REVISIONAL CRIMINAL

Before Bhandari, C. J. and Tek Chand, J.

A. L. MEHRA (APPROVER),—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Rovision No. 207-D of 1956.

1957

June, 25th

Code of Criminal Procedure (V of 1898)—Section 337(3)—Object of—Grant of pardon—Implication of Pardon, whether can be granted subject to conditions—Approver granted pardon in respect of certain offences—Whether can be said to be approver in respect of other offences arising out of the same transaction—Approver, whether can be released on bail—Section 337(3)—Whether mandatory—Sections 497 and 498—Whether empower the Court to release approver on bail—High Court—Whether has inherent power to grant bail to an approver—Inherent power to prevent the abuse of the process of the Court—Exercise of, to grant bail to approver—Circumstances in which to be exercised.

Held, that the object of requiring an approver to remain in custody until the termination of the trial under section 337(3) of the Code of Criminal Prcedure is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, to prevent him from the temptation of saving his erstwhile friends and companions and to secure his person to await the judgment of the law. The temptation on the part of an approver to flee from justice as a result of threat or coercion is supposed to outweigh all inducements to remain growing out of pecuniary obligation, no matter to what amount.

Held, that the grant of pardon carries an imputation of guilt and an acceptance thereof, a confession of it. A pardon has been defined 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 whom it is granted on the other.

As the greater includes the less, a general power to grant pardons carries with it the right to impose conditions limiting the operation of such pardon. It follows as a consequence that it is open to the pardoning power to annex to a pardon any condition, precedent or subsequent, and of any nature so long as it is not illegal, immoral or impossible of performance. When a pardon is granted on 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.

Held, that an approver who is granted pardon is an approver only for the purposes 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 cannot be said to be an approver for the purposes of any other case although arising out of the same transaction and cannot be kept in confinement till the termination of that case.

Held, that the provisions of section 337(3) of the Code of Criminal Procedure are mandatory and not directory and are to be read as exception to the general provisions contained in sections 497 and 498 of the said Code which empower the courts to release the accused persons on bail even in offences of murder, etc. The use of the word "shall" in subsection (3) of section 337 indicates that the Legislature has imposed a statutory and an imperative obligation on the court to detain an approver in cusody until the conclusion of the trial even when the prosecution of the case has been unreasonably delayed to the oppression of the prisoner and even when the delay is occasioned by the failure to present the challan or to deal with the case expeditiously. Nor has the High Court any inherent power to admit an approver to bail even if he is able to produce facts at the hearing sufficient to entitle him to bail. A court possesses inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, but it is impossible to hold that power to grant bail is reasonably necessary for the administration of justice or that in the absence of this power it is impossible for the High Court to perform the

functions which have been vested in it by law. In any case the inherent power, if any, has been expressly taken away by the enactment of subsection (3) of section 337 of the Code of Criminal Procedure.

Held, that subsection (3) of section 337 implies that there is a trial in progress and its object is to secure the evidence of the approver for such trial. If there is no such trial and no likelihood of such a trial then *cessante ratione lex ipsa cessat* and it becomes an eminently fit case in which the inherent powers of the High Court to prevent the abuse of the process of the court be exercised in favour of a person who has been in confinement for several months.

Case reported under section 438 of the Criminal Procedure Code, by Shri S. B. Capoor, Sessions Judge, Delhi, with his No. nil, dated 23rd October, 1956, for revision of the order of Shri Shafiq Hussain, Additional District Magistrate, Delhi, dated 19th September, 1956, convicting the petitioner.

Charge: Under section 13, subsection (3) of the Official Secret Act XIX of 1923.

The facts of the case are as follows:—

These are three petitions under subsection (1) of section 435 of the Code of Criminal Procedure for revision of the order of Shri Shafiq Hussain, Additional District Magistrate, Delhi, dated the 19th of September, 1956, in case No. 4/3 of 1956 of his court, which was instituted on the complaint of Shri M. L. Nanda, Senior Superintendent of Police, Delhi, under subsection (3) of section 13 of the Official Secrets' Act (Act XIX of 1923), the accused being (1) F. X. Jacobs, General Foreman of the Rashtrapati Bhawan Press, New Delhi (under suspension). (2) Davinder Pal Chadda of New Delhi. (3) Nand Lal More of Bombay, and (4) Hira Lal G. Kothari, also of Bombay. The petitioners before this Court are accused Nos. 1, 3 and 4 and they have put in separate petitions, but as these petitions involve certain common question, they will be dealt with in the course of the following order:

The facts of the case giving rise to these petitions are not in dispute and are briefly as follows:—

On the 9th of March, 1956, report No. 179 was got recorded by a Police Officer at the Parliament Street Police Station, New Delhi, under sections 120-B and 165-A of the Indian Penal Code, subsection (2) of section 5 of the Prevention of Corruption Act (Act No. 11 of 1947), and

section 5 of the Official Secrets' Act. The report referred to certain alleged leakage of the budget for the year 1956-57. The next day, A. L. Mehra was arrested and he was on the 22nd of March, 1956, produced before Shri D. D. Sharma, Additional District Magistrate, who gave him a tender of pardon under subsection (1) of section 337 of the Code of Criminal Procedure and also recorded his statement. It also appears that the confessional statements of Jacobs and Chadda were recorded. Some arrests were made at Bombay, including that of Hira Lal G. Kothari, who was arrested on the 2nd of April, 1956. Ext. "A" annexed to his petition contains copies of the report made by the Deputy Superintendent of Police of Delhi, on the 2nd of April, 1956, to the Chief Presidency Magistrate, Bombay, and the charge submitted to that Magistrate. The accused was bailed out till the 14th September, 1956, for appearance in the Court of the Special Judge, Delhi. Various adjournments were granted by the Special Judge and, as stated in para 8 of Hira Lal G. Kothari's petition when the accused appeared on the 23rd of June, 1956, in the Court of the Special Judge, the special Public Prosecutor informed that Court that the investigations of the case were over and that he would file a complaint before the District Magistrate on or before the 7th of July, 1956. In view of this statement the learned Special Judge, Delhi, adjourned the matter sine-die and ordered the accused to appear before the Court by which they may be thereafter summoned. On the 7th of July, 1956, the present complaint under subsection (3) of section 13 of the Official Secrets' Act was filed in the Court of District Magistrate, Delhi, who issued a summons to Hira Lal, G. Kothari at Bombay for the 23rd of July, 1956. On the latter date this accused filed an appearance under protest before the District Magistrate, and the point of the Delhi Courts not having jurisdiction was raised by his counsel. Subsequently the case was transferred to the learned Additional District Magistrate. In the meantime an application was made on behalf of A. L. Mehra for releasing the approver on bail, and the learned counsel for the approver as well as the learned counsel for the accused raised various legal points, which, as held rightly by the learned Additional District Magistrate, went to the root of the case. These points are as follows:—

(1) The lower Court was seised only of offences under section 5 of the Official Secrets' Act and section

120-B, I.P.C., which were referred to in part 11 of the complaint, and as none of these offences falls in any one of the categories of offences mentioned in subsection (1) of section 377 of the Code of Criminal Procedure, it could not be held that A. L. Mehra was an approver in this case.

(2) That in consequence the proceedings in the lower Court were to be trial proceedings ending in final disposal of the case and not enquiry proceedings leading on to the case being committed to the Court of Sessions for trial.

(3) That the Court had no jurisdiction to try or to enquire into offences alleged against accused Nos. 3 and 4 because the overt acts constituting the charge against them were committed at Bombay and not at Delhi.

(4) That the case had been investigated into by the police and had its genesis in a police report and, accordingly under the provisions of section 173(4) of the Code of Criminal Procedure the accused were entitled to copies of the documents mentioned in that provision before the commencement of the trial.

4. The learned Lower Court's findings on these points, as detailed in para 27 of its order are as follows:—

5. (1) A. L. Mehra is an approver for the purposes of this case also and as such cannot be set at liberty in view of subsection (3) of section 337 of the Code of Criminal Procedure.

(2) The proceedings in this Court shall be enquiry proceedings and not trial proceedings.

(3) The Courts at Delhi have prima facie jurisdiction to enquire into or try the offences alleged to have been committed by accused N. L. More and Hira Lal G. Ghothari.

(4) The accused are not entitled to copies of documents referred to in section 173 of the Code of Criminal Procedure.

6. The finding of the learned Lower Court on each of these points has been contested in revision. The order is of the nature of an interim order, but it has been asserted on behalf of the petitioners that the Magistrate is proposing

to commit the accused persons for trial after recording the statements of the approver, and that there is, therefore, no point in waiting until the Magistrate passes the final order.

7. The proceedings are forwarded for revision on the following grounds:—

8. Points Nos. 1 and 2:—These points may be discussed together. A. L. Mehra has not come in revision to contest the finding that he cannot be set at liberty, but the question, whether he is an approver for the purposes of this case, is vitally connected with the further question, whether the proceedings in the lower Court shall be enquiry proceedings' or "trial proceedings".

9. Subsection (1) of section 337 of the Code of Criminal Procedure lays down the three categories of offences in which a tender of pardon to an accomplice can legally be made and which are as follows:—

(1) Any offence triable exclusively by the High Court or the Court of Sessions;

(2) Any offence punishable with imprisonment which may extend to seven years; or

(3) Any offence under any of the following sections of the Indian Penal Code, namely sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A.

10. As stated above, the complaint now before the learned Additional District Magistrate is under section 5 of the Official Secrets Act and section 120-B of the Indian Penal Code. Under subsection (4) of section 5 of the Official Secrets' Act, the punishment provided is imprisonment for a term which may extend to two years. It is, therefore, not one of the categories of offences specified in subsection (1) of section 337 of the Code of Criminal Procedure. Under section 120-B, I.P.C., the competent Court in the case of an offence not triable exclusively by the Court of Sessions would be, the Court of Sessions, the presidency Magistrarte or Magistrate, 1st Class, but not the Court of Sessions exclusively. Under subsection (1) of section 13 of the Official Secrets' Act, no court other than that of a Magistrate, 1st Class, specially empowered in this behalf by the

the appropriate Government which is inferior to that of a District or Presidency Court shall try any offence under this Act. Under subsection (2) of the same section, if any person under trial before a Magistrate for an offence under that Act at any time before a charge is to be framed claims to be tried by a Court of Sessions, the Magistrate shall if he does not discharge the accused, commit the case for trial by that court notwithstanding that it is not a case exclusively triable by that Court. The result of these provisions, when considered together, is that neither of the offences, for which the complaint was made, comes within any of the categories laid down in subsection (1) of section 337 of the Code of Criminal Procedure.

11 Under subsection (2) of section 337 of the Code of Criminal Procedure, every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Subsection (2-A), provides that in every case where a person has accepted a tender of pardon and has been examined under subsection (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Sessions or High Court as the case may be. The learned Lower Court in its discussion on these points has relied upon certain rulings, which lay down that an approver, to whom a tender of pardon has once been legally made, remains an approver for all purposes, just as, in view of subsection (1) of section 339, his immunity extends to all offences of which he may appear to have been guilty in connection with the matter for which he was tendered a pardon, in the same way his liability also subsists even though the case may not be one which is within any of the categories laid down in subsection (1) of section 337. These authorities are as follows:—Harumal Parmanand *v.* the Emperor (1), Ismail and other *v.* Emperor (2), Shiam Sunder *v.* Emperor (3), *and* Queen Empress *v.* Ganga Charan (4).

12. In addition to these authorities the learned Special Public Prosecutor also referred to Anilesh Chandra

(1) A.I.R. 1915 Sind 43
(2) A.I.R. 1925 Nag. 409
(3) A.I.R. 1921 All. 234
(4) I.L.R. 11 All. 79

and others v. The State (1). These cases do not, however, really cover the point in issue. They are all cases in which the matter for decision was, whether a pardon, which had been tendered for one of the offences falling within one or the other categories specified in subsection (1) of Section 337, would also remain valid if the offence for which the commitment was made did not fall within either of those categories. Thus, in the case last cited, police sent up a charge sheet against the accused under section 477A of the Indian Penal Code, in addition of other offences, and it was held that a Magistrate competent to tender pardon can do so even though later on he commits the accused to the Court of Sessions for being tried under Sections 420 and 120-B, I.P.C. which are not exclusively triable by the Court of Sessions. The learned Special Public Prosecutor argues that the same principle might be extended by analogy to the investigation state also and if the case has originally been registered under any of the categories of offences specified in sub section (1) of Section 337 and pardon has been tendered to an approver but the investigation discloses that the accused is actually guilty of an offence not falling within any of those categories, it should be open to the prosecution to put in the challan for any offence not covered by subsection (1) of section 337 and to continue to treat the person to whom pardon had been tendered as an approver in the case. This argument by analogy is not, however, tenable and would, in my opinion, he contrary to the specific provisions of subsection (2) of section 337. According to this subsection, the relevant stage is the stage when the Magistrate takes cognizance of the offence, and subsection (2-A) comes into play only after subsection (2) has been complied with. The relevant words "taking cognizance of the offence" can only refer to any offence falling within either of the categories mentioned in subsecton (1) of section, 337. Under subsection (1) of section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of any offence inter alia upon receiving a complaint of facts which constitute such offence. The learned Lower Court, therefore, took cognizance of this particular case on the complaint made by Shri M. L. Nanda, Senior Superintendent of Police, which complaint did not refer to any offence falling within any of the categories specified in subsection (1) of section 337. It would follows, therefore, that the procedure

(5) A.I.R. 1951 Assam 122(2).

laid down in subsection (2), thereof and subsequent subsections would not be available to the Magistrate.

13. The learned Magistrate has not considered at all the provisions of subsection (2) but has proceeded at once to act under subsection (2-A). He has laid emphasis on the indefinite article "an" used in the phrase "if he (the Magistrate) is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence." He has argued that the indefinite article in contradistinction to the use of the definite article before the word "offence" in the preceding provisions of the section, must have been used deliberately by the Legislature, and that, therefore, it is open to the Magistrate in cases in which there is an approver to take cognizance of and to commit the accused for trial to the Court of Sessions for an offence which is not specified in subsection (1) of section 337. However, the same emphasis laid upon the use of the definite article before the word "offence" in subsection (2) would, with greater justification lead to the conclusion that if the offence, of which the Magistrate has taken cognizance, does not fall in any of the categories specified in subsection (1) of section 337, the procedure laid down in subsection (2) and subsequent subsections would not be available, and the person who has been given a tender of pardon cannot be examined as an approver but must be relegated to his position as a witness under the normal law of evidence. This view is supported by the observations made by a Division Bench of the Calcutta High Court in Narsing Dass Lakhotia and others *v.* The State (1), *and it has been conceded by the learned Special Public Prosecutor that there is no authority directly to the contrary.*

14. On this view of the case, points Nos. 1 and 2, specified above ought to have been found by the learned Magistrate in favour of the petitioners.

15. Point No. 3:—On the question of jurisdiction, the conclusions at which the learned Magistrate arrived were two fold; (1) that as the full facts of the case were not before him, any expression of opinion at that stage, whether the accused Nos. 3 and 4 did or did not come to Delhi or did or did not commit any offence alleged against them within the territorial limits of the Delhi Courts would be prejudging the matter; and that there were no glaringly outstanding

(1) A.I.R. 1954 Cal. 451

facts to bar the jurisdiction of the Delhi Courts. He, therefore, saw no reason to pronounce on that matter finally and for the present ruled that the Delhi Courts had jurisdiction; (2) under subsection (4) of section 13 of the Official Secrets' Act, for the purpose of the trial of a person for an offence under that Act, the offence may be deemed to have been committed either at the place in which the same was actually committed or at any place in the States in which the offender may be found, and as these accused had actually appeared before the Delhi Court, even though under protest, that Court had jurisdiction.

16. *In support of his view on the second point he relied on* Sahebrao Bajirao v. Suryabhan Ziblaji and another (1). *The question raised in that case was whether the Wardha Court had jurisdiction to try the applicant under the Child Marriage Restraint Act, though the marriage was celebrated at Bhopal which was "then the territory of an Indian Prince". The Court at Wardha issued a summons in execution of which the police arrested the applicant in Amroati beyond the normal jurisdiction of the Wardha Court, but brought him to that Court. The learned Judge in interpreting the word "found" as used in section 188 of the Code of Criminal Procedure (which confers extra territorial jurisdiction) held that that term meant "found by the Court at the time when the matter came up for trial, and that how the accused got there was immaterial." It did not matter, whether he came voluntarily or in answer to a summons or under illegal arrest, and it was enough that the Court should find him present when it comes to take up the matter. The learned Counsel for the petitioners have sought to distinguish this ruling on the ground that while section 188 of the Code of Criminal Procedure referred to offences committed by any citizen of India in any place without and beyond India, so that initially no court in India had jurisdiction and jurisdiction had, therefore, to be vested in any Court where the accused may be found, offences under the Official Secrets' Act could be committed in India also, though subsection (2) further provides for extra-territorial jurisdiction. This argument appears to be logical. There is, however, no qualification made in subsection (4) of section 13 of the Official Secrets' Act to the effect that when the offence is committed within India, the Court which will have the jurisdiction will be the Court in which the offences was actually committed,*

(1) A.I.R. 1948 Nag. 251

but that if the offence is committed outside India, the offender may be tried wherever he may be found. As the provision stands jurisdiction vests either in the Court where the offence was actually committed or at any place in which the offender may be found, and so I do not see how the principle laid down in Sahebrao Bajirao v. Suryabhan Zibliji and another, in which the authorities are exhaustively discussed, should not be applicable.

17. The charge-sheet submitted by the Deputy Superintendent of Police in the Court of the Chief Presidency Magistrate, Bombay, refers to three Bombay accused and others entering at Delhi and Bombay during about February, 1956, into a conspiracy to commit offences. The complaint also refers to conspiracies entered into between the four accused and the approver in the 4th week of February, 1955, and at the end of February, 1956. In view of the provisions of section 182 of the Code of Criminal Procedure and of section 109 of the Indian Penal Code, it cannot at this stage be said that the material on the record excluded the jurisdiction of the Delhi Courts as regards the two Bombay accused.

18. In view of these considerations, I am unable to hold that the finding of the learned lower Court on point No. 3 is either perverse or illegal as to justify interference in revision.

19. point No. 4:

The stand taken up on behalf of the petitioners as regards this point seems purely technical. The accused persons have applied for certified copies of the confessions and other documents on the record of the case and these certified copies are in course of preparation and there is no intention to withhold them. The Special Public Prosecutor has further stated that the copies of the statements of the witnesses made to the police would be made available to the accused under the provisions of section 162 of the Code of Criminal Procedure. The accused thus merely want an academic declaration that this is a case on a police report under section 173 of the Code of Criminal Procedure and not one upon a complaint. Obviously this case is based on a complaint under subsection (3) of section 13 of the Official Secrets Act. No Court shall take cognizance of any offence under that Act unless upon complaint made by order of or under authority from the appropriate Government some officer empowered by the appropriate Government in this behalf. The fact that the officer

(1) A.I.R. 1948 Nag. 251

empowered to file the present complaint happens to be the Senior Superintendent of Police, would not make this a case instituted not on a complaint but upon the report of police officer, and the fact that there had been an investigation by the police before the complaint was made, would not technically make any difference. The learned counsel for the petitioners referred to Rustamji Bannaji *v.* The Emperor (1), *in which it was held that even if an irregularity has been committed by an Inspector in the investigating of a cognizable offence and in arresting the accused the charge-sheet submitted by him to the Magistrate can be treated as a report made in writing by a police officer within the meaning of section 190(1)(b) of the Code of Criminal Procedure or alternatively as a complaint within the meaning of section 4(1)(h) of the Code. It was argued, therefore, that there was no sharp distinction between a complaint and a report made by a police officer. However, section 251 of the Code, as amended, has laid down diffent procedures for cases instituted on a police report and for other cases, and even though there has been investigation by the police in the present case, the learned Additional District Magistrate was technically right in holding that this case would fall within clause (h) of section 251 and not within clause (a) thereof.*

20. In view of what has been stated above as regards points Nos. 1 and 2, I would recommend that the learned Magistrate's findings on these two points be set aside and he be directed to proceed with the case in accordance with law.

J. G. SETHI and P. N. MEHTA, for Petitioner.

BIPIN BEHARI LAL, Special Public Prosecutor, for Respondent.

ORDER OF THE HIGH COURT.

BHANDARI, C.J.—These several petitions arise out of the case which is known popularly as the Budget Leakage Case.

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On the 9th March, 1956, a report was received at the Police Station that certain Government Officers

(1) A.I.R. 1948 Bom. 163

had made an unauthorised disclosure of Union Government's budget proposals for the year 1956-57 to some unauthorised persons. The Police registered a case under sections 165A, 120-B, of the Penal Code, section 5 of the Prevention of Corruption Act and section 5 of the Official Secrets Act, and apprehended a number of persons including F. X. Jacobs, General Foreman of the Rashtrapati Bhawan Printing Press, D. P. Chadha, a resident of Delhi, A. L. Mehra, Sales Manager of Mercury Paints and Varnishes, Bombay, N. L. More, a millowner of Bombay and H.G.L. Kothari, a resident of Bombay. On the 23rd March, 1956, Mr. D. D. Sharma, Additional District Magistrate, Delhi, tendered a pardon to Mehra under section 337 of the Code of Criminal Procedure on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every person concerned. With the exception of the approver who was granted a pardon all the other prisoners were released on bail.

The prisoners appeared before the Special Judge appointed under the Prevention of Corruption Act on a number of hearings but were informed on each occasion that the Police had not completed the investigation and that no proceedings could be taken. On the 23rd June, 1956, the Public Prosecutor informed the Court that the investigation of the case was over and that he would file a complaint in the Court of the District Magistrate on or before the 7th July, 1956. In view of this statement the learned Special Judge adjourned the matter before him *sine die* and ordered the prisoners to appear before the Court by which they may be thereafter summoned.

On the 7th July, Mr. M. L. Nanda, Senior Superintendent of Police, Delhi, filed a complaint in the Court of the District Magistrate, Delhi. This was not a complaint under sections 165A and 120-B, of the

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Penal Code or section 5 of the Prevention of Corruption Act in respect of which pardon was granted to Mehra but a complaint under section 13(3) of the Official Secrets Act. He requested the District Magistrate to try the four prisoners mentioned above under sections 5 of the Official Secrets Act and 120-B of the Penal Code. The District Magistrate transferred the case to the Court of Mr. Shafiq Ahmad, Additional District Magistrate, Delhi.

The prisoners submitted a number of petitions when they appeared before the Additional District Magistrate on the 23rd July, 1956. Mehra stated that he was granted a pardon only in respect of the offences under sections 165-A, 120-B, of the Penal Code and section 5 of the Prevention of Corruption Act, that he could not be regarded as an approver in the case under section 5 of the Official Secrets Act and that he was entitled to be released on bail. More and Kothari objected to the jurisdiction of the Courts in Delhi to enquire into the charges brought against them as the over acts constituting the charges were committed at Bombay and not at Delhi. All the prisoners claimed that they were entitled to copies of documents prepared under section 173 of the Code of Criminal Procedure, for although technically and formally the Court had taken cognizance of the case on a complaint as required by section 13(3) of the Official Secrets Act, the case was in substance and effect based on a police report. After a careful consideration of the arguments that were addressed to him the learned Additional District Magistrate held as follows:—

(1) A. L. Mehra is an approver not only for the purposes of the case in respect of which pardon was tendered to him but also for the purposes of the case under section 5 of the Official Secrets Act and

cannot as such be set at liberty in view of the provisions of subsection (3) of section 337 of the Code of Criminal Procedure.

(2) The proceedings in his Court are inquiry proceedings and not trial proceedings.

(3) The Courts of Delhi have *prima facie* jurisdiction to enquire into or to try the offences alleged to have been committed by More and Kothari.

(4) The prisoners are not entitled to copies of documents referred to in section 173 of the Code of Criminal Procedure.

The learned Sessions Judge was of the opinion that the findings of the learned Additional District Magistrate on points Nos. 1 and 2 should have been recorded in favour of the prisoners, that in view of the provisions of section 182 of the Code of Criminal Procedure and section 109 of the Penal Code the Courts of Delhi have jurisdiction to deal with the cases of More and Kothari and that the stand taken up by the prisoners in regard to supply of copies is purely technical as the police had willingly agreed to supply the copies free of charge without admitting their liability to do so. He accordingly recommended that the decision of the learned Additional District Magistrate on the first two points be set aside and that the Magistrate be directed to proceed in accordance with law.

Mr. J. G. Sethi, who appears for Mehra, contends that it is a strange irony of fate that his client who was tendered a pardon on the 23rd March, 1956, and is no longer an accused person should continue to languish in prison while his accomplices who are actually standing their trial for the crimes committed by them were released on bail several months ago.

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If a murderer can be released on bail, it is argued, there is no reason why a person who had been granted a pardon should not be accorded a similar facility. This argument appears to me to be devoid of force, for the provisions of law cannot be extended by analogy. The provision of law with which we are concerned is embodied in subsection (3), of section 337. It declares that an approver, unless he is already on bail, shall be detained in custody until the termination of the trial. The object of requiring an approver to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, to prevent him from the temptation of saving his erstwhile friends and companions and to secure his person to await the judgment of the law. The temptation on the part of an approver to flee from justice as a result of threat or coercion is supposed to outweigh all inducements to remain growing out of pecuniary obligation, no matter to what amount.

The decision of the several questions which have arisen in this case will depend upon the construction which is placed on section 337 of the Code of Criminal Procedure. The relevant portions of this section are in the following terms:—

> "337(1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment, which may extend to seven years or any offence under any of the following sections of the Indian Penal Code, namely, sections 161, 165, 165A, 216A 369, 401, 435 and 477A, the District Magistrate..... or any Magistrate of the first class may, at any stage of the

investigation or inquiry into or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof;

Provided that

(1A) * * *

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) * * *

(2B) * * *

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial."

The first point for decision in the present case is whether subsection (3) reproduced above imposes a statutory obligation on the Court to detain the approver in the present case in custody until the termination of the trial in the case under section 5 of the Official Secrets Act. The answer to this question will turn upon the answer to two subsidiary questions, namely:—

(1) Whether Mehra is an approver for the purposes of the case under section 5 of the Official Secrets Act, and

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(2) Whether "the trial" referred to in sub-section (3) is the trial of the cases in respect of which pardon has been granted or the trial of the case under section 5 of the Official Secrets Act.

According to section 337 pardon can be granted only in respect of three clases of offences, namely:—

(1) offences triable exclusively by the High Court or Court of Session;
(2) an offence punishable with imprisonment which may extend to seven years, or
(3) any offence under sections 161, 165, 165A, 216A, 369, 401, 435 and 477A of the Penal Code.

Mehra was granted a pardon (1) in respect of an offence under section 120-B as the offence which is the subject of the conspiracy is triable exclusively by the Court of Sessions; (b) in respect of an offence under section 5(2) of the Prevention of Corruption Act which is punishable with imprisonment which may extend to seven years; and (c) in respect of an offence under section 165A, of the Penal Code which is specifically mentioned in the body of sub-section (1). No pardon could, however, be granted in respect of an offence under section 5 of the Official Secrets Act as this offence is punishable only with imprisonment which may extend to two years, or in respect of an offence under section 120-B of the Penal Code as this offence is not triable exclusively by the High Court or Court of Session. Neither of these two offences falls within the ambit of any of the three categories set out in subsection (1) of section 337.

Now the State did not prosecute the prisoner for any of the offences in respect of which pardon could be lawfully granted to the approver. It proceeded

instead to prosecute them under section 5 of the Official Secrets Act and section 120-B of the Penal Code and to examine Mehra as an approver in regard to these offences. This procedure does not appear to be authorised by law, for subsection (2) of section 337 provides clearly that every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. The expression "the offence" must obviously refer to the offence in respect of which pardon has been granted under the provisions of subsection (1). As the offences in respect of which the prisoners are being prosecuted are not offences in respect of which pardon has been given under subsection (1) no duty is imposed upon the State to examine Mehra, or upon Mehra to give evidence, in his capacity as an approver. He can give evidence only in his capacity as a witness. 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 fulfil the condition on which tender was made to him may be tried not only for the particular offence in respect of which 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. I am clearly of the opinion that Mehra is an approver only for the purposes of the case in respect of which pardon was granted and that 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 section 5 of the Official Secrets Act and he cannot be kept in confinement till the termination of the trial of the said case.

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Mr. Sethi has placed three submissions before us in support of the contention that notwithstanding the provisions of subsection (3) of section 337 it is within the power of the Court to admit his client to bail. It is contended in the first place that as soon as an accused person is tendered a pardon under the provisions of section 337 of the Code of Criminal Procedure, he loses the status of an accused person and acquires that of a witness *A. J. Pelris* v. *State of Madras* (1), in the matter of Kharrati Ram (2), and is entitled as such to be released from custody. This contention cannot bear a moment's scrutiny, for, as pointed out by an American jurist, the grant of pardon carries an imputation of guilt and an acceptance thereof, a confession of it. A pardon has been defined 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 whom it is granted on the other. As the greater includes the less, a general power to grant pardons carries with it the right to impose conditions limiting the operation of such pardon. It follows as a consequence that it is open to the pardoning power to annex to a pardon any condition, precedent or subsequent, and of any nature so long as it is not illegal, immoral or impossible of performance. 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 *Pyare* v. *The State* (3), *Kundan Lal and others* v. *The Crown* (4). If the condition is satisfied the pardon and its connected promises take full effect. In the leading

(1) A.I.R. 1954 S.C. 616.
(2) I.L.R. 12 Lah. 635, 639.
(3) A.I.R. 1955 NUC (Madhya Bharat) 5650.
(4) I.L.R. 12 Lah. 604, 613.

case of Exp. Garland (1), the Supreme Court of United States 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 the guilt, so that in the eye of the 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 consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities, and restores him to all his civil right; 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."

Section 337 empowers the appropriate authority to tender a pardon to a prisoner on condition of his making a full and true disclosure of the circumstances within his knowledge and the prisoner in the present case was granted a pardon on the said condition. He has not complied with this condition, for the trial of the case which he has agreed to give evidence has not commenced so far; and it seems to me therefore that, in view of the provisions of subsection (3) of section 337, he must continue to languish in prison until the termination of the case, irrespective of the fact whether the legal status acquired of him is that of a witness or of an accused person.

(1) 18 U.S.L. Ed. 366.

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Now what are the legal consequences which flow from the provisions of sections 497 and 498 of the Code of Criminal Procedure, which empower the Courts to release an accused person on bail even if he is alleged to have taken the life of another? Do the provisions of these two sections override the provisions of subsection (3) of section 337 and is it within the competence of the Court to admit an approver to bail when the law declares in unambiguous language that an approver shall not be released until the decision of the case? The answer is clearly in the negative. At common law all superior Courts in England had power to admit to bail apart from and independently of statute, but the Courts in India are not possessed of the jurisdiction of Courts of the common law and have only such jurisdiction as is conferred upon them by the Legislature. Section 497 of the Code of Criminal Procedure empowers every judicial Officer having the power to hear and determine criminal cases to take bail in any non-bailable case other than a case punishable with death or imprisonment for life; and section 498 empowers the High Court and the Court of Session to allow bail even in non-bailable cases. If these two sections were the only provisions of law with which the Courts are concerned, there can be no manner of doubt that it would have been within the power of Criminal Courts to release an approver on bail, but the Legislature has enacted subsection (3) of section 337 which provides that an approver, unless he is already on bail, shall be detained in custody until the termination of the trial, The provisions contained in subsection (3) must be read as an exception to the general provisions contained in sections 497 and 498 of the Code of Criminal Procedure, for it is an old and familiar principle that the special provision overrides the general *Karuppa Sarvai* v. *Kundaru* (1), *Mahomed Abdul Majid* v. *Emperor* (2)'

(1) A.I.R. 1952 Mad. 833
(2) A.I.R. 1927 Sind 173

Nor is there any substance in the contention that, notwithstanding the provisions of subsection (3) of section 337, this Court has inherent power to admit an approver to bail if he is able to produce facts at the hearing sufficient to entitle him to bail. A Court possesses inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, but it is impossible to hold that power to grant bail is reasonably necessary for the administration of justice or that in the absence of this power it is impossible for this Court to perform the functions which have been vested in it by law. In any case the inherent power, if any, has been expressly taken away by the enactment of subsection (3).

The question now arises whether the provisions of subsection (3) of section 337 are directory and confer a discretion on the Court to release an approver on bail even during the pendency of a case in which pardon has been granted. The use of the word "shall" in subsection (3) appears to indicate that the Legislature has imposed a statutory and an imperative obligation on the Court to detain an approver in custody until the conclusion of the trial even when the prosecution of the case has been unreasonably delayed to the oppression of the prisoner *Bhavani Singh* v. *The State* (1), *Karuppa Sarvai* v. *Kundaru* (2), and even when the delay is occasioned by the failure to present the challan or to deal with the case expeditiously.

We endeavoured to ascertain from Mr. Lal, whether Government propose prosecuting the prisoners for the offences in respect of which pardon has been granted to the approver and if so, the probable period during which the challan is likely to be put

(1) A.I.R. 1956 Bhopal 4
(2) A.I.R. 1952 Mad. 833

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in Court. He explained that the challan would have been presented long ago had it not been for the fact that the legal advisers of Government were confronted with a difficulty which appeared to them to be insurmountable. A case under section 5 of the Prevention of Corruption Act can be heard only by a Special Judge, while a case under section 5 of the Official Secrets Act can be heard only by a Magistrate of the first class specially empowered by the appropriate Government. Subsection (2) of section 13 of the Official Secrets Act declares that if any person under trial before a Magistrate for an offence under this section at any time before the charge is framed claims to be tried by a Court of Sessions, the Magistrate shall commit the accused for trial by that Court notwithstanding that it is not a case exclusively triable by that Court. It was felt that the prisoners were almost certain to take advantage of the choice offered to them by this provision of law and to claim a trial before the Sessions Judge. In view of these difficulties, it is contended, the legal advisers decided that the two cases should be separated and that they should be tried in two different Courts. Mr. Lal was unable to indicate the date on which this decision is likely to be implemented or the date on which the first case is likely to be put in Court, for he stated that the sanction of Government to the prosecution of the prisoners under section 5(2) of the Prevention of Corruption Act has not been accorded so far. If the prisoners are not to be brought to trial under section 5 of the Prevention of Corruption Act, or if there is no likelihood of such trial in the near future, or if their prosecution under that section is to be indefinitely postponed, it would in my opinion be a traversty of justice to keep the approver in confinement "until the termination of the trial." It could not have been the intention of the Legislature that a person who has been granted a pardon in respect of a particular

offence should be kept in confinement for an indefinite period particularly when Government have not been able to decide during the last 15 months whether the prisoners should be prosecuted at all. While there can be no doubt that the approver was apprehended under an originally valid and regular process duly and properly issued, his continued detention in custody when the prosecution of the offenders is not being seriously contemplated, appears to me to constitute an abuse of the process of Court. Indeed the delay which is being occasioned in the decision of this important matter leaves one in reasonable doubt as to whether the detention of the approver is directed to achieve the object of law or merely to harass him for his part in the crime. It seems to me. therefore, that although the process of arrest was proper in its inception, the complaint of the approver arises in consequence of subsequent proceedings. Subsection (3) of section 337 implies that there is a trial in progress and its object is to secure the evidence of the approver for such trial. If there is no such trial and no likelihood of such a trial then *cessante natione lex ipsa cessat in re Dagdoo .Bapu* (1). This is an eminently fit case in which the inherent powers of this Court to prevent the abuse of the process of the Court be exercised in favour of a person who has been in confinement for several months and who was recently released on parole at the urgent request of the Solicitor-General. I direct that the approver shall be released on bail on furnishing security to the satisfaction of the District Magistrate.

This disposes of Criminal Revision No. 207-D of 1956.

I shall now deal with the petitions which have been presented by Kothari, Chadha and More. The first point for consideration in these cases is whether

(1) I.L.R. 46 Bom. 120.

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the approver can be examined only as a witness or whether he can be examined as an approver. If he is examined as a witness it will be open to the Magistrate to dispose of the case finally and for good for the offence for which the accused have been charged is punishable with an imprisonment for a period which may extend to two years. If, however, the approver is examined in his capacity as an approver it will be necessary for the Court to commit the prisoners for trial to the Sessions Court. The Public Prosecutor suggests that we should exercise the powers conferred upon us by section 439 and direct that the case be committed to the Sessions. In the alternative it is contended that we should transfer this case to the Court of Session under section 526(1) (e)(iv) of the Code of Criminal Procedure. I am extremely doubtful whether it is within the competence of this Court acting under the provisions of section 439 of the Code of Criminal Procedure to direct the commitment of the cases to the Sessions Court. No formal application under section 526(1)(e) (iv) has been made to us and it is impossible for us to accede to the request of the State without affording the prisoners a reasonable opportunity of being heard. If Government are anxious that the case should be transferred to the Court of Session it will be open to them to make a formal application in this behalf.

The other petitions which have been presented to this Court can be easily disposed of. Mr. Ghaswala who appears on behalf of Kothari, reiterates the objection taken by him in the Courts below that the Courts at Delhi have no jurisdiction to enquire into and try the offences which are alleged to have been committed by his client as mentioned in the complaint filed by Mr. Nanda on the 7th July, 1956. The Courts below have given good reasons for holding that the Courts in Delhi have jurisdiction to hear and determine the case which has been brought

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against Kothari, and the view taken by them is completely supported by the provisions of subsection (4) of section 13 of the Official Secrets Act, which declares that for the purposes of the trial of a person for an offence under this Act the offence may be deemed to have been committed either at the place in which the same was actually committed or at any place in the provinces in which the offender may be found. It is common ground that Kothari came to Delhi in response to the process issued to him and that he was actually found within the precints of the Courts at Delhi. Mr. Ghaswala does not seriously challenge the correctness of the prosecution that a person may be said to be found in a particular place even though he has been brought there under the process of law.

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The only other objection which merits consideration is whether the prisoners are entitled to copies of documents as provided in section 173 of the Code of Criminal Procedure. As the prosecution have already agreed to supply copies of documents as an act of grace, no useful purpose is likely to be served by going into the question as to whether they are entitled to supply of these copies as a matter of right.

I am in general agreement with the view taken by the learned Sessions Judge and am of the opinion that A. L. Mehra is not an approver for the purposes of this Case, that the proceedings in the Court of the Additional District Magistrate are not inquiry proceedings but trial proceedings, that the Delhi Courts have jurisdiction to hear and determine the case against the prisoners and that it is not necessary to determine whether the prisoners are entitled to supply of copies of documents as a matter of right. Mehra should be released on bail on furnishing security to the satisfaction of the District Magistrate, Delhi. I would order accordingly.

TEK CHAND, J.—I agree.

Tek Chand, J.