of the accused and committed ten others to the Sessions Court.

Shahdino was examined as a witness in the Sessions Court and then he made a full and true disclosure of all the facts relating to the offence. The Sessions Judge, however, took the view that the evidence of Shahdino was practically worthless. Subsequently, Shahdino was prosecuted for the part attributed to him in the original offence of unlawful assembly and abduction. Shahdino pleaded that the prosecution was barred under Sec. 339, Criminal Procedure Code (now Sec. 308 new Cr.P.C.,) since he had complied with the conditions upon which the pardon was tendered to him. The Additional Sessions Judge accepted the plea and acquitted him. The Government appealed. The court observed:

"But we think that when the evidence given by the approver in the Sessions Court was in accordance with the conditions of his pardon, and was evidence upon which, in the circumstances as now disclosed. reliance might very well have been placed, then the fact that in the Committing Magistrate's Court, the approver gave false evidence, should not

necessarily be taken to be non-compliance with the condition of pardon."

The Madras High Court has held that the case is not intended to rule that it is sufficient for an approver to adhere to his story at one stage of the proceeding. *In re Arusami Goundan.*[145]

Balakrishan Ayyar, J., who delivered the judgment of the Court observed:

"It must be pointed out that the facts in that case were somewhat peculiar. Shahdino made a confession to the Magistrate. When he was placed in the box before the committing Magistrate he restricted his earlier statements. That was apparently because he had been frightened by the other accused who were detained in the same sub-jail. As soon as practicable thereafter he made representation to that effect to the Magistrate who thereupon had him removed to another place.

In the Sessions Court, he fully adhered his original statement. Therefore when he retracted his statement in the Committing Court, he did so out of fear. The High Court also took the view that it was in the Sessions Court that the approver had his main duty to perform and that in the circumstances of the case, it considered that Shahdino had substantially complied with the terms of the pardon tendered to him. That being so, it will not be right to treat this case as an authority for the proposition that an approver will have earned his pardon if he adheres to his story in the Sessions Court, and that if he is denied the opportunity of doing so by his not being examined in that court, it cannot be said that he has failed to

145 AIR 1959 Mad 274: 59 MLJ (Cr) 503: 1959 AWR (Sup) 42: 1959 All C.R 187: IIR 1959.

comply with the terms on which the pardon was tendered to rule that it is sufficient for an approver to adhere to his story at one stage of the proceedings".

11. Evidentiary value of the evidence of Approver:-

Though a conviction is not illegal because it proceeds on the uncorroborated testimony of an approver (sec. 133, Evidence Act), yet the universal practice is not to convict on the testimony of an accomplice unless it is corroborated in material particulars.[146] The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, that the evidence of an accomplice is regarded and initio as open to grave suspicion. Accordingly, if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particulars; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon that evidence alone. The Judge in his charge to the jury should take care to point out that although a conviction based on the uncorroborated testimony of the approver is not illegal, yet it is not the practice of the court so to convict, and should state also that the evidence of the approver was given on conditional pardon.[147] If this warning is omitted, a conviction based on such uncorroborated evidence must be set aside.

The combined effect of ss. 133 and 114 (b) of the Evidence Act is

146 Kallu, 7 All. 160.
147 Jamiruddi, 29 Cal 782.

that-an accomplice is competent to give evidence; (b) though the conviction of an accused on the sole testimony of an accomplice cannot be held to be illegal yet the courts as a matter of practice, will not accept the evidence of such a witness without corroboration of his evidence in material particulars qua each of the accused.[148]

Every witness who is competent to give evidence is not necessarily a reliable witness. Since an approver is alleged to be an accomplice in the commission of the crime itself or 'privy' to the offence, the appreciation of his evidence must satisfy a double test.[149]

Appreciation of an approver's evidence has to satisfy a double test, his evidence must show that he is a reliable witness. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration.[150] but this does not mean that it is only after the first test is satisfied that the question of looking for corroboration arises.[151]

The reliability of the approver's evidence against a particular accused may be shaken if the approver's account against another accused is wholly discrepant.[152]

Now does it mean that before reliance can be placed upon the evidence of an approver, it must appear that he is a penitent witness. The Section itself shows that the motivating factor for an approver to turn is the

148 Bhiva v. State of Maharashtra. A. 1963 S.C. 599 (para 7).
149 Sarwan v. State of Punab A. 1957 SC 637 (paras. 7-8).
150 Sarvanbhavan. A 1966 SC 1273; Lachhiram. A 1967 SC 392.
151 Devi Pd. A. 1967 A 64.
152 AIR 1957 S.C. 637.

hope of pardon and not any noble sentiment like contrition at the evil in which he has participated. Whether the evidence of the approver will be accepted or not will have to be determined by applying the usual tests, such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on. The Court has, in addition, to ascertain whether his evidence has been corroborated in material particulars.

The reliability test, again, does not mean that the evidence of the approver has to be considered in two water-tight compartments; it must be considered as a whole, along with the other evidence led by way of corroboration.

After the approver's evidence passes the test of reliability, which is a test common to all witnesses[153], it must pass the test of corroboration, which is special to the approver's evidence because it is tainted evidence, coming from an accomplice to the crime. The nature of corroboration required will not doubt vary according to circumstances but it means that the approver-witness's account must be corroborated by the evidence of other witnesses or circumstantial evidence on the following points:

It must confirm in some material particulars that the offence had been committed. It must also be confirmed that the accused committed the offence. This means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony of the approver, it must confirm

153 Jnanendra vs. State of W.B. AIR 1959 SC 1199.

that part of the testimony which suggests that the crime was committed by the accused.

For instance if the approver says that the accused and he stole the sheep and he put the skins in a certain place the discovery of the skins in that place would not corroborate the evidence of the approver as against the accused. But if the skins were found in the house of the accused, this would corroborate, because it would tend to confirm the statement that the accused had some hand in the theft.[154] Thus there are few general guiding rules as to corroboration:-

i) Such corroboration may come from circumstantial evidence.[155]

ii) The circumstantial evidence need not be to the effect that the accused committed the crime, but would suffice if it shows that the accused was connected with the crime, e.g., in the case of offences committed in secret, where direct evidence may not be available.[156]

iii) The conduct of the accused himself, as against whom corroboration is required, may constitute circumstantial corroboration of the approver's evidence.

iv) When the evidence of an approver is sought to be corroborated by the evidence of other witnesses, such witnesses must be independent of sources which are likely to be tainted so that the evidence of one approver cannot be corroborated by the evidence of another accomplice.

154 Shasamma v. State A. 1970 S.C. 1330.
155 Subramaniam v. State of T.N.A. 1975 S.C. 139 (paras 45-46).
156 Rameswar v. State (1952) S.C.R. 377 (387-90).

v) But a previous statement of the approver himself may afford corroboration of his testimony under the present section if it satisfies the conditions laid down in s. 157, Evidence Act.

vi) The nature or extent of corroboration required would vary according to the circumstance in which the offence was committed and other relevant circumstances. It may even be dispensed with where there are special circumstances. Where, however corroborative evidence is produced, it has also to be weighed, with other evidence, even though it is legally admissible. Where the approver's evidence is corroborated by the other evidence, on material points, conviction may be based on the sole testimony of the approver. The statement of an approver may be given in evidence against him under s 339 (2) [now s 308 (2)] Cr P. Code but the operation of s. 24 of Evidence Act is altogether not excluded.[157]

The statement made by an approver can be given in evidence against him at his trial. The statement made by an approver relates only, to a statement, made by him before the committing Magistrate[158] . But in a Nagpur case it was held that the expression used in sub-section (2) to Section 339 is wide enough to cover a statement before the pardoning Magistrate.[159] The word 'statement' in sub-section (2) of Section 339, obviously refers to the statement of the approver as a witness during the course of the enquiry or trial.

157 R. vs. Cunna, 22 Bom LR 1247 : 59IC 324.
158 Emperor v. Nga Bolyji, AIR 1925 R 286 3 Rang 224.
159 Gangaram v. Emperor 1925 N 172.

But in its extended meaning it may include statement of the approver recorded under Section 164 Cr.P.C. but in no case, it will include a confessional statement of the approver and recorded under Section 164, before actually pardon was granted to him.[160]

So approver's evidence before committing Magistrate is a statement within the meaning of Section 339 (2) and can be used against him in evidence when the pardon has been forfeited, even though he was not examined as a witness in the trial in the Sessions Court.

But this last-mentioned contingency seldom happens because an approver must be sent up to the Sessions Court to give evidence. However, as such statement is in the nature of a confession and so when it is withdrawn it should be regarded as a retracted confession, and must; therefore, be corroborated in adequate manner because even to convict an approver there must also be that degree of certainty which the law requires.[161] The withdrawal of his statement by the approver at the earliest opportunity throws doubt on the truth of the statement. Thus where a Magistrate withdrew the pardon granted by him to the accused on his making a statement in the witness box, which was a complete retraction of the confession made by him, the confession cannot be made the basis of the conviction of the approver.

The fact that he retracted the confession at the earliest opportunity in spite of the promise of pardon is a very strong circumstances against the

160 Hiralal Mohanlal Gond v. Emperor AIR 1940 Nagpur 218.
161 AIR 1937 Lah 689.

truth of the confession made by him.[162]

Now sub-section (2) of Sec. 339 Criminal Procedure Code [now Sec. 308(2) new Criminal Procedure Code] provides that the statement made by a person who has accepted a pardon may be proved in evidence against him at the trial of the approver. It will be noticed in the first place that the words of the subsection are general so as to allow the statements to be used against the approver whether he is tried for perjury or for the original offence. Secondly, as the sub-section refers to "the statement made by a person who has accepted a tender of pardon," it obviously contemplates those statements of the approver, which are made at or after the tender of pardon.

When the statement sough to be proved against the approver is a confession to a Magistrate made after the approver has accepted the conditions of tender of pardon or is one made in his deposition before the Court, a question common to both these classes of statements is if Sec. 24 of the Evidence Act applies to such confessions or depositions and if so, to what extent? As regards confessions and depositions made at or after the tender of pardon, evidently an inducement by a person in authority has come into existence for making the disclosure but Sec: 339 (2) Criminal Procedure Code [now Sec. 308 (2) new Criminal Procedure Code] has been enacted to make it clear that a statement made by a person who has accepted a tender of pardon, is not governed by Sec. 24 of the Evidence Act so far as the statement is due to the inducement made by way of a

162 Chandan vs Emperor, 1935 Qudh 226.

promise of pardon and the statements of the approver though induced by such promise of pardon can be used as evidence against the maker when the pardon has been forfeited.[163] It does not follow from the above that disclosures made by inducement other than promise of pardon are admissible. It has been seen before that disclosures otherwise induced would be inadmissible.

The statement referred to in Sec. 339 (2) [now Sec 308 (2) new Criminal Procedure Code] is not restricted to the deposition given under subsection (2) of Sec. 337 [now Sec. 306(4) (a) new Criminal Procedure Code] but is wide enough to include the statements made by the approver at the time of the tender of pardon.[164]

The approver should be examined first but where the approver was examined after the examination of other witnesses not including any corroborative eye-witness and the corroborative evidence consisted of confessional statements of accused implicating themselves and their co-accused and general circumstantial defence, it was held that no prejudice was caused to the accused and though the approver should have been examined first, his evidence could be acted upon.[165]

In *State of Himachal Pradesh v. Surinder Mohan and others*[166] the approver was examined under Sec. 306 (4) (a) Cr.P.C. before the Chief Judl. Magistrate and he was subsequently examined and cross-examined

163 Sulan Khan v. R. (1908) 8 Cr. LJ 445.
164 Gangaram v. R. (1925) 25 Cr. LJ 1335 : Ram Nath V. R. 1L R (1928) 9 Lah 608 29 Cr. LJ 413: Emperor v. Motilal Hiralal II R (1922) 46 Bom 61
165 Thangbul v. Government of Manipur 1968 Cr. LJ 514 at 518 : AIR 1968 Manipur 34.
166 (2000) 2, S.C.C. 396.

during trial before the Court of Session. At the stage of arguments before the sessions Court, it was contended for the first time that failure to give an opportunity for the accused to cross-examine the approver before committal court would vitiate trial. The said contention was repelled by the Supreme Court holding that the said contention was raised belatedly and that even if the accused had the right to cross-examine the approver when examined under Sec. 306 (4) (a) Cr.P.C., the defect would stand cured under Sec. 465 Cr.P.C. Dealing with the contention of the accused regarding the alleged right of cross-examination, this is what the apex court held in para 11.

"From the aforesaid ingredients, it is abundantly clear that at the stage of investigation, inquiry or trial of the offence, the person to whom pardon is to be granted, is to be examined for collecting the evidence of a person who is directly or indirectly concerned in or privy to an offence. At the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right to cross-examination would arise only at the time of trial. During the course of investigation by the police, the question of cross-examination by the accused does not arise. Similarly, under Sec. 200 Cr.P.C. when the Magistrate before taking cognizance of the offence, that is, before issuing process holds the inquiry, the accused has no right to be heard, and, therefore, the question of cross-examination does not arise. Further, the person to whom pardon is granted, is examined but is not offered for cross-examination and thereafter during trial if he is examined and cross-

examined then there is no question of any prejudice caused to the accused. In such cases, at the most the accused may lose the chance to cross-examine the approver twice, that is to say, once before committal and the other at the time of trial."

12. Constitutional validity regarding Exercise of Pardon power:-

The philosophy underlying the pardon power is that "every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy."[167]

The rationale of the pardon power has been felicitously enunciated by the celebrated Justice Holmes of the United States Supreme Court in the case of *Biddle. vPerovish*[168] in these words-

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed".

In case of *Kehar Singh vs union of India,*[169] these observation of Justice Holmes have been approved.

167 59 American Jurisprudence 2 d, Page 5.
168 (71 L.Ed. 1161 at 1163)
169 1989(1) SCC 204

The classic exposition of the law relating to pardon is to be found in *Exparte Philip Grossman* [170] where Chief Justice Taft stated:-

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of Justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal Judgments."

The dicta *in Ex parte Philip Grossman* were approved and adopted by the apex court in *Kuljit Singh vs Lt. Governor of Delhi-*[171] In actual practice, a sentence has been remitted in the exercise of this power on the discovery of a mistake committed by the High Court disposing of a criminal appeal[172]

However the legal effect of a pardon is wholly different from a judicial supersession of the original sentence. In *Kehar Singh's*[173] case this Hon'ble Court observed that in exercising the power under Article 72 " the President does not amend or modify or supersede the judicial record..... and this is so, not withstanding that the practical effect of the Presidential act. to remove the stigma of guilt from the accused or to remit the sentence

170 (69 L.Ed. 527)
171 1982(1) SCC 417
172 Nar Singh vs state of uttar pradesh AIR 1954 SC 457
173 1989 (1) SCC 204 P. 213.

imposed on him" The President " acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it"

This ostensible incongruity is explained by Sutherland J. in *United States v. Benz*[174] in these words:-

"The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function to carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment"

The constitution of India and the criminal procedure code provide following explicit grounds to be considered while granting pardon. They are-

a) interest of society and the convict;

b) the period of imprisonment undergone and the remaining period;

c) seriousness and relative recentness of the offence;

d) the age of the prisoner and the reasonably expectation of his longevity;

e) the health of the prisoner especially any serious illness from which he may be suffering;

174 25L.Ed.354.P.358

f) good prison record;

g) post conviction conduct, character and reputation;

h) remorse and atonement;

i) deference to public opinion.

It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law.

It is necessary to keep in mind the salutary principle that: "To shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss the community"[175]

The power of pardon under criminal procedure draw its validity from the constitution of India. Section 306 Cr.P.C in corporated principles enshrined in various Articles of Indian constitution and does not conflict with the fundamental rights provides by our constitution. An elaborate comparison and explanation is discussed below -

(i) Section 306 and Art 14 of the constitution:-

Section 306 (old section 337 of Cr.P.C.) is enacted for the purpose of facilitating the securing of evidence to establish a criminal offence. It was attacked on the ground that it favours one accused person at the

175 Burgbess,J.C.in (1897) ,U.B.R. 330 (334)

expense of the other accused and hence it offends Art. 14of the Constitution. The Madras High Court in *Mohideen v state of Madras*[176] held that the section refrains from` prosecution of one accused for creation reasons enjoined by the statute in the interest of the successful prosecution of certain other persons and getting the best evidence possible against them.

It is not a case of failure to give protection to the accused who are prosecuted, and hence the section does not offend Art. 14 of the Constitution. It was held by the Supreme Court in *lqbal Singh v. State (Delhi Administration)*[177] that-

Under Sec. 337 (2-B) of the Criminal procedure code, 1898 (Corresponding to sec. 306(5) of the new Code of Criminal procedure 1973], in the case of an offence mentioned in the sub-section (now sub-section(2) of Sec. 306 of the new Code of Criminal procedure, 1973), the Magistrate has to send the case for trial to the court of the Special Judge-

a. Without making any further inquiry as to whether there are reasonable grounds for believing that the accused is guilty, but.

b. After the approver has been examined under sec 337(2) of the old code[corresponding to Sec. 306 (4) (a) of the new code].

Thus where a person has accepted a tender of pardon at the stage of investigation in a case involving any of the specified offences the prosecution can file the charge-sheet either- in the Court of a

176 (1965) 2Cr LJ516
177 AIR 1977 SC 2437

competent Magistrate, or before the special Judge who under Sec. 8 (1) of the Criminal Law (Amendment) Act, 1952 has power to take cognizance of the offence without the accused being committed to him for trial.

c. It follows that if the magistrate takes cognizance of the offence, the approver will have to be examined as a witness twice-once in the Court of the Magistrate; and again in the Court of the Special Judge to whom the Magistrate has to send the case for trial, but, if the charge-sheet is filed directly in the court of the Special Judge, he can be examined once only before the Special Judge.

d. It is clear from the scheme of Sec. 337 of the old Code (now Sec. 306 of the new Code that what is required is that a person who accepts a tender of pardon, must be examined as a witness at the different stages of the proceeding. Where, however, a Special Judge takes cognizance of the case, the occasion for examining the approver as a witness arises only once. In such a case, there would be no previous evidence of the approver against which his evidence at the trial can be tested, which would be available to the accused had the proceeding been initiated in the Court of a Magistrate. But there is nothing in Sec. 337 (2-B) of the old Code (now Sec. 306 (5) (a) (ii) of the new Code) to suggest that it affects in any way the jurisdiction of the Special Judge to take cognizance of an offence without the accused being committed to him for trial.

e. Also the fact that the approver's evidence cannot be tested against

any previous statement does not make any material difference to detriment of the accused transgressing Article 14 of the Constitution. The Special Judge in any case will have to apply the well-established tests for the appreciation of the accomplice's evidence.

f. The mere availability of two procedures would not justify the quashing of a provision as being violative of Article 14 and what is necessary to attract the inhibition of the Article is that there must be substantial and qualitative difference between the two procedures so that one is really and substantially more drastic and prejudicial than the other.

g. There is no such qualitative difference in the two procedures. Whether a witness is examined once or twice does not make any such substantial difference.

h. Therefore, Sec. 337 (2-B) of the old Code does not offend Art. 14 of the Constitution.

(ii) Section 306 Cr. P.C. and Art. 20 (3) of the Indian Constitution:-

Article 20 (3) of the Constitution protects a person who is accused of an offence that he shall not be compelled to be a witness against himself. But as a co-accused accepts a pardon of his free will on condition of a true disclosure in his own interest, and is not "compelled" to give self incriminating evidence, the law in ss 306 and 308 Cr. P. Code is not affected. He is a person who voluntarily answers questions from the witness-box waives the privilege, because he is then not a witness against

himself but against others. The evidence of an accomplice cannot, therefore, be ruled out because he could have been tried jointly with the accused but was not and was instead to give evidence in the case.[178] Art. 20(3) of the Constitution gives no right to the approver to refuse to answer incriminating question because-

The moment he is granted pardon, he ceases to be an accused and becomes a witness, and as a witness he is fully protected from prosecution or conviction for incriminating statements made by him as approver, by virtue of s. 132 of the Evidence act.

As on account of, Art. 20 (3) of the Constitution, no person accused of an offence can be compelled to be a witness against himself. So the compelled statement even of an approver cannot be used as evidence against him in his subsequent trial.

When trifling discrepancies are elicited in cross-examination and when there is no proof that the approver's statement is inconsistent in any of the trifling matters, there may be no justification for forfeiture of pardon once granted.[179] So a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under s 308.

Sub-section (3) of Sec. 339, Criminal Procedure Code [now the second Proviso to Sec. 308 (1) new Criminal Procedure Code] provides that no prosecution for the offence of false evidence in respect of such statement made by a person who has accepted a tender of pardon, can be

178 Laxmipat Choraria v. State of Madras. 1968 Cr. LJ 1124, 1128: AIR 1968 SC 938: (1963) 1
179 Dip Chand v. Emperor, AIR 1935 Lahore 799.

entertained without the sanction of the High Court.

The sanction is essential and if not obtained before the institution of the proceedings, the defect affects the jurisdiction of the Court and cannot be cured under Sec. 537, Criminal Procedure Code[180] (Now Sec. 465 new Criminal Procedure Code).

The sanction to prosecute an approver should be obtained by an application to the High Court by motion on behalf of the Government in open Court and not by a letter of reference.[181]

It is better to set out in the application the distinct statements said to be false without leaving them for the Court to discover them.

The High Court has power to grant sanction for the prosecution under Sec. 193 or Sec. 194 Indian Penal Code, on the strength of a statement made by the approver which is prima facie false; and it can goven such sanction even though the approver has not been examined as a witness in the cases as required by Sec. 337 (2) [now Sec. 306 (4) (a) new Criminal Procedure Code][182]

Sub-section (3) of Sec. 339 now second Proviso to Sec. 308 (1) of the new Code of Criminal Procedure Code 1973 relates to a charge for giving false evidence in respect of the statement made by an approver who has accepted a tender of pardon.

The necessity for obtaining the previous sanction of the High Court shows that the mere fact that the approver makes two inconsistent

180 (Mst) Sharina v. R. 1834 PR Cr. No. 42 at 96 R. v. Htuktalwe (1904) 1 Cr. LJ 1021.
181 R. vs Manik Chand Sarkar 1 LR (1987) 24 Cal. 492.
182 R. vs Raja (1913) 14 Cr. LJ 64.

statements cannot be a justification for directing his prosecution.[183]

This direction vested in the High Court to sanction the prosecution should be exercised with extreme caution. The mere fact that approver has made two contradictory statements cannot be a warrant for this prosecution, because it sometimes happens that when as Investigation Officer is confronted with a weak case, he in his misplaced zeal attempts to bolster it by getting hold of an approver that if there is any such indication in the circumstances of a particular case, sanction ought not to be given under Sec. 339 (3) Criminal Procedure Code [now second proviso to Sec. 308 (1), new Criminal Procedure Code][184]. But where the approver resides from previous statement, he can be prosecuted under the original cases or under Sec. 193 I.P.C.[185]

Sub-section (3) [now Second Prviso to Sec. 308 (1) of the new Code of Criminal Procedure, 1973] merely imposes an additional condition to the institution of a prosecution for perjury and does not have the effect of overriding the provisions of Sec. 476, Criminal Procedure Code (now Sec. 340, new Criminal Procedure Code). Thus, even where the sanction of the High Court is obtained the prosecution could be instituted only in accordance with the provisions of Secs. 195 and 476, Criminal Procedure Code (now Secs. 195 and 340, new Criminal Procedure Code)[186].

Sub-section 3 of the Section 339 provides that no prosecution for the offence of giving false evidence in respect of the statement made by him

183 R vs Mathur (1934) 35 Cr. L.J. 444.
184 State v. Atma Ram 1966 Cr. LJ 262 AIR 1966 Him Pra 18
185 State v. Gurdial Singh 1967 Cr LJ 247 : AIR 1967 Punj 31 : Punj LR 1046.
186 R. v. Gambhir Bhujua (1927) 28 Cr. LJ 645.

which led to the forfeiture of his pardon shall be entertained without the sanction of the High Court. This is an extraordinary provision, the aim of which appears to be to limit the possibility of freely prosecuting an approver for giving false evidence. The sine que non for initiating the prosecution for perjury against an approver is the sanction of the High Court. So, therefore, there would be a good deal of safety that the highest criminal tribunal of a State would consider the propriety of a contemplated prosecution for perjury against an approver. The proper procedure that a State has to, adopt for obtaining sanction of the High Court to prosecute an approver for giving false evidence is to apply to the High Court in open court, but not by a letter of reference.[187]

It was indicated in a Nagpur case that the following factors may be considered by the High Court before sanctioning prosecution of an approver for perjury:

i) the quantum of punishment awarded for the original offence. If the punishment for the original offence is considered by the High Court to be adequate, both for the original offence and the offence of perjury then, sanction to prosecute an approver for perjury may be unnecessary.

ii) whether conviction for the original offence is likely or unlikely;

iii) if it can be reasonably assumed that the punishment for the original offence that could be passed would be too light;

187 Emperor v. Madiga Mallavadu, 32 Madras 47, 24 Cal 492.

iv) the absence of intention on the part of state to prosecute the approver for the original crime;

v) that the approver had already been prosecuted for the original crime and either has been acquitted or has received or is likely to receive such a light sentence that it is not sufficient to cover his crime of perjury.[188]

(iii) Section 306 Cr.P.C. and Sect. 132 of Evidence Act:-

The approver is bound, by the terms of the pardon under s. 306 (1) to answer any question even if the answer to such question is likely to criminate him directly or indirectly, His protection lies under the proviso to s. 132 of the Evidence Act, viz that the answer given by him cannot be proved against him except in a prosecution for giving false evidence by such answer.

13. Admissibility of an Accomplice evidence without grant of Pardon:-

In *Shiv Sharanath v. State*[189], it was held that the practice of citing an accomplice as a witness without tendering him pardon in accordance with Section 337, Cr.P.C. (new section 306) is reprehensible. It was held in another case[190] that, "If pardon is not granted to an accomplice in accordance with Section 337, and if he gives evidence against an accused in the case, there would be illegality if prejudice is caused to the accused.

188 Local Government v. Gambhir Bhujua, AIR 1927 Nag 189.
189 AIR 1953 Bhopal 21.
190 58, I.C. 449.

In an old Lahore case it was held that an accomplice who had been promised immunity from prosecution by the local Government and who had not been formerly discharged by a written order of the Magistrate did not cease to be an accused person and therefore he cannot be examined during the trial against the other accused persons."

A different view was taken in a case where at the opening of the Sessions Trial, the name of an approver, who had already been granted pardon was still in the category of accused persons by mistake and at the trial, as soon as the mistake was found, he was removed from the dock.[191] However, there are many cases, which take a different view including a recent case of the Madras High Court. When the accused had pleaded guilty but was not convicted and at that stage he was illegally granted pardon, nonetheless his evidence was held to be admissible. It was also held that trial against such a person practically would close as soon as he pleaded guilty and the same was recorded.[192] In a Punjab case it happened that a person on a promise of pardon by a local Government for an offence not falling within Section 337, Cr.P.C. was sent up as a witness to the Sessions Court. Held that he was not an accused person and that his evidence on oath was admissible.[193] Even statements of persons illegally pardoned by the police and discharged were held to be admissible in evidence.[194] The reason given was that the moment he is not included along with the other accused persons in the case, he ceases to be an accused

191 54 Cal. 539
192 Subramania v. R., 25 Mad 61 10 MLJ 147 (FB)
193 21 Tr. 1904 (Cr) 135 PIR 1904.
194 16 Bom 661.

within the meaning of Section 342 Cr.P.C.

In *Emperor v. Hara Prasad Bhargava*[195], Mears, C.J. emphastically observed:- "that there is no provision of Indian statute law, nor is there any principle of natural justice which makes an accomplice as such, an incompetent witness, at the trial of another person in respect of the offence, in the commission of which he was an accomplice. The prosecution is not evading the provisions of Section 337, Cr.P.C. when it puts into witness-box an accomplice in the commission of offence to which that section does not apply. The refusal to admit his evidence, merely because the accused is one outside the purview of Section 337, would be a clear error of law. It is not necessary in order to make an accomplice a competent witness that the procedure prescribed by Section 337 should be invariably made use of."

In *A. v. Josepth v. Emperor*[196], Baguley, J. held, after a review of all the available cases bearing on the subject, that there was ample justification for the dictum that it is beyond controversy that when an accomplice was not jointly tried with the accused, he was a competent witness for and on account of the accused. In *Karamalli Gulamalli v. Emperor*[197], a Bench of the Bombay High Court held that the expression "accused" is used in Section 342 Cr.P.C. to mean the accused then under trial, and examined by the court and cannot include the accused over whom the court is exercising jurisdiction in another trial. The Division Bench case followed the decision in Emperor v. Govinda Balwanta Laghate.[198] In

195 LR 45 All 226, AIR 1923 All 91.
196 ILR R 3, Rang 11: AIR 1925 Rang. 122.
197 ILR 1939, Bom. 42, AIR 1938 Bom. 481.
198 ILR 23 Bom. 213.

the latter case the facts were:-

The charge-sheet having been preferred on 10 persons accused of a certain offence, the prosecution applied for the separate trial of one of those persons so as to enable them to examine him as a witness for the prosecution. The Magistrate granted the application and the person then gave evidence. A question arose as to whether that person was a competent witness and his evidence would be admissible. It was held that the person was a competent witness since he was not an accused for the purpose of section 342, nor for the purpose of Section 343, Cr.P.C., 1898, the reason being that there was no evidence of any promise or any inducement having been made to him which would render his evidence inadmissible. It was also held that the value to be attached to the evidence of such a person was a question distinct from that of its admissibility. In *Emperor v. Hara Prasad Bhargava*[199], it was laid down that it was not necessary in order to make an accomplice a competent witness that the procedure prescribed by Section 337, Cr.P.C. should be invariably made use of and that whatever effect the circumstances under which the witness's evidence is, given might have upon its credibility, there can be no objection as to its admissibility. It was also made clear in this decision that section 337, Cr.P.C. was an empowering section which enables certain courts of justice to grant pardon to an accomplice to make his evidence available for the prosecution. But, however, it has nothing to do with the power or discretion of an executive authority such as local Government in the matter of instituting, or refraining from instituting any prosecution and that the

199 45, All 226.

legislature had seen it fit to limit its operation to the cases of any offence triable exclusively by a Court of Sessions or a High Court and other offences as mentioned in the section. In *Amdumian v. Emperor*[200], the Nagpur High Court held "the word 'enquiry' used in section 342 does not include investigation and the word 'accused' person means one over whom a magistrate is exercising jurisdiction. Therefore, a person against whom there was sufficient evidence to justify his production for enquiry of trial before a Magistrate under section 170, is not prosecuted by the police, such a person is not an accused person within the meaning of section 342 Cr.P.C. There is nothing, which precludes a court from administering an oath to such a person. Hence he can be a competent witness even though he was not pardoned under section 337. But his evidence must ordinarily be of less value than that of the person who has been granted a valid pardon and has no longer any fear of a prosecution.

14. Other ways of procuring evidence of an accomplice:-

The procedure laid down in Section 306, new Cr.P.C.[201] namely, tendering pardon to an accomplice with all the safeguards contained in that section, is not the only method for procuring the evidence of a co-accused; another way is to withdraw prosecution under s 321 which is not governed by s. 306. Where s 306 or s 307 apply, it is always proper to invoke those sections and follow the procedure there laid down. Where these sections do not apply there is the procedure of withdrawal of the case against an accomplice.[202] Section 306 of the Cr.P.C. deals with the action of a Judicial

200 AIR 1937 Nag 17 (F.B.)
201 Per Basheer Ahmed, J. In re Kand aswamy AIR 1957 Mad 727.
202 Laxmipat, AI 968 SC 938.

Officer and section 321 with that of an Executive Officer. Thus pardon under s 306 is a judicial act and action under s 321 is a general executive discretion, subject however, to the consent of the court.[203] Section 321 says nothing about pardons at all. The whole procedure and consequences under Section 321 differ from those under section 306.[204] The role of the prosecutor under Section 307 is distinct and different, from the part he called on to play under the provision of Section 321 Cr.P.C. Grant of pardon is covered under Sect. 307 Cr.PC and withdrawal from prosecution is covered under Section 321 Cr.P.C. power of tending pardon is restricted to one consideration alone namely the obtaining of evil from person to whose pardon is granted relating to offence being tried.[205]

An accomplice by accepting a pardon under s 306 Cr. P Code becomes a competent witness and may, as any other witness, be examined on oath; the prosecution must be withdrawn and the accused formally discharged under s 494 (now s. 321) Cr P Code before he would become a competent witness.[206]; but although there is omission to record discharge, an accused becomes a competent witness on withdrawal of prosecution.[207] If in substance a pardon is made under s 306, the prosecution cannot thereafter proceed under s 321 depriving the accused of the right of trial in sessions under sub-s (2-A) of 337 (now sub-s (5) of new s. 306 Cr.P.C.).

If the manner in which the tender of pardon is made follows in substance the method prescribed by section 337 (Section 306, new

203 Bawa Fakir v. R. 42 CWN 1252 : A1938 PC 266]. Sarkar's Cr. P Code 4th Ed, notes to 306 and 321.
204 Ramn, 33 CWN 468: Harihar, 40 CWN 876 FB: A 1936 C. 356.
205 Jasbirshing v. Vipin Kumar Jangi 2002 (1) PCCR 105 (SC). 2001 Cr.L.J. 3993 SC.
206 Banu Singh v R, 33C 1353: 10 CWN 962.
207 Sheorati v R 18 CWN 1213; Peiris v R. A1954. SC 616: 1954 Cr. LJ 1638.

Cr.P.C.), then the section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the section. The special machinery provided under Section 337 has a peculiar feature in that the pardon in that section is tendered as a judicial act and under the special precautions rules and consequences, which the statute sets out. One consequence, perhaps the most important consequence, is that when a Magistrate has tendered the pardon, the trial must be by another Magistrate even though he is invested under Section 30, Cr.P.C. with powers to try such an offence (or by the High Court or Sessions Court).

By invoking the provisions of section 494, Cr.P.C. (Section 321, new Cr.P.C.) the charge against one accused person may be withdrawn by the public prosecutor and make the evidence of that accused available for the prosecution.[208] It cannot be said that Section 337 in any way controls the operation of Cr.P.C., the language of which is very wide and gives discretion to a magistrate as to whether he would consent to the withdrawal of a prosecution by the Public Prosecutor. As soon as a prosecution is withdrawn against an accused person, he will be taken away from the category of an accused person and becomes under general principles of law, a competent witness against his co-accused. There is also nothing wrong in the court allowing the public prosecutor to withdraw the prosecution against an accused person in order that he may be called as a witness for the prosecution.[209]

Similarly in Archbold's Criminal Pleading and Practice[210], we find

208 ILR 2 All 260 R. v. Ashgar.
209 GV Raman v. Emperor 56 Cal 1023.
210 322 (1934 Edn. at page 463)

that where it is proposed to call an accomplice as witness for the crown. It is the practice :-

a) not to include in the indictment, or to take his plea of guilty on arraignment and convict him or before calling him either to offer no evidence and permit his acquittal or.

b) to enter a *nolle prosequi* against him.

In India also it was held in some old cases that an accused person who was not pardoned in accordance with the provisions contained in Section 337, cannot be examined as a witness. Thus in one Allahabad case, when a Magistrate tendered a pardon to one of the accused in a case not exclusively triable by the Court of Sessions, and not otherwise coming under Section 337 Cr.P.C. and examined that person as a witness, the statement made by that person was held to be irrelevant and inadmissible as evidence; and such a statement is inadmissible even as a confession of a co-accused.[211] It was held pardon may be offered to one or more of the accused, but only in the manner prescribed by law; and if therefore, such pardon has not been given and an accused who has not been proceeded against is thereby made a witness, in the trial of the others, and if such illegality has operated to their prejudice, the trial is bad and the conviction must be set aside. Similarly, an accomplice who has been promised immunity from prosecution by a local Government and who has not been formally discharged by a written order of a magistrate, does not cease to be an accused person and therefore cannot be examined as a witness.[212]

211 IIR 2 All 260 R v. Ashgar; 16 N L R 9 (58 IC 449)
212 ILR 1 Lah 102.

But the above view was not adopted in some of the later decisions.

In a Madras case[213] it happened that an accused pleaded guilty, but was not convicted, but he was pardoned and sent up as a witness. Held that his evidence was admissible because the trial against him practically closed as soon as his plea of guilt was recorded. In a Punjab case, a person on a promise of pardon by the Local government for an offence; not falling within Section 337, Cr.P.C. was sent up a witness to the Sessions Court. It was held in that case, that such a person was not an accused person and that his evidence on oath was admissible.[214]

Thus it may be laid down that the evidence of an accomplice can be obtained by the following methods:-

1) By the grant of a conditional pardon to an accused person, under the provisions of section 337, Cr.P.C. (Sec. 306 new code) when he becomes an approver.[215]

2) By the withdrawal of the charge against an accused person at the instance of a public prosecutor under section 493, Cr.P.C. the disability to be examined as a witness on oath against the persons, who are brought before the court on the same indictment, may cease on the withdrawal of the indictment against him.[216]

3) By the previous conviction of the accused for his part in an

213 25 M 61 : 10 MLJ 147, FB (Davies-J Diss)
214 21 PR 1904 (Cr): 135 PLR 1904.
215 Emperor v. Alisab Rajesab AIR 1933 Bom 24.
216 33 Cal 1353 Banu v. R.

offence in which another or others are also involved. Then after his conviction, he becomes a competent witnesses against other accused.[217]

This may happen when several accused persons are charged separately of whom those who admit may forthwith be convicted and those who do not admit will have their trial later on. Then those who are already convicted may be competent witnesses against the others. It may be also noted in certain cases under some enactments such as the Abkari Acts, there is a provision for compounding of offences by an executive officer. When some do not compound their offences, they will be sent up for trial before a Magistrate. Thus those whose offences have already been compounded may figure as witness against those who had not agreed to any compounding.

4) It may also happen that pardon may be granted to an accused person, though illegally, by the police or the local Government and a person thus pardoned may also be a competent witness.[218]

The statement of person illegally pardoned by the police and discharged are held to be admissible in evidence for such a person is not an accused person within the meaning of Section 342, Cr.P.C. (2). This question was ably discussed in a sensational case from Allahabad. In that case one Har Prasad Bhargava, a Subordinate Judge was charged with receiving illegal gratifications. The Local Government published in that local Gazette that persons who gave bribes to the said Judge might be

217 Emperor v. Alisab Rajesab A.I.R. 1933 Bom 24.
218 R. Mona Runa, 16 Bom 661.

pardoned if they would make a full disclosure of the transactions within their knowledge. On the strength of this certain persons came forward with their disclosures. When they were sent up as witnesses, question arose whether they could be considered as proper witnesses. It was held there is no provision of Indian Statute Law, nor is there any principle of natural justice; which makes an accomplice as such, an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. The prosecution is not evading the provisions of Section 337, Cr.P.C. when it puts into the witness-box an accomplice in the commission of an offence to which that section does not apply. A refusal to admit his evidence merely because the case is one outside the purview of section 337, Cr.P.C. would be a clear error of law. It is not necessary, in order to make an accomplice a competent witness, that the procedure prescribed by Section 337, Cr.P.C. should be invariably followed.[219]

According to above, an accomplice can be sent up as a witness even though a legal pardon in accordance with the provisions of Section 337 was not granted. But most common practice apart from the procedure laid down in Section 337 (Sect. 306 new code) is that contained in Section 494 (Sec. 321 new code) Cr.P.C. As Section 337, Cr. P.C., deals with pardon in' serious cases, in minor offences the prosecution has a way open to obtain the evidence of an accomplice by the provisions contained in Section 494 Cr.P.C. The rejection of application for grant of pardon by Court by assessing probable value of evidence that was yet to be given is

219 Har Prasad Bhargava 45 A 226 (230) : AIR 1923 All 91 (per Mears CJ)

improper.[220]

The different methods of obtaining the evidence of an accomplice are discussed in other case. The magistrate under Section 337, Cr.P.C. can grant to an accomplice a conditional pardon, or the public prosecutor, with the consent of the magistrate can under section 494, Cr.P.C. withdraw the charge against the accomplice in order to send up such a person as a witness. It is added, in that case that these powers ought to be exercised where the prosecution consider that the evidence of accomplice is necessary. But the police have no power to stop charging a person against whom they have evidence simply because they require him as a witness.[221]

Withdrawal of prosecution under Section 494, Cr.P.C. may be for the purpose of examining such accused as a witness. The entering of *nolle prosequi* against an accused may be for the purpose of examining him as a witness. In one case it was stated. "In view of the provisions of Section 337, the evidence of an accomplice is available to the prosecution, and the court cannot be said to make an improper use of its discretion in consenting to the discharge of an accused on the ground that it was proposed to examine him as a witness. Nothing in the code expressly limits the discretion, given by Section 494 (Cr. P.C.) and the position that a discharge for the purpose of obtaining the evidence of an accused-is contrary to the spirit of the legislature does not appear to me to be in the least degree a sound position. At has been said that such a procedure is by way of bargain[222] and should not be allowed: secondly, that it may tend to

220 Jasbir Singh v. Vipin Kumar Jaggi, 2001 Cri LJ 3993 (SC)
221 AIR 1935 Bom 186.
222 PR 1905 (G) F.B. Per Barkly. J.

affect the confidence of the accused on trial in the impartiality of the court. Now, the law provides for the conditional pardon in specific cases. I do not, therefore, think that there is anything contrary to the spirit, if the court consents to the withdrawal of the charge in order that the accused my be put into the witness-box.

Further, the court, in, the exercise of its discretion, cannot refuse to consider the interests of all the parties who are before it. I agree, however, that, in cases to which the provisions of Section 337 apply, it is better exercise of discretion on the part of the magistrate to use that section instead of section 494.[223]

Where certain accused were charged with offences which are included in Section 337, Cr.P.C. and a conditional pardon was tendered to and accepted by one of the accused and where subsequently the prosecution applied under Section 494 and got the withdrawal of the case as against that accused and he gave evidence as against the rest in the trial before a Special Magistrate to whom the case had been transferred and who was empowered under Section 30 to try the offences, it was held that what was done came substantially within Section 337 and hence the trial by the Special Magistrate was without jurisdiction.[224]

Where in a case on the complaint under Sea Customs Act and investigated under that Act an accomplice E was not put on trial along with the other accused but instead was made to give evidence in the case it was held that the matter of taking accomplice E's evidence outside s 306 by

223 Per Bartly J.
224 Bawa Faquir Singh v. Emperor (1938) 2 MLJ 780: 65 I A 338.

using s 321 or otherwise is not violative of art 14 of Constitution. E would be competent witness although her evidence should be received with caution necessary in all accomplice evidence. E was protected under s 132 proviso of Evidence Act even if she gave evidence incriminating herself.[225]

S. 306 is the normal procedure in regard to the offences covered by it and in such cases it would be wrong of the court to consent to withdrawal unless there are exceptionally strong reasons[226] but in the case of offence not covered by s 306, the evidence of an accused can be obtained against the co-accused by withdrawing the case against the former under s 321.

The C.P. Government noticed that no prosecution would be instituted against any person who came forward to give evidence against a public officer who was charged with taking bribes and two persons being undoubtedly accomplices gave evidence-held, that the evidence was admissible. It is not necessary in order to make an accomplice a competent witness that the procedure in s 337 (now s 306) should be invariably made use of[227] (306). S. 337 does not suggest that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon; another way is to withdraw prosecution. S 494 (now s. 321) stands by itself and the effect of the section is that as soon as the accused is discharged, he becomes under the general principles of law a competent witness against his co-accused[228]. A later Full Bench case affirmed *Raman's case* holding that the court may consent to the public prosecutor withdrawing from the

225 Laxmipat Sup.
226 Ramsaran A 1945 N 72.
227 R v. Har Pd. 45 A 226.
228 Raman v R. 56 C 1023 : Al929 C 319: 33

prosecution of any person under s 494 (a) [now s 321 (a)] Cr.P Code, for the purpose of obtaining his evidence against others placed on trial along with him and can do so even in a case to which s 337 (now s 306) applies. But when the latter section is applicable, the better course is to proceed under that section[229]. In this connection *R v Hussein Haji*[230] where an attempt has been made to reconcile the provisions of S. 337 and 494 (now S. 306 and 321) Cr P Code. As to whether a discharged co-accused is competent to testify or not[231]. The co-accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in the case of both.[232]

* * * * *

229 Haihar v. R. 1937 Cal 711 : 40 CWN 876 FB
230 25 B 422.
231 R v Mona Puna 16 B 661: Aung Min v R. 4 IBR 362 9 Cr LJ 370 and 7 WR Cr 44.
232 Sudam Vs R. A 1933, C 148.