Plea bargaining: Challenges in Implementation.

By

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High Court, Madras.

- Evolution and development of Plea bargaining.
- Doctrine of *nolo contendere*
- Identification of cases for disposal through plea bargaining and implementation of plea bargaining.
- Disposal under Ch XXIA of Cr.P.C and exploring possibility of plea bargaining.

Doctrine of *nolo contendre*

- principle of ‘Nolo Contendere’, literally meaning ‘I do not wish to contend’. I neither accept nor deny the charges but agrees to accept punishment.
- The modern concept of plea bargaining emerged in the 19th century, having its trace in American Judiciary. India did not feel the need for Plea Bargaining due to the presence of the Jury system until the 1960s when legal representation was permitted.

Madanlal Ram Chandra Daga & Others Versus State of Maharashtra: 1968 AIR(SC) 1267

- We pointed out that the High Court adopted an unusual course in the case. In fact a similar course was suggested to us at the hearing by submitting that we should increase the fine and reduce the sentence to the period undergone. In other words, the accused were adopting the same method which they did in the High Court, namely, that they will pay the amount which they have wrongly realised from the J. R. Firm and this may be taken in mitigation of the punishment imposed on them.
- In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court and for the same reason we would refrain from accepting the suggestion of Mr. Nuruddin Ahmed that we should increase the fine with a view to reducing the sentence of imprisonment.

Muralidhar Meghraj Loya –vs- St of Maharashtra: 1976 (3) SCC 684

- The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by **revisional excursions to higher courts,** the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old professions. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States **but in our jurisdiction**, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law.

1976 (3) SCC 684 contn:

- The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a sentence concession to a defendant who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him‘.
- "In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute ... finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must enforce the law." Therefore open methods of compromise are impossible."

- ***Kaachhia Patel ShantilalKoderlal-vs- St.of Gujarat and another, (1980) 3 SCC 120,*** the Supreme Court held that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice.
- Similar views expressed in
- ***Kasambhai Ardul Rehmanbhai v. State of Gujarat & Anr*** AIR 1980 SC 854. and
- ***Ganeshmal Jashraj v. Govt. of Gujarat*** .[AIR 1980 SC 264].

- ***State of Uttar Pradesh V. Chandrika [*** AIR 2000 SC 164] the Apex Court had held that it is a settled law that on the basis of plea bargaining the court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented. It was further held that neither a mere acceptance or admission of the guilt should be a ground for reduction of sentence nor can the accused bargain with the court that as he is pleading guilty, sentence should be reduced.

- Highlighting the glaring inefficiency of the Indian Criminal Justice system, with a multitude of backlogs, excessively long trial life spans and low rate of conviction, The Law Commission of India, in its 142nd report,(1991), implicitly underlined the need for Plea Bargaining.

- In its 154th report in 1996, it called for having a remedial measure for the timely disposal of trials for the better of under-trial prisoners.

- Then in 2001, in its 177th report, the need for the concept of Plea Bargaining was reiterated.

- Justice Malimath Committee set up in the year 2003 to suggest improvements to India's criminal justice system, recommended the implementation of the plea bargaining concept for speedy disposal of cases and reduced burden on courts.

State Of Gujarat vs Natwar Harchandji Thakor (22nd Feb, 2005)

- Before Gujarat High Court the issue whether the trial court can impose punishment less than the minimum sentence prescribed under the statute, came up for consideration.
- Lr. Judges traced legal the history and current scenario thread bare. They observed, “the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static.”
- This judgment was delivered when the Cr.P.C amendment Bill 2003 was introduced in parliament and pending for consideration.

Chapter XXI A of Cr.P.C. 5th July 2006

Section 265-A (1): The plea bargaining shall be available to the accused charged of any offence **other than offences** punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years and such offences which affects the socio-economic condition of the country, or has been committed against a woman, or a child below the age of 14 years.

Section 265 A (2) of the Code gives power to the Central Government, to notify the offences which affects the socio-economic condition of the country for the purpose of this chapter.

In exercise of the powers conferred under sub-section (2) of Section 265-A of the Code of Criminal Procedure, 1973, the Central Government had notified offences under 19 Acts, as **offences affecting the socio-economic condition of the country** .

- **(***Ministry of Home Affairs, Notification No. S.O. 1042(E), dated July 11,2006)*

(*i*) Dowry Prohibition Act, 1961

(*ii*) The Commission of Sati Prevention Act, 1987

(iii) The Indecent Representation of Women (Prohibition) Act, 1986

(*iv*) The Immoral Traffic (Prevention) Act, 1956

(v) Protection of Women from Domestic Violence Act, 2005

(vi) The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992

(*vii*) Provisions of Fruit Products Order, 1955 (issued under the

Essential Services Commodities Act, 1955)

(viii) Provisions of Meat Food Products Orders, 1973 (issued under

the Essential Commodities Act, 1955)

(ix) Offences with respect to animals that find place in Schedule I and

Part II of the Schedule II as well as offences related to altering of boundaries of protected areas under Wildlife (Protection) Act, 1972

(*x*) The Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989

(*xi*) Offences mentioned in the Protection of Civil Rights Act, 1955

(*xii*) Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000

(*xiii*) The Army Act, 1950

(*xiv*) The Air Force Act, 1950

(*xv*) The Navy Act, 1957

(*xvi*) Offences specified in Sections 59 to 81 and 83 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002

(*xvii*) The Explosives Act, 1884

(*xviii*) Offences specified in Sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1995

(*xix*) Cinematograph Act, 1952

- **Section 265-B** contemplates an application for plea bargaining to be filed by the accused which shall contain a brief description of the case relating to which such application is filed, including the offence to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily preferred, after understanding the nature and extent of the punishment provided under the law for the offence, the plea bargaining in his case and that he has not previously been convicted by a court in a case in which he had been charged with the same offence.

- **Section 265-C** prescribes the procedure to be followed by the court in working out a **mutually satisfactory disposition.**

  In a case instituted on a police report, the court shall issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused to participate in the meeting to work out a satisfactory disposition of the case.

  In a complaint case, the Court shall issue notice to the accused and the victim of the case.

- **Section 265-D** deals with the preparation of the report by the court as to the arrival of a mutually satisfactory disposition or failure of the same.
- If the parties arrive at a mutually satisfactory disposition, report by the Presiding Officer is prepared and forwarded for further proceedings.

- **Section 265-E** prescribes the procedure to be followed in disposing of the cases when a satisfactory disposition of the case is worked out.

The Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence.

While punishing the accused, the Court, at its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence.

Apart from this, in cases of release or punishment, if a report is prepared under S 265 D, report on mutually satisfactory disposition, contains provision of granting the compensation to the victim the Court also has to pass directions to pay such compensation to the victim.

265 E : Disposal of the case

- The Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition.

  Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence.

  While punishing the accused, the Court, at its discretion, can pass sentence of 50% of the punishment prescribed, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence.

- 265 G: The judgment so delivered is final and no appeal except under Article 136 or under Article 226 and 227 will lie.
- 265 I: Provision of Section 428 Cr.P.C to set off applies.
- 265 K: Statements of the accused made in the application of plea bargain shall not to be used for any other purposes.
- 265 L : Nothing in this chapter will apply to a juvenile or child defined under JJ Act.

Sum up:

Voluntariness, informed choice and mutuality are the main features of the process of plea-bargaining.

Plea-bargaining is a voluntary process in which the parties exercises their informed choice after mutual discussion. An accused intends to plea-bargain for a reduced sentence or compensate the victim of the offence.

The Court has been enjoined upon to ensure the voluntary character of the process of plea-bargaining under sub-section (4) of Section 265 B of the Cr.P.C.

The Court is under a legal duty to examine the accused in camera to satisfy itself that the application was filed by the accused voluntarily.

The Court must inform the accused the implications of plea of guilt and possible sentence in the case. The accused must be put to notice that in case, his plea- bargain is accepted, he would be convicted for the offences and sentenced accordingly.

- Once the Court is satisfied that the accused understood the nature and extent of punishment provided under the law for the offence and the application was filed voluntarily, then the Court should call the parties to work out a mutually satisfactory disposition. If, no such disposition could be worked out, the Court shall record such observation and the case will proceed from the stage such application was filed.

Types of Plea Bargain

- **Charge Bargaining**: This is common and widely known form of plea bargaining. It involves a negotiation of the specific charges or crimes that the defendants will face at trial. Usually, in return for a plea of ‘guilty’ to a lesser charge, a prosecutor will dismiss the higher or other charges counts. For example, a defendant charged with burglary may be offered the opportunity to plead guilty to attempt burglary. It is, therefore, basically an exchange of concessions by both the sides.

- **Sentence Bargaining**: Sentence bargaining involves the agreement to a plea of guilty for the stated charge rather than a reduced charge in return for a lighter sentence. It sources the prosecution the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence. It is the process which is introduced in India where the accused with the consent of the prosecutor and complainant or victim would bargain for a lesser sentence than prescribed for the offence.

- **Counts Bargaining**: In this kind of bargaining, the defendant pleads guilty to a subset of multiple original charges.

- **Facts Bargaining**: The least used negotiation involves an admission to certain facts, thereby eliminating the need for the prosecutor to have to prove them, in return for an agreement not to introduce certain other facts into evidence.

Advantages of Plea Bargaining

Time saving: will help in cutting short the delay, backlogs of cases and speedy disposal of criminal cases.

- **Compensation to victims:** The victims of crimes might be benefited as they could get monetary compensation.
- **Benefits for Accused:** He might get half of minimum prescribed punishment. If no such minimum is prescribed, accused might get one fourth of punishment prescribed, or released on probation or after admonition or get concession of considering the period of undergone in custody as suffering the sentence under section 428 of CrPC.
- He will be relieved of extended trial i.e, appeals consuming unending time. Accused is also benefited even when plea bargaining fails as his admission cannot be used for any other purpose. Ultimate benefit for him is that his time and money are saved.

Dis advantages of Plea Bargaining

- **Unfair:** The system will be too soft for the accused and allow them unfair means of escape. It is an alternative way of legalization of crime to some extent and hence not a fair deal.
- **Contempt for system:** It may create contempt for the system within a class of society who frequently come before the courts.

- **Conviction of innocents:** This process might result in phenomenal increase in number of innocent convicts in prison. Innocentaccused may be paid by the actual perpetrators of crime in return to their guilty plea with assured reduction in penalty.

Implementation

In Re: Policy Strategy for Grant of Bail, 2022 SCC OnLine SC 1487

- Suggestions for effectuating the provisions relating to plea bargaining

- “3.1 As a pilot case, one Court each of Ld. Judicial Magistrate 1st Class, Ld. ACJM or CJM, and Court of Sessions in each district may be selected.

- 3.2 The said courts may identify cases pending at pre-trial stage, or evidence stage and where the accused is charge sheeted / charged with offence(s) with a maximum sentence of 7 years' imprisonment. The Ld. Court would exclude cases mentioned in Section 265A Cr.P.C., namely offences notified by the Central Government vide notification dated 11.07.2006 or offences committed against women or child/ children less than 14 years.

- ' 3.3 The identified cases can thereafter be posted on a working Saturday or any other day which is suitable to the court with notice to the Public Prosecutor, complainant and the accused. The said notice would indicate that the court proposes to consider disposing of those cases under Chapter XXIA of Cr.P.C. plea bargaining, Probation of Offenders Act, 1958 or compounding i.e. Section 320 Cr.P.C. The notice will also indicate that the accused/complainant would be entitled to avail legal aid and details of the District Legal Services Authority would be made available in the said notice. It would also be made clear that the accused has to remain present with his/ her advocate and the complainant may also remain present with his/her advocate.

The Public Prosecutor would be required to ascertain the criminal antecedents of the accused. Only cases of first time offenders would be taken up.

On the date fixed, the court can inform the accused of the provisions of plea bargaining. The Court can also persuade the parties to compound the offence (if the offences are compoundable). The Court can also inform the accused of the benefits of Probation of Offenders Act, 1958. The services of panel lawyers from District Legal Services Authority would also be made available to the accused/ Complainant.

The Court may give time to the accused/complainant to think over the matter and give another date.

In cases where the under trial is in judicial custody, the trial court may explain to the accused and the learned counsel appearing for the accused to explore the possibility of plea bargaining or compounding or benefit of Probation of Offenders Act. The accused can be given time to consider the matter. The services of panel lawyers of District Legal Services Authority can also be made available. For this purpose, a list of such accused can be furnished to the Secretary, DLSA to depute the panel lawyers of sufficient seniority to explain the provisions to the accused, who are in custody.

It is suggested that a brief training session may also be organised for the Ld. Judicial Officers in the Judicial Academies.

A timeline of 4 months may be fixed to carry out this exercise

- In order to make the plea bargaining more effective, to reduce the delays in criminal justice system and growing pendency of criminal cases, we will have to appreciate the causes due to which the plea bargaining has not been successful so far. The Criminal Justice System has to be more efficient, reliable and predictable with higher rates of convictions, to allow an accused to make an informed choice for plea bargaining.

The provisions of plea bargaining are not likely to succeed for the reasons:

- 1. The Government does not encourage the provisions of plea bargaining. A Public Prosecutor is not given any credit for successful plea-bargained cases, rather he is looked upon as a amenable prosecutor. He may with success in convictions on plea bargaining, face a disciplinary action or difficulties in renewal of his term.
- 2. The rate of acquittal in criminal cases is so high that the accused wants to take his chances in trial, rather than face conviction on lesser charges or lesser punishment on admitting his guilt.
- 3. There is a trust deficit in the functionaries in the criminal justice system to such a level that it is difficult for an accused to believe in his lawyer, prosecutor or the judge to believe the offer of lesser or reduced sentence.

- 4., The social stigma and the reduced chances or rehabilitation after undergoing conviction and then a jail term, however short it may be, after conviction does nor encourage the accused to accept plea bargaining.
- 5. The delay in trial and chances to getting bail both during the trial and in appeal after conviction are so high that the accused wants to take his chances to be out on bail rather than take a lesser sentence.
- 6. Lastly, the legal services are not so expensive in India to discourage the accused with the cost of a full-fledged trial. The cost of defending himself, unless the accused is very poor, are not prohibitive enough and weigh in favour of trial, instead of a chance of reduced charge or sentence in case of plea bargaining.

In re suo moto order dated 28/03/2023

- What has been pointed out is that the District Courts in UP have identified more than 52000 cases which could be considered of this nature, out of which 9142 cases have been disposed of. We would require the remaining cases also to be considered by the next date and a report be furnished to this Court.