(2012) 01 BOM CK 0143

Bombay High Court

Case No: Criminal Writ Petition No. 2109 of 2011

Guerrero Lugo Elvia Grissel, Campos Molan Elias, Gonzalex Maldonado Mauricio and Gutierez Orlando		APPELLANT
	Vs	
The State of Maharashtra (DCB, CID Unit XII)		RESPONDENT

Date of Decision: Jan. 4, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 265(F), 265B, 265B(4), 265C, 265D
- Penal Code, 1860 (IPC) - Section 109, 120(B), 34, 380, 397

Citation: (2012) BomCR(Cri) 328 : (2012) 114 BOMLR 616 : (2012) CriLJ 1136 : (2012) 2 MhLj 369

Hon'ble Judges: R.G. Ketkar, J; A.M. Khanwilkar, J

Bench: Division Bench

Advocate: Murtaza Najmi with Mr. Jagdish Shetty, for the Appellant; M.M. Deshmukh, Assistant Public Prosecutor, for the State, for the Respondent

Final Decision: Dismissed

Judgement

A.M. Khanwilkar, J.

This matter raises pure question of law as to the interpretation of Section 265-E of the Code of Criminal Procedure, 1973, in particular clause (d) thereof. The petitioners were arrested by DCB, C.I.D., Unit XII, in connection with C.R. No. 77/2010 on 26th August, 2010 at Dubai for having committed offence under Sections 380 and 34 of the Indian Penal Code.

2. Shorn of details, the prosecution case is that

(a) An International Jewellery Exhibition was held at Mumbai Exhibition Centre, Goregaon (E), Mumbai, between 19th August, 2010 and 23rd August, 2010. A

Jewellery Company of Hongkong by name Daluwi Diamonds had also installed its stall thereat. One Goy Yehskil Yas, an Israel National, the complainant, was looking after the stall of Dalumi Diamonds along with his associates Kobi and Henry, both foreign nationals.

(b) That on 23rd August, 2010, at about 3.30 P.M., when the complainant was busy in winding up and putting the Diamonds in boxes, one unknown person came to the stall and diverted the attention of Kobi, who later found one diamond box worth Rs. 6,60,85,000/-missing. The complainant lodged his complaint with Goregaon (E) Police Station which was registered vide C.R. No. 251/10 u/s 380 read with Section 34 of the Indian Penal Code. The case was transferred to DCB, CID, on 24th August, 2010 and registered as C.R. No. 77/2010.

(c) The accused were arrested at Dubai International Airport by Dubai Police on 25th August, 2010 along with diamonds and gold ornaments valued at Rs. 3,00,00,000/-and brought to Mumbai by DCB, CID, Unit 12.

(d) In the meantime on 25th August, 2010, DRI, Mumbai, intercepted a box containing 1641 diamonds and other articles which were booked to Italy through Air Courier, DHL, on 23rd August, 2010 at the Airport. The wanted accused had booked the said box. The diamonds recovered by DRI are valued at Rs. 3,60,85,000/-. Thus, the entire diamonds have been recovered.

(e) The prosecution claims to have verified the footage of C.C.TV camera installed at the Exhibition site and found some of the accused near the stall of the complainant at the material time.

3. In this backdrop, the petitioners were arrested on 26th August, 2010 in connection with the alleged offence. After carrying out investigation, the police filed charge-sheet against the accused (petitioners). The petitioners had applied for bail, which was, however, rejected on 4th December, 2010. Since the petitioners were more than convinced that the trial of the case would take quite some time, and the petitioners, being foreign nationals from Mexico, were keen to return back to their home countries at the earliest, they decided to move an application u/s 265-B of the Code, for plea-bargaining. The said application was filed on 22nd December, 2010. Besides, the petitioners filed separate affidavits, stating that they have filed the application for plea-bargain after understanding the nature and extent of punishment provided under law for the offence. Further, they have filed the said application voluntarily. They asserted that they have not been convicted previously by any Court of the same offence with which they have been charged and facing trial.

4. Consequent to filing of the aforesaid application and affidavit by each of the petitioners, the designated Metropolitan Magistrate interviewed the petitioners and recorded their plea u/s 265-B(4) of the Code of Criminal Procedure in camera through interpreter, as the petitioners were familiar only with Spanish Language. In

the course of their statement, each of them, when called upon to indicate as to whether they were aware that they may be sentenced to one-fourth of the maximum punishment or one-half of the minimum punishment, in addition to the payment of the compensation, if any, they have, in no uncertain terms, stated that their lawyer had informed them that they will be sentenced with one-fourth of the maximum punishment or one-half of the minimum punishment specified for the stated offence.

5. Thereafter, the Additional Chief Metropolitan Magistrate examined the plea of the accused, as required u/s 265-B(4) of the Code, and recorded his satisfaction that, from the plea of the accused, they have moved the application for plea-bargaining voluntarily and without any sort of pressure on them. Accordingly, the Magistrate kept the case for hearing to work out a mutually satisfactory disposition of the case. Consequent thereto, the process of arriving at mutually satisfactory disposition was taken forward and culminated in filing of report jointly signed by the Special Public prosecutor and Investigating Officer of the case u/s 265-B of the Code.

6. In the context of the issue that arises in this matter, we deem it apposite to advert to the relevant clauses of the said report, which read thus:

4. The parties followed the guidelines given u/s 265-C and finally arrived at the mutually satisfactory disposition. The complainant and the accused filed their reports of mutually satisfactory disposition before the Court in writing.

5. The complainant claimed that he had received Rs. 55 lakhs in cash at Hong Kong and that he had accepted the said money from the accused as satisfactory disposition as compensation.

6. As agreed, the accused are willing to deposit Rs. 5 lakhs in the Court as expenses incurred during the case by the State. The State is agreeable to the disposition and the said money may be deposited with the Registrar of the Court on behalf of the State of Maharashtra.

7. u/s 265-E, the court shall dispose of the case in the manner provided under the section as sub-section (a) and (b) are not applicable to the accused. The benefit of releasing the accused on probation of good conduct under the Probation of Offenders Act is not attracted as the crime is exceptional and daring committed in India by foreigners.

8. The case of the applicant falls u/s 265-E(d) as the offence committed by the accused is punishable with 7 years, the court may sentence the accused to one-fourth of the punishment provided or extendable, i.e. offences under sections 380, 34, 109, 120(B) of IPC.

9. The property, i.e. the stolen diamonds from Dalumi Diamonds, Hongkong valued at 6.73 crores are recovered at the instance of the arrested accused and also the wanted accused. One portion of the stolen diamonds, i.e. 305 carats, is in the

custody of the Investigating Officer and the other portion, i.e. 619 carats, is in the custody of DRI. The complainant is claiming the said property and the State has no objection to return the same to the complainant.

In the above circumstances, the Hon. Court may deliver the judgment in terms of section 265(F) by convicting the accused for 1/4th of the maximum punishment extendable i.e. 7 years, which comes to 21 months. The Court may give the benefit of set-off period i.e. 8 months 10 days, which is undergone by the accused.

The Court may convict and sentence accused for the remaining period of 12 months 20 days in addition to the compensation to the complainant and the expenses to the State of Maharashtra, as the final satisfactory disposition of the ''Plea Bargaining''.

(Emphasis supplied)

7. The matter proceeded before the Additional Chief Metropolitan Magistrate, who recorded his satisfaction that the accused have moved the application for plea-bargaining voluntarily and without any sort of pressure on them.

8. The matter was then placed for hearing before the Additional Chief Metropolitan Magistrate, as required u/s 265-E of the Code. The Magistrate, vide impugned judgment and order dated 24th May, 2011, noted that it is already stated in the order of Report of the Mutually Satisfactory Disposition of the matter, the case is not that of the kind which should be dealt with in accordance with clause (b) of Section 265-E of the Code by giving the benefit of Section 360 of the Code or the Probation of Offenders Act, looking into the nature of the offence and the value of the property involved. The Court, therefore, heard the parties on the quantum of sentence. The argument of the petitioners before the Magistrate was that the entire stolen property has been returned or proposed to be returned to the complainant, and, in addition to that, the complainant is already paid the compensation to the tune of Rs. 55 lakhs. As a result, the loss of the complainant is sufficiently compensated. Further, all the accused are in jail right from the date of their arrest, i.e., 26th August, 2010. Moreover, the State has also been compensated to the tune of Rs. 5 lakhs on account of expenditure of the investigation, etc. It was argued that, keeping in mind all these aspects, even if the prosecution was to prove guilt of the accused at the end of the trial, the Court, normally, would impose sentence with imprisonment of two years and not up to the maximum imprisonment of seven years. On this premise, in exercise of power u/s 265-E(d) of the Code, the Court ought to award imprisonment of one-fourth of two years'' period, which, normally, the accused would have received, in which case, the sentence to be awarded to the petitioners would come to six months.

9. Besides this argument, relying on the expression "may" and "provided or extendable", it was argued on behalf of the petitioners that the same denotes that the Court has discretion to award sentence, which can be for a period less than one-fourth of the punishment provided or extendable. According to the petitioners,

the purpose of introducing Chapter of Plea Bargaining by Amendment Act 2 of 2006 was to end uncertainty, save litigation costs and anxiety costs, to reduce back-breaking burden of the Court case and also to reduce the congestion in jails. Considering all these aspects, a purposive interpretation is warranted.

10. The Special Public Prosecutor, on the other hand, argued that the Court had no discretion in the matter of sentencing where the guilt is admitted by way of plea-bargaining. The Court is bound to sentence the accused with one-fourth of the punishment provided or extendable and not lesser punishment than that.

11. The Magistrate agreed with the submission of the Special Public Prosecutor that accepting the argument of the petitioners would result in re-writing of clause (d) of Section 265-E of the Code. The Magistrate opined that the two words "provided" and "extendable" used in the said provision were joined with conjunction "or". That means that the Court may sentence the accused with one-fourth of the punishment "provided" or with one-fourth of the punishment "extendable". Employing these two different terminologies was necessary, as, in some offences, the punishment is extendable up to maximum of certain term, and, in other set of offences, the punishment is not extendable but fixed quantum is provided. For instance, Section 397 of the Indian Penal Code. On this reasoning, the Magistrate noted that the Court has no discretion to sentence the accused with lesser punishment than one-fourth of the punishment, provided if it is fixed punishment under law and one-fourth of the punishment extendable if the law prescribes extendable punishment up to a fixed limit.

12. As regards the first argument of the petitioners that the Court, upon proving the guilt on merit, would have imposed only two years of sentence, the Magistrate took the view that the same was presumptuous argument. Instead, he held that the allegations in the charge-sheet indicated that the offence took place in a systematic, planned manner and was a daring operation by foreigners in India in respect of high value property (diamonds worth Rs. 6.73 crores). In such a case, there was rare possibility of showing leniency in the sentence upon proving the guilt. On the above basis, the Magistrate proceeded to hold that the sentence to be imposed on the petitioners will be one-fourth of the maximum imprisonment provided u/s 380 of the Indian Penal Code, which comes to 21 months. This decision of the Magistrate is the subject-matter of challenge in the present Writ Petition at the instance of the accused.

13. Nowhere in the petition it is even remotely suggested that the petitioners signed the application u/s 265-B of the Code or the affidavits filed therewith, including their plea recorded in the course of the enquiry on the question of plea-bargaining was obtained under force or any misrepresentation or that it was involuntary and more particularly without full understanding of the situation. Even the Report of the Mutually Satisfactory Disposition u/s 265-D of the Code re-states the position that the petitioners entered into mutually satisfactory disposition with full understanding

that, upon conviction, they would be sentenced for one-fourth of the maximum punishment extendable, i.e., 7 years, which comes to 21 months.

14. Notably, even the grounds of challenge in the Writ Petition are of limited import. Firstly, it is urged that the complainant as well as the accused persons are foreigners. No loss is caused to the society, and the stolen property has been recovered, which will be returned to the complainant. Secondly, in the plea-bargaining, the petitioners have stated that all the accused want to return to their own countries as early as possible. Thirdly, the accused have already compensated the complainant by paying Rs. 55 lakhs, and the complainant has filed affidavit that he has no grievance against accused persons and is willing to compound the offence. Fourthly, the accused have already compensated the State by paying Rs. 5 lakhs. Fifthly, the Magistrate has not applied his mind while awarding sentence u/s 265-E(d) of the Code. As per that provision, the Magistrate could have awarded lesser sentence to the extent already undergone by the accused. Sixthly, the accused persons are foreigners, and, till the filing of the petition, they have undergone more than 10 months'' custody. Seventhly, Section 265-E(d) does not limit the power of the Court to grant minimum sentence. This aspect has been glossed over by the Magistrate. Further, considering the main object of plea-bargaining, if the Court were to give maximum sentence, then, no accused will come forward for plea-bargaining. Eighthly, accused No. 1 is a female, and she is having two-years'' young child. She is wife of accused No. 4.

15. During the course of arguments, however, the counsel for the petitioners, besides arguing on interpretation of Section 265-E of the Code, has faintly argued that the Magistrate has completely failed to examine the possibility of invoking Section 360 of the Code or the provisions of the Probation of Offenders Act, 1958 or any other law for the time being in force, which will be applicable to the case of the petitioners for releasing them on probation or providing benefit of any other law, as the case may be. That argument, in our view, is not open to the petitioners, as they have not challenged the order passed by the Court on mutually satisfactory disposition. Further, the Court has rightly noted that the facts of this case do not warrant invoking clause (b) of Section 265-E of the Code. Needless to observe that the said report was submitted on the basis of consensual disposition agreed by the accused. In any case, the Magistrate proceeded to hold that, looking into the nature of the offence and the systematic, planned manner and the daring operation by foreigners in India in respect of high value property (diamonds worth Rs. 6.73 crores), the question of invoking the benefit of Section 360 of the Code or the provisions of the Offenders Act does not arise. We have no hesitation in upholding the said finding recorded by the Magistrate.

16. That leaves us with the questions, firstly, as to the interpretation of Section 265-E of the Code and, secondly, whether, in the fact situation of the present case, the sentence awarded by the Magistrate of 21 months'' imprisonment to the accused is

just and proper.

17. We are conscious of the fact that the Magistrate has opined that Section 265-E of the Code, in particular clause (d) thereof, gives no discretion to the Court to award sentence lesser than one-fourth of the punishment provided or extendable, as the case may be; but, at the same time, while considering the first argument of the petitioners noted in paragraph two of the impugned decision, the Magistrate proceeded to hold that the same was presumptuous argument. While dealing with the said argument, the Magistrate has opined that, looking at the systematic, planned manner and daring operation by foreigners in India in respect of high value of stolen property, there was rare possibility of showing leniency in sentencing the accused in such a case, if the guilt was to be proved at the end of the trial. In other words, in the facts and circumstances of the present case, the Magistrate was of the opinion that awarding sentence of 21 months was just and proper, even though the accused have pleaded guilty and opted for plea-bargaining, as can be discerned from the observations in paragraphs 7 and 8 of the impugned decision. On upholding this finding, it may not be necessary for us to dwell upon the wider question raised by the petitioners in the fact situation of this case.

18. Be that as it may, in the impugned judgment, the Magistrate has also rightly proceeded on the premise that the Court has no discretion to award sentence lesser than one-fourth of the punishment provided or extendable, as the case may be. For considering this aspect, we may, first, advert to Section 265-E of the Code. The same reads thus:

265-E. Disposal of the case.--Where a satisfactory disposition of the case has been worked out u/s 265-D, the Court shall dispose of the case in the following manner, namely:-

(a) the Court shall award the compensation to the victim in accordance with the disposition u/s 265-D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition u/s 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused;

(b) after hearing the parties under clause (a), if the Court is of the view that section 360 or the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force are attracted in the case of the accused, it may release the accused on probation or provide the benefit of any such law, as the case may be;

(c) after hearing the parties under clause (b), if the Court finds that minimum punishment has been provided under the law for the offence committed by the accused, it may sentence the accused to half of such minimum punishment;

(d) in case after hearing the parties under clause (b), the Court finds that the offence committed by the accused is not covered under clause (b) or clause (c), then, it may sentence the accused to one-fourth of the punishment provided or extendable, as the case may be, for such offence.

(Emphasis supplied)

On a bare reading of this provision, it is noticed that, where a satisfactory disposition of the case has been worked out u/s 265-D, the Court has to dispose of the case in the manner provided in this provision. As per clause (a), the Court has to hear the parties on the quantum of punishment, releasing of the accused on probation of good conduct or after admonition u/s 360 or for dealing with the accused under the provisions of the Probation of Offenders Act or any other law for the time being in force and following procedures specified in the succeeding clauses for imposing punishment on the accused. Once, after hearing the parties, the Court is of the opinion that the fact situation of the case does not warrant releasing the accused on probation of good conduct or after admonition u/s 360 of the Code deal with the accused under the provisions of the Probation of Offenders Act, clause (b) will have no application to such a case. In that case, the Court, then, has to consider whether the facts of that case are covered by clause (c). If the offence in question provides for minimum punishment, the said clause would be attracted. In any other case covered by Chapter XXI-A of the Code, clause (d), which is the residuary clause, would be applicable. In the present case, the Court has found that clauses (b) and (c) of Section 265-E of the Code have no application to the case on hand. We are in agreement with the said opinion. Thus, the case is governed by clause (d) of the said section.

19. Before we elaborate further on the interpretation of clause (d) of Section 265-E, it may be apposite to keep in mind the background in which Chapter XXI-A of the Code has been introduced. The question regarding concessional treatment for offenders who, on their own initiative, proceed to plead guilty without any bargaining, was examined by the Law Commission of India in its One Hundred and Forty-Second Report. After due deliberations in Chapter IX of the said Report, the guidelines and procedure to be incorporated in the said Report for the sake of implementing the Scheme and the functioning thereof, have been adumbrated. In clause 9.32 of this Report, it is recommended that, in cases where the Competent Authority forms the opinion that, having regard to the gravity of the offence and the circumstances of the case viewed in totality, the ends of justice demand that substantive sentence of imprisonment in jail deserves to be imposed on an offender who pleads guilty whilst invoking the scheme for concessional treatment. For that, appropriate guidelines will have to be formulated. In clause 9.33 of the same Report, it has been noted that since it is considered inadvisable to adopt the scheme for plea-bargaining which obtains in U.S.A. for weighty reasons in the context of the prevailing condition in India, a practical difficulty requires to be overcome. The Law Commission, therefore,

recommended that some other formula must be evolved in order to make the scheme reasonably attractive or workable. That formula must appear to be just, fair, proper and acceptable. In that, the Competent Authority may impose such punishment as may be considered appropriate in the facts and circumstances of the case, subject to the rider that the jail term that can be imposed shall not exceed one-half of the maximum term provided by the statute for the concerned offence.

20. Chapter X of the said Report deals with how the proposed scheme overcomes the objections and apprehensions entertained by those who doubt the feasibility of the concept. The same reads thus:

10.1. The scheme being propounded by this Report is basically different from the plea-bargaining schemes prevailing elsewhere in five important areas, namely:

(1) There will be no contact between the public prosecutor and the accused for the purpose of invoking the scheme. The initiative will be solely with the accused who alone can make the applicable. The public prosecutor will have no role to play.

(2) The decision to accord concessional treatment will rest solely with a judicial officer functioning as a Plea-Judge in respect of offences punishable with imprisonment for less than 7 years or Tribunal comprised of two retired High Court Judges in respect of offences punishable with imprisonment for 7 years or more and will not be the result of an outcome of haggling between public prosecutor on one hand and accused on the other.

(3) There will be no bargaining with the judicial officers and an application once made will not be allowed to be withdrawn and the accused will not know what the judicial officers will do. He will only make a representation and plead for such concessional treatment as, according to him, would be appropriate.

(4) The sole arbiter will be the judicial officer and, therefore, there will be no risk of underhand dealings or for coercion or improper, inducement by the prosecution.

(5) The aggrieved party and the public prosecutor will have a right to be heard and place their points of view.

10.2. In view of these distinctive features, the apprehensions in regard to the feasibility of the scheme will stand allayed, as discussed hereafter:-

(1) In the plea-bargaining scheme prevailing elsewhere, an agreement in an outcome of negotiations and haggling haggling between the prosecution on one hand and the accused on the other. In the proposed scheme, this feature which is considered less than desirable has been eliminated. The haggling-haggling process is viewed with skepticism by the public at large and undermines the faith of the public in the outcome of the process. It also gives scope for doubting the bona fides and the integrity of the prosecutor involved in the negotiations. The criticism on this score is overcome in the proposed scheme which does not envisage any role to be

plead by the public prosecutor. It also does not visualize any haggling haggling process. The proposed scheme contemplates that the initiative for invoking the powers for concessional treatment under the scheme must originate from the accused and the application must be addressed directly to the Plea-Judge or the Tribunal constituted in this behalf who will decide whether or not to entertain the application and if it is decided to entertain the same, the Plea-Judge or the concerned Tribunal will decide what concessional treatment would be afforded having regard to all the relevant circumstances in the light of the guidelines and the statutory provisions.

(2) In the scheme obtaining elsewhere, there is a risk of improper inducement being offered inasmuch as there is a contact between the prosecutor and the accused in negotiations for entering a plea of guilty. In the proposed scheme, as the initiative comes from the accused, this risk is substantially eliminated. The possibility of threats or improper inducement having been offered in a clandestine manner also is eliminated since the proposed scheme visualizes ascertainment by the competent authority as to whether the application has been made voluntarily without any inducement or threat by making an enquiry in the open court whereat no police officer or person objected to by the accused would be allowed to remain present. Thus, there is an inbuilt safety mechanism to guard against inducement or threat.

(3) The risk of an innocent person pleading guilty is also taken care of in the proposed system since a judicial officer would apply his mind to the material on record and would be required to reject the application if there is prima facie no material spelling out the offence with which the applicant has been charged.

(4) The less than desirable feature of haggling haggling which may be considered less than becoming also does not exist in the proposed scheme, for the accused can only plead and place his point of view before the competent authority but cannot higgle haggle for he will have no power to withdraw the application if the court is not inclined to take as lenient a view as may be considered appropriate in the circumstances of the case.

(5) The risk of a guilty person escaping with unduly lenient punishment will also not exist inasmuch as the competent authority [composed of two retired High Court Judges in relation to offences punishable with imprisonment of 7 years or more] alone would decide what would be the appropriate punishment in the circumstances of the case and also because the aggrieved party will be heard before the competent authority passes an order under the scheme. Besides, the guidelines envisage imposing of a minimum jail term in regard to specified offences as elaborated in Chapter IX.

10.1 It can, therefore, be said with a degree of assurance that the proposed scheme does away with all objectionable features of the American practice and can be safely implemented and there is no cause for entertaining any apprehensions regarding

the feasibility or desirability of this course being adopted

(Emphasis supplied)

21. In Chapter XI of the said Report, the Law Commission has summed up the conclusions and recommendations. The same read thus:

CHAPTER XI
CONCLUSIONS AND RECOMMENDATIONS

Conclusions

I

The Commission is of the considered opinion that a scheme, to be known as "scheme for granting prayer for concessional treatment made by accused pleading guilty voluntarily" requires to be introduced in the criminal justice system in India by way of enacting a legislation according statutory recognition and authority to the scheme.

II

The need for introducing the scheme has become compulsive in a situation where the trial of a criminal case culminating in an acquittal can take as many as 33 years in a relatively petty case (involving alleged misappropriation of Rs. 12,000, Rs. 4,000 and Rs. 2,000) and result in an expenditure of as much as a crore of rupees to the State exchequer, with no corresponding benefit to the community. And in a situation, as reported on 16-8-1989 in Indian express, where the courts in a city like Bombay in 1988 recorded 124 rape cases but could dispose of only one and in first six months in 1989 recorded 67 cases but could dispose of not a single case.

III

There is more than ample justification for introducing the scheme in as much as:-

(1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community.

(2) It is desirable to infuse life in the reformative provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now.

(3) It will help the accused who have to remain as under trial prisoners awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as-

(a) end of uncertainty,

(b) saving in litigation-cost,

(c) saving in anxiety-cost,

(d) being able to know his or her fate and to start a fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career,

(e) saving avoidable visits to lawyer''s office and to court on every date of adjournment.

(4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.

(5) It will reduce congestion in jails.

(6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.

(7) Under the present system 75% to 90% of the criminal cases, if not more, result in acquittals.

RECOMMENDATIONS

The Commission, therefore, recommends that a scheme for concessional treatment to offenders willing to plead guilty on their own volition without any plea-bargaining or higgle haggling as outlined in Chapter IX (highlights whereof are set out hereunder) be statutorily introduced by adding a Chapter in the Code of Criminal Procedure of 1973.

Highlights of the Scheme

(1) The scheme may be invoked only by the offender himself. (See para 9.6).

(2) There will be no negotiations for plea-bargaining with the prosecuting agency or its advocate none of whom will have any role to play in the matter of moving the Competent Authority for invocation of the scheme. (See para 9.7).

(3) The Competent Authority will be a ''plea-judge'' designated by the Chief Justice of the concerned High Court from amongst the sitting judges competent to try cases punishable with imprisonment of upto 7 years. And a Bench of two retired High Court Judges nominated in this behalf by the Chief Justice of the State concerned in respect of offences punishable with imprisonment for 7 years or more. (See paras 9.3 and 9.5).

(4) The application will be entertained only after the Competent Authority is, upon ascertaining in the manner specified in the scheme, is satisfied that it is made voluntarily and knowingly. (See paras 9.15 and 9.16).

(5) The Competent Authority will hear the application in the presence of the aggrieved party and the public prosecutor or an assistant public prosecutor and

after affording a short hearing to them. (See paras 9.17 & 9.18).

(6) The Competent Authority shall have the power to impose a jail term, and/or fine and/or direct the accused applicant to pay compensation to the aggrieved party for compounding the offence in regard to the offences which are compoundable with or without the leave of the Court. (See paras 9.17 (iii) and 9.27).

(7) The Competent Authority shall award a minimum jail term of say six months or one year in respect of specified offences if the scheme is extended in this behalf in the light of the provision in the scheme.

(8) The Competent Authority may award a jail term not exceeding one half of the maximum provided by the relevant provision where the Competent Authority is not called upon to exercise the powers to release on probation under the Probation of Offenders Act or u/s 360 of the Code of Criminal Procedure in accordance with the guidelines. (See paras 9.24, 9.32, 9.33).

(9) In the first instance, as an experimental measure, the scheme may be made applicable only to offences which are liable for punishment with imprisonment of less than seven years and/or fine if both the Central and the State Government so resolves by notification issued by such Government and published in Government gazette. (See paras 8.4 and 9.37).

(10) The scheme may be made applicable to offences liable to be punished with imprisonment for 7 years and more after properly evaluating and assessing the results of the application of the scheme to offences liable to be punished with imprisonment for less than 7 years. (See paras. 8.4, 8.6 and 9.37).

[The scheme has been outlined elaborately in Chapter IX.]

II

The scheme may be made inapplicable to socio-economic offences of a non-technical nature in the first phase provided, however, that it may, later on, be made applicable with a rider than an offender will have to undergo a minimum jail term of not less than six months or 1 year or such other period as may be specified, if considered appropriate in the light of the public debate.

Note: In making this recommendation the factors that weigh are:-

(1) A punishment meted out quickly serves a better public purpose than a punishment meted out after a decade of litigation tiring to both the sides and shaking the faith of the public at large.

(2) Once an offender is made to suffer a substantive jail term from the point of view of deterrence, it may not matter much whether it is for 1 year or whether it is for a longer term. (See para 9.35).

III

The scheme may be made inapplicable to offences against women and children including offences of rape, bride burning, dowry deaths, demand and acceptance of dowry etc. which are viewed by the community with social worth in the context of the age-long history of injustice and suffering on the part of these sections of the society. [See para 9.35 (d)].

IV

Moreover, u/s 357(i) of Cr. P.C. it is only from out of the fine imposed by the court that compensation can be awarded. And u/s 357(3) compensation can be awarded only whilst imposing a sentence other than that of fine. As at present, compensation cannot be awarded in matters in which parties ''compound'' an offence u/s 320 of Code of Criminal Procedure because the compounding usually takes place by agreement between the parties in compoundable matters even before the commencement of trial. Stipulation for payment of compensation cannot under the circumstances, be made a part of an order of the Court or the Competent Authority without recording a conviction. So also larger amount of compensation cannot be ordered where there is a ceiling on the imposition of fine. In order to give effect to the scheme, it is therefore, necessary to amend this section to enable the competent authority to direct payment of compensation to the aggrieved party even in the absence of a pea of guilty and regardless of whether fine is imposed or not. That is why it is recommended that section 357 of Cr. P.C. be amended so as to empower the Competent Court to order payment of compensation even in cases where no conviction has been recorded and regardless of whether fine is imposed or not if an offence is compounded before the Court or the Competent Authority under the scheme. (See para. 9.38).

V

The scheme may be restricted to first offenders only. [See para 9.35(a) and (b)].

It is hoped that if appropriate legal measures are taken as soon as practicable in the light of this report it will go a long way in resolving the alarming problem of the mountain of arrears of criminal matters which problem brooks no delay.

We recommend accordingly.

(Emphasis supplied)

22. This Report was considered by the Law Commission of India in its One Hundred and Fifty-Fourth Report. While considering the efficacy of process of plea-bargaining, in Chapter XIII of the said Report, the Law Commission observed as follows:

...

7. We have examined the cases decided in USA as well as by the Supreme Court of India in respect of this concept and the 142nd Report of the Law Commission. We

are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is properly administered. For that purpose, certain guidelines and procedure have to be incorporated in the Code of Criminal Procedure.

8. Having given our earnest consideration, we recommend that this concept may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code. Plea bargaining can also be in respect of the nature and gravity of offences and the quantum of punishment.

9. However, plea bargaining should not be available to habitual offenders those who are accused of socio-economic offences of a grave nature and offences against women and children.

...

9.4 Such an application may be rejected either at the initial stage or after hearing the public prosecutor and the aggrieved party. If the Court finds that, having regard to the gravity of the offence or any of the circumstances which may be brought to its notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of its powers on plea-bargaining, the Court may reject the application supported by reasons therefore.

...

9.8 If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for, the Court may, instead of rejecting the application in limine, after hearing the public prosecutor and the aggrieved party, accept the plea of guilty and pass an order of conviction and sentence to the tune of one-half of the minimum sentence provided.

9.9 The Court shall on such a plea of guilty being taken, explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the Public Prosecutor or the aggrieved person as the case may be:

(i) impose a suspended sentence and release him on probation.

(ii) order him to pay compensation to the aggrieved party, or

(iii) impose a sentence, which commensurate with the plea bargaining; or

(iv) convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.

....

(Emphasis supplied)

23. The above-said Reports were considered by the Malimath Committee for Criminal Justice Reforms. In Chapter XIV of the said Report, the Committee considered the question of compounding / settlement without trial. The Committee, in detail, approved the recommendations made in the said Reports which promote settlement of disputes without trial. The extract of clauses under heading "Compounding/Settlement Without Trial" reads thus:

14.10 COMPOUNDING/SETTLEMENT WITHOUT TRIAL

14.10.1 Plea-bargaining which has been implemented with a great deal of success in USA has to be seriously considered. The Supreme Court of United States has upheld the Constitutional validity and also endorsed that plea-bargaining plays a significant role in the disposal of criminal cases. The United States experiment shows that plea-bargaining helps the disposal of the accumulated cases and expedites delivery of Criminal Justice and the Law Commission of India in its 154th and 142nd reports adverted to the same. The Law Commission also observed that when an accused feels contrite and wants to make amends or is honest and candid to plead guilty in the hope that the community will enable him to pay the fine for the crime with a degree of compassion, then he deserves to be treated differently from the accused who seeks trial involving considerable time, cost and money and cost of the community.

14.10.2 The Law Commission in its 142nd report stated that it is desirable to infuse life into reformative provisions embodied in Sec. 360 CrPC and the Probation of Offenders Act which according to the Law Commission remained unutilized. Law Commission noted the advantages of plea-bargaining which ensures speedy trial with benefits such as end of uncertainty, saving of cost of litigation, relieving of the anxiety that a prolonged trial might involve and avoiding legal expenses. The Law Commission also noted that it would enable the accused to start a fresh life after undergoing a lesser sentence. Law Commission noted that about 75% of total convictions are the result of plea-bargaining in USA and they contrasted it with 75% of the acquittals in India. Law Commission also observed that certainly plea-bargaining is a viable alternative to be explored to deal with huge arrears of criminal cases. The same might involve pre-trial negotiations, and whether it is "charge bargaining" or "sentence bargaining" it results in a reduced sentence and early disposal.

14.10.3 The Law Commission adverted to the views of the Indian Supreme Court in this regard but however stated that plea-bargaining can be made one of the components of the administration of the criminal justice and the only caveat that they entered is that it should be properly administered and they recommend that in cases where the imprisonment is less than seven years and / or fine may be brought into schemes of things where plea bargaining should be there and they also stated that in respect of nature and gravity of the punishment quantum of punishment could be brought down but unlike in the United States, where plea bargaining is

available for all the crimes and offences plea-bargaining in India should not be extended to socio economic offences or the offences against women and children.

14.10.4 As recommended by the Law Commission when the accused makes a plea of guilty after hearing the public prosecutor or the de facto complainant the accused can be given a suspended sentence and he can be released on probation or the court may order him to pay compensation to the victim and impose a sentence taking into account the plea bargaining or convict him for an offence of lesser gravity may be considered. Taking into account the advantages of plea-bargaining, the recommendations of the Law Commission contained in the 142nd report and the 154th report may be incorporated so that a large number of cases can be resolved and early disposals can be achieved. By no stretch of imagination can the taint of legalizing a crime will attach to it. It should not be forgotten that already the Probation of Offenders Act gives the court the power to pass a probation order. Further the power of executive pardon, power of re-mission of sentences have already an element of not condoning the crime but lessening the rigor or length of imprisonment. In imposing a sentence for a lesser offence or a lesser period the community interest is served and it will facilitate an earlier resolution of a criminal case, thus reducing the burden of the court. Perhaps it would even reduce the number of acquittals for after prolonged trial it is quite possible that the case may end in acquittal. If the compounding offences is there in the statute even under old Cr.P.C. there is no reason why, when the accused is not let off but he is sentenced for a lesser sentence plea bargaining should not be included in the Criminal Justice System, so that the object of securing conviction and also reducing the period of trial can be achieved and reduced pendency can also be achieved in "one go".

14.10.5 The Law Commission after thorough examination of the subject of plea-bargaining/ compounding /settlement without trial has in its 142nd and 154th reports made detailed recommendations to promote settlement of criminal cases without trial. As the Committee is substantially in agreement with the views and recommendations of the Law Commission in the said reports it considers unnecessary to examine this issue in detail.

14.10.6 However, the Committee is of the view that in addition to the offences prescribed in the Code as compoundable with or without the order of the court there are many other offences which deserve to be included in the list of compoundable offences. Where the offences are not of a serious character and the impact is mainly on the victim and not on the values of the society, it is desirable to encourage settlement without trial. The Committee feels that many offences should be added to the table in 320(1) of the Code of Criminal Procedure. The Committee further recommends offences which are compoundable with the leave of the court, may be made compoundable without the leave of the court. These are matters which should be entrusted to the Committee.

(Emphasis supplied)

24. It may be also useful to advert to the Prefatory Note in the Statement of Objects and Reasons for enactment of Amendment Act No. 2 of 2006, whereby Chapter XXI-A of the Code dealing with Plea Bargaining has been introduced. The relevant extract of the Statement of Objects and Reasons reads thus:

...

2. The disposal of criminal trials in the Courts takes considerable time and that in many cases trials do not commence for as long a period as 3 to 5 years after the accused was remitted to judicial custody. Large number of persons accused of criminal offences are unable to secure bail, for one reason or the other, and have to languish in jail as under trial prisoners for years. Though not recognized so far by the criminal jurisprudence, it is seen as an alternative method to deal with huge arrears of criminal cases. To reduce the delay in the disposal of criminal trials and appeals as also to alleviate the suffering of under trial prisoner, it is proposed to introduce the concept of plea-bargaining as recommended by the Law Commission of India in its 154th Report on the Code of Criminal Procedure. The Committee on Criminal Justice System Reforms under the Chairmanship of Dr (Justice) V.S. Malimath, formerly Chief Justice of Kerala High Court, has also endorsed the Commission''s recommendations. It means pre-trial negotiations between defendant and prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. The benefit of plea-bargaining would, however, not be admissible to habitual offenders. A Chapter on this is being incorporated in the Code of Criminal Procedure, 1973.

....

25. Reverting to the question of interpretation and purport of Section 265-E of the Code, in particular clause (d) thereof, we cannot be oblivious to the legislative intent and the background in which Chapter XXI-A of the Code has been introduced. The question is: whether the language of clause (d) justifies the stand of the petitioners that the Court has discretion to award sentence to the accused for a period lesser than one-fourth of the punishment provided or extendable, as the case may be, for the offence in question? According to the petitioners, the fact that Section 265-E mandates that the Court must hear the parties on the quantum of the punishment, coupled with the expressions "may", "to" and "provided or extendable" used in clause (d) leaves no manner of doubt that it is a directory provision giving discretion to the Court to award sentence up to one-fourth of the punishment provided or extendable, as the case may be, for the offence in question. In other words, the sentence to be awarded by the Court in the case of plea-bargaining covered by clause (d) can be up to one-fourth of the punishment provided or extendable, as the case may be. The argument, though attractive at the first blush, on deeper examination, in our opinion, deserves to be stated to be rejected.

26. As regards the expression "may" appearing in clause (d), similar expression has been used in clauses (b) and (c) of Section 265-E. The use of expression "may" in the setting in which it is placed, will have to be construed as "shall". In that, if the Court, upon hearing the parties, was to be satisfied that Section 360 of the Code or the provisions of the Probation of Offenders Act were attracted in the fact situation of the case, it would be the bounden duty of the Court to release the accused on probation or provide the benefit of any such law, as the case may be. In that case, the other two clauses in Section 265-E, i.e., clauses (c) and (d), will not come into play at all. But, in a given case, if clause (b) is not applicable or attracted, then, the Court, after hearing the parties, has to satisfy itself that the offence, in respect of which, the accused has pleaded guilty, and has invoked remedy of plea-bargaining, provides for any minimum punishment. If minimum punishment is provided under the law for the said offence, then, it would be the bounden duty of the Court to sentence the accused in the manner provided in clause (c). Once clause (c) is attracted, clause (d) will have no application to that case. In one sense, the regime provided in clauses (c) and (d) is mutually exclusive. In matters of plea-bargaining, where the Court is satisfied that neither clause (b) nor clause (c) is applicable, all such specified cases would be covered by clause (d). In other words, clause (d) is a residuary clause covering all those specified cases which are not covered by clause (b) or clause (c). If the case falls in clause (d), then, the Court is obliged to sentence the accused in the manner provided in the said clause. Thus understood, the expression "may" appearing in clause (d) is not indicative of having bestowed discretion in the Court regarding the quantum of sentence, but is to cast obligation on the Court to sentence the accused in the manner provided in the said clause.

27. As regards the expression "to" appearing in clause (d), it is pertinent to note that same expression is used even in clause (c), i.e., "to half of such minimum punishment". If the argument of the petitioners in respect of expression "to" to mean "up to" was to be accepted, that may result in Court re-writing the said word to mean "up to" or "extent of". That will be impermissible. In our opinion, the expression "to" appearing in clause (d) as much as in clause (c) of Section 265-E is a preposition used as a functional word to indicate quantum of sentence. In other words, the quantum of sentence to be imposed by the Court is defined by the respective clauses, leaving no discretion to the Court to impose any lesser sentence. Taking any other view would mean that, even in the matters covered by clause (c), the Court can sentence the accused for a period lesser than half of the minimum punishment. That interpretation will not only be preposterous, but also destructive of the legislative intent.

28. As regards the expression "provided or extendable" occurring in Section 265-E(d), we uphold the opinion of the Magistrate that the same are joined with conjunction "or" -which means the Court may sentence the accused with one-fourth of the punishment "provided" or with one-fourth of the punishment "extendable" by the principal provision in the substantive law. In that, these two different

terminologies were necessary, as, in some offences, the punishment is extendable up to maximum of certain term, and, in other set of offences, the punishment is not extendable but fixed quantum is provided.

29. We cannot be oblivious to the background in which the enactment in question has been introduced. The Law Commission, in no uncertain terms, observed that guidelines and procedure will have to be incorporated in the Code of Criminal Procedure in respect of scheme for concessional treatment to offenders who plead guilty on their own volition in lieu of a promise to reduce the charge, to drop some of the charges or getting lesser punishment. In our view, if the provision was to be interpreted to have invested discretion in the Court to decide on the quantum of sentence, it would introduce an environment of uncertainty in awarding sentence. That may shake public confidence and would be counter-productive. It would also encourage accused persons gaining impression that they can get away with the specified offences, on paying compensation, if caught by the police and prosecuted. It would result in a situation -"slap first, then say sorry, and get away lightly by paying compensation". That is not what was envisaged by the Law Commission or the Parliament while enacting Chapter XXI-A of the Code. The intent behind Chapter XXI-A of the Code, although, was to help the litigant to end uncertainty, save litigation costs and anxiety costs, as also to reduce back-breaking burden of the Court and to reduce the congestion in jails; but, at the same time, a conscious decision is taken that we have to depart from the scheme of plea-bargaining prevailing in other countries and adopt such scheme so that substantive sentence of imprisonment in jail deserves to be imposed on an offender who pleads guilty whilst invoking the scheme for concessional treatment. The Law Commission recommended formulation of appropriate guidelines in that behalf. This recommendation of the Law Commission has been mirrored in clauses (d) and (c), respectively, which spell out the quantum of sentence to be awarded by the Court and is in the nature of guidelines formulated by the Legislature.

30. Indeed, it is possible to contend that, the above interpretation may result in a situation where a person, after facing a full-fledged trial, is awarded punishment for lesser period than 21 months, considering the nature of offence and the circumstances in which the said offence had occurred; whereas, if that accused were to invoke plea-bargaining, may have to end up in not only paying compensation but also suffering imprisonment for a period of minimum 21 months, subject to adjustments of set off against the sentence of imprisonment. That may give rise to an argument of possibility of inflicting discriminatory treatment to such accused. As a result, the accused persons would be dissuaded from resorting to plea bargaining, and, instead, prefer to fend for themselves to face the long-drawn trial, which may eventually enure to their advantage. Further, that interpretation may give rise to the argument that, although the parent provision in the principal substantive law does not provide for minimum punishment, but, by virtue of clause (d) of Section 265-E of the Code, the provision of minimum punishment of one-fourth punishment

provided or extendable, as the case may be, for such offence is introduced.

31. None of these submissions commend to us. The status of accused, who pleads not guilty to the charge and claims to be tried is incomparable with the status of the accused, who pleads guilty and invokes remedy of plea-bargaining. In that sense, the two sets of accused cannot be equated or said to be similarly placed. Moreover, the provision, such as Section 265-E, providing for sentence is a concession offered to accused who voluntarily resorts to plea-bargaining, so as to avoid the uncertainty of the trial, the term of sentence, if found guilty and also the litigation costs and time. Until the introduction of Chapter XXI-A in the Code, the law of the land was to discourage plea bargaining, being against public policy. Thus, the argument of discrimination is unavailable to the accused, who, at his own volition, elects the remedy of plea-bargaining. As regards the effect of providing for fixed sentence period in cases of plea-bargaining, even though the principal substantive law does not provide for minimum sentence, we fail to understand as to how this argument can be taken forward by the accused electing remedy of plea bargaining at his own volition. Notably, the validity of Section 265-E is not put in issue in the present case. Neither the argument of discrimination, nor the effect of the provision resulting in imposing minimum sentence of one-fourth of the punishment provided or extendable can be taken forward by these petitioners.

32. Taking over all view of the matter, we have no hesitation in upholding the opinion of the trial Court that the Court has no discretion to award sentence other than one-fourth of the punishment provided for or extendable, as the case may be, for the offence in question in cases covered by clause (d) of Section 265-E of the Code. On this finding, the final order passed by the Magistrate of awarding sentence of 21 months to the petitioners is unassailable.

33. The counsel for the petitioners had placed reliance on the decision of the Apex Court in the case of State of Madhya Pradesh Vs. Munna Choubey and Another, . We fail to understand as to how this decision is of any help to the petitioners. Firstly, this decision deals with the question as to whether the Single Judge of the High Court was right in reducing the sentence imposed on each of the accused by the trial Court in the fact situation of that case. The Single Judge had decided the matter in favour of the accused on the finding that the sentence already undergone by the accused would meet the ends of justice, as the offence had taken place nearly 6 years'' back; and the second reason which weighed with the Single Judge was that the accused belong to rural area. The Apex Court found that none of these considerations were valid, more particularly in view of the offence of rape concerning the human body, and the accused cannot be let free on the sentence of imprisonment for a period of about 3 years and 6 months already undergone.

34. Reliance was then placed on the decision of the Division Bench of our High Court in the case of Ramesh Sadashiv Khatpe & Ors. v. State of Maharashtra & Ors. -2007 (1) Bom. C.R. (Cri.) 993. Even this decision is of no avail to the petitioners. The

opinion recorded in that case that almost 18 years have gone by since the offence was committed and no purpose would be served by incarcerating the accused any further, especially since they have reformed. That reasoning can be of no avail while sentencing the accused in terms of Section 265-E of the Code. Suffice it to observe that the said decision has no application to the case on hand.

35. Accordingly, we hold that this petition is devoid of merits, and deserves to be dismissed. Hence, dismissed. Rule is discharged.