

PLEA BARGAINING IN US AND INDIAN CRIMINAL LAW CONFESSIONS FOR CONCESSIONS

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Introduction

It is appropriate to begin this paper with the famous quote of Indian Jurist and leading lawyer Nani Palkhivala: “the greatest drawback of the administration of justice in India today is because of delay of cases...The law may or may not be an ass, but in India, it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in the community of snails. Justice has to be blind but I see no reason why it should be lame. Here it just hobbles along, barely able to work”¹.

India’s ‘efficiency’ in crime investigation, prosecution and trial process is under a shadow of doubt and crisis of credibility because more than seventy per cent accused are acquitted. When it is difficult or impossible to secure evidence to establish crime through able investigation, what are the alternatives to send the criminals to jails? One limited answer is ‘plea bargaining’ where confessions will be bargained from criminal under judicial supervision which might result in speedy trial and sentencing. This article intends to examine the utility of plea bargaining.

In India the conviction rate is gradually falling which indicates an abysmal state of ‘law and order’ or lack of it. The statistics relating to crimes in 2011 released by National Crime Record Bureau reflect the inefficient functioning of ‘system’². In 2011, the violent crimes were 2.56 lakhs while in only 84.5 per cent of these crimes marched to the stage of charge sheeting while just 28 percent ended in conviction. Maharashtra state recorded lowest conviction rate at 8.2%. The conviction rates for different kinds of crimes in the country is: a) for crimes against women 26.9 per cent, b) Economic Crimes 28.6 per cent, c) Crimes against SCs 31.8%, d) Property Crimes: 34.5 % as per the

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1 Nani A Palkhivala, “We the nation...lost decade (1994) UBS Publications, p 215

2 5th July 2012, <http://www.jagranjosh.com/current-affairs/national-crime-record-bureau-released-the-crime-statistics-for-2011-1341490766-1>

NCRB Records³. The Union Minister told Rajyasabha in December 2011⁴, that around 3.2 crore cases were pending in high courts and subordinate courts across the country while 56,383 cases were pending in the Supreme Court. It also said 74% of the total 3.2 crore cases were less than five years old⁵. Similarly, 20,334 out of 56,383 pending cases in the apex court were less than one year old. There are more than 72 lakh criminal cases such as murder, rape and riots are pending in different courts across the country with Maharashtra having a highest backlog of over 13 lakh.

Bargain in Criminal Case

The question is can we bargain a conviction and negotiate some sentence without ‘much’ trouble for the state. The plea bargaining is somewhat an answer. It is also called: plea agreement, plea deal or copping a plea, which is an agreement between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. It is a Pre-Trial procedure whereby a bargain or deal is struck between the accused of an offence and the prosecution with the active participation of the trial judge. It can further be explained as:

- (i) Withdrawal of one or more charges against an accused in return for a plea of guilty,
- (ii) Reduction of a charge from a more serious charge to a lesser charge in return for a plea of guilty.
- (iii) Recommendation by the prosecutor to sentencing judges as to leniency of sentence in lieu of plea of guilty.

Charge Bargaining: It is basically an exchange of concessions by both the sides which may also mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.

3 July 4, 2012, the Hindu, <http://www.thehindu.com/news/states/karnataka/article3599124.ece>

4 http://articles.timesofindia.indiatimes.com/2011-12-20/india/30537308_1_subordinate-courts-pendency-crore-cases

5 http://articles.timesofindia.indiatimes.com/2012-05-31/mumbai/31920171_1_court-posts-district- and -subordinate-courts-crore-cases

Sentence bargaining, 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.

Besides the above two kinds of bargaining there is **count bargaining**, wherein they plead guilty to a subset of multiple original charges, and **fact bargaining** where the defendants plead guilty pursuant to an agreement in which the prosecutor stipulates to certain facts that will affect how the defendant is punished under the sentence guidelines.

Coercive plea bargaining has been criticized as it infringes an individual's rights under Article 8 of the European Convention on Human Rights. Another argument against plea bargaining is that it may not actually reduce the costs of administering justice. Eg. if there is only a 25% chance of conviction and punishing for 10 years imprisonment, defendant may make a plea agreement for one year imprisonment and if plea bargaining is unavailable, the prosecutor might drop the case completely⁶. Plea bargaining should consist of two important qualities i.e., voluntariness and judicial scrutiny.

Plea Bargaining in US

The Sixth Amendment to US Constitution enshrines the fair trial principle. But it did not mention the practice of plea bargaining. However the US judiciary has upheld the constitutionality of this process. The classic case of adoption of plea bargaining is the case of assassination of Martin Luther King Jr⁷. In 1969 accused James Earl Ray pleaded guilty to the murder of Martin Luther King Jr to avoid death penalty⁸. He got 99 years of imprisonment⁹. Today the Plea bargaining became a significant part of the criminal justice system in the United States; as the vast majority (roughly 90%) of criminal cases are settled by plea bargain rather than by a jury trial. In a criminal trial in the United States, the accused has three options as far as pleas are concerned: A)

6 http://legalpundits.indiatimes.com/_nl_january_2006.html 18-7-2006

7 Huie, William Bradford (1997). *He Slew the Dreamer: My Search for the Truth About James Earl Ray and the Murder of Martin Luther King* (Revised ed.). Montgomery: Black Belt Press. ISBN 978-1-57966-005-5.

8 <http://www.history.com/this-day-in-history/ray-pleads-guilty-to-king-assassination>

9 Ray was convicted on March 10, 1969, after entering a guilty plea to forgo a jury trial. Had he been found guilty by jury trial, he would have been eligible for the death penalty. He was sentenced to 99 years in prison. He later recanted his confession and tried unsuccessfully to gain a new trial. He died in prison of hepatitis C.

guilty, B) not guilty or C) plea of *nolo contendere*=(I do not wish to contend). At every minute, a criminal case is disposed off in a US court based on guilty plea bargained or *nolo contendere* plea.

As held in "*Fox v. Schedit* and in *State exrel Clark v. Adams*¹⁰", the plea of "Nolo Contendere" sometimes called also "Plea of Nolvut" or "Nolle Contendere" means, in its literal sense, "I do no wish to contend", and it does not origin in early English Common Law. This doctrine, is also, expressed as an implied confession, a quasi-confession of guilt, a plea of guilty, substantially though not technically a conditional plea of quality, a substitute for plea of guilty, a formal declaration that the accused will not contend, a query directed to the Court to decide on plea-guilt, a promise between the Government and the accused, and a Government agreement on the part of the accused that the charge of the accused must be considered as true for the purpose of a particular case only.

Be it noted, that raising of plea of "Nolo Contendere" is not *ipso facto*, a matter of right of the accused. It is within the particular discretion of the Court concerned to accept or reject such a plea. However, if the Court accepts such plea, it must do so unqualifiedly. It is, therefore, clear that if such plea is once accepted, by the Court, the accused may not be denied, his right to raise such plea. The Court cannot accept such plea having rights of the accused and determination of facts on any questions of law. Of course, the discretion of the Court, if plea is accepted, has to be exercised in light of special facts and circumstances of the given case. It is, also held at times that such discretion vested in the Court has to be used only when special considerations are present. It is, also important to mention, at this stage that in the absence of statutory provisions to the contrary, consent of a prosecutor is not required as a condition for refusing the plea of 'Nolo Contendere' by the Court. And the fact that the prosecutor's consent is not generally required would not tantamount to non-consideration of his version or attitude. The Court is required to consider the prosecutor's version as an important factor in influencing the Court in deciding whether such plea should be accepted or not.

10 363 US 807

Upon the acceptance of a plea of "Nolo Contendere" for the purpose of the case in which such a plea is made, it becomes an implied confession of the guilt equivalent to a plea of guilty; that is the incidence of plea. So far as a particular criminal action in which the plea is offered is concerned, rather than the same, as of a plea of guilty, of course, it is not necessary that there should be adjudication by the Court that the party whose plea is accepted as guilty, but the Court may immediately impose sentence. This proposition is very well elucidated in "*United States v. Risfeld*, 340 US 914". However, it may be noted a new dimension was evolved in "*Lott v. United States*, 367 US 421", where the Court, after stating that the plea is tantamount to an admission of a guilt for the purpose of the case, added that the plea itself, does not constitute a conviction, and hence, is not a determination of guilt. As found from some of the judicial pronouncements, it is beyond the purview of the Court once a plea of "Nolo Contendere" is needed to make in adjudication to the guilt of the accused.

The plea of "Nolo Contendere", barring a few percentages of cases, has been recognised in the administration of criminal justice in many countries, including the United States, and has resulted into substantial reduction in the workload of the criminal justice system. Such a plea, it has been stated, has a success of practical aspect over the technical one¹¹.

As there is no possibility of punishment or retaliation so long as the accused is free to accept or reject the prosecution offer. This is the rationale behind the US Supreme Court's judgment in *Bordenkircher v Haynes*¹². While accepting the constitutionality of the plea bargaining, the US Supreme Court upheld the sentence of life imprisonment to the accused, who rejected the 'plea guilty' offer in return to 5 year imprisonment. The US apex court of course did not rule out the possibility of duress the accused might suffer to choose the lesser of two evils.

11 Observations of Ahmadabad High Court in *State of Gujarat v Natwar Harchandji Thakor*, (decided on 22 February, 2005), 2005 CriLJ 2957, <http://indiankanoon.org/doc/1439610/> (Ahmadabad High Court) paras 73-78

12 434 US 357 1978, Hayes was indicted on charges of forgery. He and his counsel met with the prosecutor who offered a lesser sentence if he pled guilty. Hayes decided not to plead guilty and the prosecutor asked that he be tried under the Kentucky Habitual Criminal Act. Hayes was found guilty and sentenced to life as a habitual offender.

Plea bargaining was initially not favored in colonial America but it gained increasing acceptance with the rise in population by which courts became overcrowded, and trials became lengthier. The first case of US Supreme Court noticed in this regard is *Brady v. United States*¹³. In this case the Supreme Court held that merely because the agreement was entered into out of fear that the trial may result in a death sentence, would not illegitimise a bargained plea of guilty. The U.S. Supreme Court has approved practices such as plea bargaining when properly conducted and controlled. By the twentieth century, guilty pleas dominated the majority of criminal cases. Almost every criminal case is now conducted by Plea bargaining and today it is often said that the American Criminal Justice would collapse if plea bargaining is removed from it. In U. S, it is a deal struck between prosecution and defense. It is much broader and fairness is writ large over it. Voluntariness and judicial scrutiny are two important aspects. The courts have been given a very vital role to play and it has to see that the entire thing is voluntary and the accused is given the protection of secrecy and all the parties may participate freely and no one is subjected to any coercion or duress of another.

Harvard Law School Discussion paper has, recently concluded with: Higher levels of crime and a greater social emphasis on ensuring that guilty individuals are punished lead to a greater use of plea bargaining, while lower levels of crime and a greater social emphasis on ensuring that innocent individuals are not punished leads to less use of plea bargaining¹⁴.

In India, Response of Judiciary

After the US has experimented, reformed and practiced the process of plea bargaining in 19th Century, India, a century after, now discussing the implementation of the provisions which brought plea bargaining in very limited cases in a limited manner.

It is termed as immoral compromise in criminal cases, or trading out in India. The moral question dominates the criticism of plea bargaining concept. Apart from academia the apex court also was not in

13 397 U.S. 742 (1970)

14 Yehonatan Givati, Harvard Law School Discussion Paper June 2011. Comparative Law & Economics of PB: Theory and Evidence

favour of this practice in the circumstances prevailing in India. While Law Commission of India was continuously researching and recommending introduction of plea bargaining, the Supreme Court of India was questioning its moral base and apprehending its consequences because of dishonest circumstances prevailing around. The Supreme Court criticized it in its judgment namely, *Murlidhar Meghraj Loya v. State of Maharashtra*¹⁵, as follows:

“...call ‘plea bargaining’, ‘plea negotiation’, ‘trading out’ and ‘compromise in criminal cases’ and the trial magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, ‘trades out’ of the situation, the bargain being a plea of guilt, coupled with a promise of ‘no jail’. These advance arrangements please everyone except the distant victim, the silent society...”

The Supreme Court in *Kachhia Patel ShantilalKoderlal v. State of Gujarat and Anr*¹⁶ strongly disapproved the practice of plea bargain again. It observed that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. In yet another case *Kripal Singh v. State of Haryana* observed that neither the Trial court nor the High Court has jurisdiction to bypass the minimum sentence prescribed by Law on the premise that a plea bargain was adopted by the accused.

In *Kasambhai v. State of Gujarat*¹⁷, expressed an apprehension of likely misuse. In *State of Uttar Pradesh v. Chandrika*¹⁸, the Supreme Court held that it is settled law that on the basis of Plea Bargaining court cannot dispose of the criminal cases. Going by the basic principles of administration of justice merits alone should be considered for conviction and sentencing, even when the accused confesses to guilt, it is the constitutional obligation of the court to award appropriate sentence. Court held in this case that mere acceptance or admission of the guild

15 AIR 1976 SC 1929

16 1980 CriLJ553

17 AIR 1980 SC 854

18 2000 Cr.L.J 384 (386)

should not be reason for giving a lesser sentence. Accused cannot bargain for reduction of sentence because he pleaded guilty.

Shift in judicial thinking:

But it was Gujarat High Court that recognized the utility of this method in *State of Gujarat v. Natwar Harchandji Thakor*¹⁹, as an alternative measure of redressal to deal with huge arrears in criminal cases. The court reasoned the change as follows: “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. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms.”

The seed of the process of plea bargaining is found in Section 206(1) and 206(3) of the Code of Criminal Procedure and Section 208 (1) of the Motor Vehicles Act, 1988. Under these provisions the accused can plead guilty of petty offences or less grave offences and settle with penalties for small offences to close the cases.

“Plea of guilty” and “plea bargaining”

Ahmadabad High Court brought out distinction between ‘plea of guilty’ and ‘plea bargaining. The Court said: “...But the 'plea bargaining' and the raising of "plea of guilty", both things should not have been treated, as the same and common. There it appears to be mixed up. Nobody can dispute that "plea bargaining" is not permissible, but at the same time, it cannot be overlooked that raising of "plea of guilty", at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether, "plea of guilty" really on facts is "plea bargaining" or not is a matter of proof. Every "plea of guilty", which is a part of statutory process in criminal trial, cannot be said to be a "plea bargaining" ipso facto. It is a matter

19 (2005) Cr.L.J. 2957

requiring evaluation of factual profile of each accused in criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be based upon facts and proof not on fanciful or surmises without necessary factual supporting profile for that"²⁰.

It is interesting to note that Sub-section (2) of Section 240 provides that the charge shall then be read and explained to the accused and he shall be asked as to whether he pleads guilty of the offence charged or claims to be tried. Section 241 provides that if the accused pleads guilty Magistrates shall record the plea and may in his discretion convict him thereon. Now, it is not obligatory on the part of the Magistrate to convict him even if the accused pleads guilty, he may proceed with the trial.

Every "plea of guilty" during the course of observance of the mandatory procedure prescribed in Code and particularly in Sections 228(2), 240(2), 252 and also in Section 253 for the trial of case by the Magistrates, when plea of guilty is recorded as per the procedure prescribed cannot be said to be a "plea bargaining".

Research of the Law Commission:

The Law Commission of India advocated the introduction of 'Plea Bargaining' in the 142nd, 154th and 177th reports. The 142nd Report set out *in extenso* the rationale and its successful functioning in USA and manner in which it should be given a statutory shape. This Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea-bargaining can also be in respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The 154th report recommended dealing with huge arrears of criminal cases. This recommendation of the

20 *State of Gujarat v Natwar Harchandji Thakor*, (decided on 22 February, 2005), 2005 CriLJ 2957, <http://indiankanoon.org/doc/1439610/> (Ahmadabad High Court) para 68

154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report.

The Report of the Committee on the reform of criminal justice system, 2000 under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice²¹. In its report, the Malimath Committee recommended that a system of plea-bargaining be introduced into the criminal justice system of India to facilitate the earlier resolution of criminal cases and reduce the burden on the courts²².

Process of Plea Bargaining: Amendment to Criminal Law

The process of plea bargaining was brought in as a result of criminal law reforms introduced in 2005²³. Section 4 of the Amendment Act introduced Chapter XXIA to the Code having sections 265 A to 265 L which came into effect on 5th July, 2006 The Cr.P.C. Chapter XXI A, allows plea bargaining to be used in criminal cases where:

1. Plea-bargaining can be claimed only for offences that are penalized by imprisonment below seven years. 265 A
2. If the accused has been previously convicted of a similar offence by any court, then he/she will not to be entitled to plea-bargaining.
3. Plea-bargaining is not available for offences which might affect the socio-economic conditions of the country.
4. Also, plea-bargaining is not available for an offence committed against a woman or a child below fourteen years of age 265 L.

The opportunity of plea bargaining is not acceptable for accused in serious crimes such as murder, rape etc. It does not apply to serious cases wherein the punishment is death or life imprisonment or a term exceeding seven years or offences committed against a woman or a child below the age of 14 years²⁴.

21 <http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm>

22 Recommendation 106 Malimath Commission Report,
<http://www.hrdc.net/sahrdc/hrfeatures/HRF88.htm>

23 The Criminal Law (Amendment) Act, 2005 (Act 2 of 2006).

24 Section 265 L of CrPC, 1973

Offences affecting the socio-economic condition of the country:

The Government Order issued in 2006 explains emphatically that this process is not available in the offences affecting the socio economic conditions of the country. Thus there is no plea bargaining for accused, who are charged with offences under the enactments such as, Dowry Prohibition Act, 1961, the Commission of Sati Prevention Act, 1987, the Indecent Representation of Women (Prohibition) Act, 1986, the Immoral Traffic (Prevention) Act, 1956, Protection of Women from Domestic Violence Act, 2005, Provisions of Fruit Products Order, 1955 (issued under the Essential Commodities Act, 1955), the Infant Milk Substitutes, feeding Bottles and Infants Foods (Regulation of Production, supply and distribution) Act, 1992, Provisions of Meat Food Products Order, 1973 (Issued under the Essential Commodities Act, 1955), the SC and ST (Prevention of Atrocities) Act, 1989., Offences mentioned in the Protection of Civil Rights Act, 1955, Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Army Act, 1950, the Air Force Act, 1950, the Navy Act, 1957, the Explosives Act, 1884 and Cinematograph Act, 1952.

For the crimes under 16 laws there is no provision for plea bargaining. Where the offences are compoundable, the process of plea bargaining may not add any improvement. Because of these limitations and many charges were kept beyond scope of the process of plea bargaining, a very few sections of crimes besides petty cases like a scuffle, misappropriation of accounts, forgery, defamation, illegal threat, rash driving, food adulteration and other offences can be solved with mutual consent of both the parties using the law of plea bargaining. Though disputed the offence of causing death by negligence, mostly the accidental deaths are negotiated under this process.

Early cases of plea bargaining:

First case, Plea Rejected: Mr. Sakha-ram Bandekar, a grade I employee of RBI, was accused of siphoning off Rs 1.48 crore from the RBI by issuing vouchers against fictitious names from 1993 to 1997 and transferring the money to his personal account. The CBI arrested him on October 24, 1997, and released on bail in November. The Court of

Special CBI judge A R Joshi had framed charges on March 2, 2007²⁵. The accused made an application for Plea Bargaining on the ground of old age, ie., 58 years and tried to take the benefit of just passed amendment to criminal law providing for this new process. The CBI opposed plea bargaining attempt saying; "The accused is facing serious charges and plea bargaining should not be allowed in such cases...Corruption is a serious disease like cancer. It is so severe that it maligns the quality of the country, leading to disastrous consequences. Plea bargaining may please everyone except the distant victims and the silent society." Agreeing with the CBIs reasoning the court rejected Bandekar's application. Still the lawyers came to know that a procedure where concessions can be gained for confessions is now available as an alternative to languishing in courts and jails²⁶.

*Vijay Moses Das v CBI*²⁷, The second reported case from Uttarakhand was successful. A person who was accused of supplying substandard material to ONGC and that too at a wrong Port causing immense losses to ONGC sought the plea bargaining. The CBI investigated and initiated prosecution under sections 420, 468 and 471 of IPC. Accused proposed to plea bargaining and the ONGC (Victim) and CBI (Prosecution) had no objection to such request, but trial court rejected on the ground that Affidavit under section 265B was not filed by accused and compensation was not fixed. Justice Prafulla Pant of Uttarakh and High Court, hearing the Criminal Miscellaneous Application directed the trial court to accept the plea bargaining application.

Case in Mumbai: A magistrate's court on 25th may, 2011 accepted a plea bargain application and convicted four foreign nationals-who were accused of stealing diamonds worth Rs 6.6 crore at an international jewellery show 2010, to 21 months rigorous imprisonment. The maximum punishment in such cases is usually seven years. The foreigners, three Mexicans and one Venezuelan, were convicted by the 37th Esplanade court, after they had pleaded guilty to their offence and sought a plea bargain under the provisions of the Criminal Procedure Code.

25 Times of India: Oct 15, 2007

26 http://articles.timesofindia.indiatimes.com/2007-10-15/mumbai/27960117_1_plea-bargaining-application-sessions-court

27 Crim.Misc. Appln 1037/2006

Panaji case: Bombay High Court at Goa on 13th July, 2011 held that it was mandatory for a court to follow the procedure prescribed while deciding accused's petition for plea bargaining. The High Court set aside an order passed against a foreigner's application for plea bargaining, by a judicial magistrate first class court in a case of overstaying. Mr. Okeke Nwabueze Nnabuike, a Nigerian national, has challenged the order passed by the JMFC court, rejecting his application for PB.

Plea bargaining in 304A cases and sentencing: In *Ranbir Singh v State*²⁸, the Petitioner challenged sentencing accused to imprisonment for six months besides penalty of Rs.5000 under Section 304A IPC and in default to undergo an additional imprisonment for one month and also the sentence to pay the fine of Rs. 5,000/- under Section 279 IPC and in default of payment of fine to undergo Simple Imprisonment for one additional month in a case where the Petitioner had entered into plea bargaining. The Trial Court has power to direct the sentence for imprisonment of 1/4th of the sentence provided if an accused enters into plea bargaining however, while awarding the sentence of 1/4th of the sentence provided the learned Trial Court is bound to look into the mitigating circumstances. None of the mitigating circumstances were considered while awarding the maximum punishment. Petitioner is the only bread earner and has two minor children and old parents to support. Despite being poor the Petitioner gave an amount to the satisfaction of the victims. He has also placed on record the affidavit of the legal heirs of the deceased to state that the parties have entered into a settlement and no dispute remains between them. The prosecution on the other hand contended that the offences under Section 304A IPC of killing by rash and negligent driving are on the rise and stern action was needed for deterrent effect. Even Section 265E Cr. P.C. permitted the Court to award a sentence to 1/4th of the punishment provided even on the mutually satisfactory deposition being arrived at between the parties. Moreover the judgment by the trial court is final and no appeal lies against it as prescribed under Section 265G of the Code.

Delhi High Court held that "though it cannot be said that in view of these mitigating circumstances the Petitioner should not be awarded any imprisonment and should be let off, however, he should not have

28 <http://indiankanoon.org/doc/115079753/> decided on 5th September, 2011 by Delhi High Court

been awarded the maximum punishment as done by the learned Trial Court. The court modified the sentence to four months imprisonment under Section 304A IPC and a fine of Rs. 1,000/- Section 279 IPC and in default to undergo Simple Imprisonment for a period of one week.

2012 case of Bombay High Court: In *Guerrero Lugo Elvia Grisselv The State Of Maharashtra* on 4 January, 2012, the Bombay High Court Bench: A.M. Khanwilkar, Rajesh G. Ketkar reviewed the procedure prescribed for plea bargaining and upheld 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. High Court was considering a pure question of law as to the interpretation of Section 265-E of the Code of Criminal Procedure, 1973.

The accused (foreign nationals) were arrested on charge of theft of diamond worth crores of rupees from a jewellery shop in an international exhibition during August 2010. Under Section 265-B accused applied for plea bargaining.

The Additional Chief Metropolitan Magistrate examined the plea of the accused, as required under Section 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. The parties followed the guidelines given under section 265-C and finally arrived at the mutually satisfactory disposition. 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. 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. Under section 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. The case of the applicant falls under section 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. Court gave 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. Bombay High Court while confirming the sentence, justified the scheme of plea bargaining as recommended by Law Commission in its 142nd report and provided by the amendment to criminal procedure in 2005²⁹.

David Headley Case: Pakistani-American David Headley 49, LeT operative, charged with conspiracy in the Mumbai terror attacks, has pleaded guilty before a US court to bargain for a lighter sentence to avoid capital punishment. He was arrested by FBI in October 2009. David Headley has moved the plea bargain at a court in Chicago. He was facing six counts of conspiracy involving bombing public places, murdering and maiming persons in India and providing material support to foreign terrorist plots and LeT; and six counts of aiding and abetting the murder of US citizens in India³⁰.

India questions: Former Union Home Secretary G K Pillai questioned the motive behind the US entering into the plea bargain with Headley, who did a recce of the 26/11 targets for the Lashkar-e-Taiba, which carried out the attacks on Mumbai three years ago. In India plea bargaining is not allowed in such serious anti national crimes.

Poor usage: Apart from reported cases (above referred) of plea bargaining, there is a very poor usage of this process in India. According to official figures received through RTI, during 2006 to 2010, only 22 cases have been reported and solved in the state that too in the court of chief metropolitan magistrate in Ahmedabad. Courts in most of the other cities including Gandhinagar, Vadodara and Rajkot have never registered a case for plea bargaining. It is estimated that around 21.5 lakh cases are awaiting trial in Gujarat. Here an NGO started creating awareness about plea bargaining.

29 *Guerrero Lugo Elvia Grissel v The State Of Maharashtra* <http://indiankanoon.org/doc/173657747/>

30 Times of India 18th March 2010

Duty of defence counsel:

Accused is entitled to efficient, fair and honest advice from the defense counsel especially in plea bargaining. During March 2012, two US Supreme Court decisions are very significant to explain this responsibility.

In *Missouri v. Frye*, No. 10-444 (2012)³¹, the US Supreme Court found that a Defense Attorney had a duty to convey all written plea offers to the criminal defendant and the failure to do amounts to ineffective assistance of counsel and a violation of the defendant's sixth amendment rights. While it is true, though some attorneys acting on previous instructions of their defendants refuse plea offers without communicate such offers to the defendant, very few of these offers are in writing. Typically a plea agreement, or "green sheet" as they are called in Massachusetts are not drafted until there is an agreement between the parties. An assistant district attorney, particularly in the face paced hurly burly of the District Court, would be unlikely to draft plea offer without the prior acquiescence of the defendant.

In *Lafler v. Cooper*, No. 10-209 (2012)³² however, the court held that bad advice from defense counsel about whether or not to take a plea agreement may amount to ineffective assistance of counsel and a violation of the defendant's sixth amendment rights. Where a defendant refused a plea offer from the prosecution which he or she would otherwise accepted, on the basis of an attorney's recommendation which itself was grounded in an error in law, the split court found the criminal defendant's sixth amendment rights were violated. In this case, the defense attorney told his client that the prosecution would not be able to prove "intent" to kill, where the victim was shot below the waist.

Advantages of 'Plea Bargaining'

Time saving: Examining possible plus points of Plea bargaining in India, it will help in cutting short the delay, backlogs of cases and speedy disposal of criminal cases, saving the courts time, which can be used for hearing the serious criminal cases, putting a certain end to uncertain life of a criminal case from the point of view of giving relief to

31 <http://supreme.justia.com/cases/federal/us/566/10-444>

32 <http://supreme.justia.com/cases/federal/us/566/10-209>

victims and witnesses of crime, saving a lot of time, money and energy of the accused and the state, reducing the congestion in prisons, raising the number of convictions from its present low to a fair level to create some sort of credibility to the system, not to facilitate making of criminals by allowing innocents or unproven accused to live with the company of hard core criminals during the trial and after conviction through making guilty plea.

Compensation to victims: The victims of crimes might be benefited as they could get the compensation. They need not get implicated or involved either as witness or seeker of compensation or justice any longer than required for acceptance of plea bargaining. Whether they get money or not their time might be saved.

Benefits for Accused: The accused might be a beneficiary as 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.

Disadvantages

Unfair: The system will be too soft for the accused and allow them unfair means of escape in a dishonesty ridden society in India. It is an alternative way of legalization of crime to some extent and hence not a fair deal. It creates a feeling that Justice is no longer blind, but has one eye open to the right offer. Prosecutors and police, foreseeing a bargaining process, will overcharge the defendant, much as a trade union might ask for an impossibly high salary. It is inherently unfair, assuming you have two defendants who have engaged in the same conduct essentially similar circumstances, to treat one more harshly because he stands on his constitutional right.

Contempt for system: It may create contempt for the system within a class of society who frequently come before the courts. A shortcut aimed at quickly reducing the number of under-trial prisoners

and increasing the number of convictions, with or without justice. While countless numbers of poor languishing in the country's prisons while awaiting trial, only a few might get a chance of bargaining.

Conviction of innocents: This process might result in phenomenal increase in number of innocent convicts in prison. Innocent accused may be paid by the actual perpetrators of crime in return to their guilty plea with assured reduction in penalty. Thus illegal plea bargaining between real culprits and apparent accused might get legalized with rich criminals corrupting police officials ending up in mockery of justice system. When plea bargaining is certainly not resulting in acquittal or limited to penalties or payment of damages, accused may not find it as useful and plea bargaining may not operate as incentive at all.

Coercion: Element of coercion is not ruled out as the police is involved in the process.

Derailment of Trial: Once the guilty plea comes forward and recorded on the file and in the mind of the judge, the trial will be surely derailed. The court may not strictly adhere to or depart from the requirement of proof of beyond reasonable doubt and might lead to conviction of innocent.

Conclusion:

This disputed concept of Plea Bargaining is more a mechanism of convenience and mutual benefit than an issue of morality, legality or constitutionality. There is an inevitable need for a radical change in criminal justice mechanism. It may be a welcome change but only when there is possibility of swift and inexpensive resolution of cases. If the sole purpose of criminal justice system is to rehabilitate criminals into society, by making them undergo specified sentences in prison, then plea bargaining loses most of its charm.

Whether it is known or not, plea bargaining is being practiced by the various stakeholders of 'crime' and criminal justice system. Putting this process under judicial scrutiny opens up the possibility of fair dealings in these bargaining. In the present atmosphere plea bargaining is inevitable component of adversarial system.

However, to make use of the available process and to secure the gains from these reforms, the plea bargaining process could be successfully used, for which the police, judiciary and the bar need to understand it in first place, and try to adopt. Defending Advocates should encourage the litigant to opt for the plea bargaining rather than to treat the plea bargaining as threat to their profession. It is obvious that the capacity building of police and judges should be the high priority and a pre-requisite for experimenting the plea bargaining. It can be given a chance of survival. From the experience in US it can be said that the plea bargaining remains a disputed concept and a doubtful practice. As the overloading of courts with piling up of criminal cases is threatening the foundations of the system, the plea bargaining may be accepted as one of the required measures for speeding up caseload disposition. After giving a rigorous trial to this mechanism, there should be a thorough study of its working, its impact on crime rate, conviction rate, and ultimately how the rule of law is affected.